

CAMBRIDGE
REFERENCE
LIBRARY

19 OCT 2004

THE ALL ENGLAND LAW REPORTS 2004

Volume 3

Editor-in-Chief

CRAIG ROSE Barrister

Editor

KAREN WIDDICOMBE Solicitor



LexisNexis™ UK

Members of the LexisNexis Group worldwide

United Kingdom	LexisNexis UK, a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, LONDON, WC2A 1EL, and 4 Hill Street, EDINBURGH EH2 3JZ
Argentina	LexisNexis Argentina, BUENOS AIRES
Australia	LexisNexis Butterworths, CHATSWOOD, New South Wales
Austria	LexisNexis Verlag ARD Orac GmbH & Co KG, VIENNA
Canada	LexisNexis Butterworths, MARKHAM, Ontario
Chile	LexisNexis Chile Ltda, SANTIAGO DE CHILE
Czech Republic	Nakladatelství Orac sro, PRAGUE
France	Editions du Juris-Classeur SA, PARIS
Germany	LexisNexis Deutschland GmbH, FRANKFURT, MUNSTER
Hong Kong	LexisNexis Butterworths, HONG KONG
Hungary	HVG-Orac, BUDAPEST
India	LexisNexis Butterworths, NEW DELHI
Ireland	LexisNexis, DUBLIN
Italy	Giuffrè Editore, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	LexisNexis Butterworths, WELLINGTON
Poland	Wydawnictwo Prawnicze LexisNexis, WARSAW
Singapore	LexisNexis Butterworths, SINGAPORE
South Africa	LexisNexis Butterworths, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
USA	LexisNexis, DAYTON, Ohio

© Reed Elsevier (UK) Ltd 2004
Published by LexisNexis UK

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright owner except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency Ltd, 90 Tottenham Court Road, London, England W1T 4LP. Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

Crown copyright material is reproduced with the permission of the Controller of HMSO and the Queen's Printer for Scotland. Any European material in this work which has been reproduced from EUR-lex, the official European Communities legislation website, is European Communities copyright.

A CIP Catalogue record for this book is available from the British Library.

Printed and bound in Great Britain by William Clowes Ltd, Beccles and London

ISBN for the complete set of volumes: 0 406 85159 X
for this volume:

ISBN 0-406-97445-4



Visit LexisNexis UK at www.lexisnexis.co.uk

Cam/Reg
340/CAS

CONSULTING EDITORS

Celia Fox Barrister

Kate O'Hanlon Barrister

Dilys Tausz Barrister

REPORTERS

Martyn Gurr Barrister

Pamela Hardisty Barrister (NZ)

Stephen Leake Barrister

Rebecca Lewis Barrister

Melanie Martyn Barrister

Neneh Munu Barrister

Victoria Parkin Barrister

Sanchia Pereira Barrister

Aaron Turpin Barrister

Gareth Williams Barrister

James Wilson Barrister (NZ)

MANAGING EDITOR

Helen O'Shea Dip Law, Dip LP

SENIOR SUB-EDITORS

Catherine Bayliss LLB, Dip LP

Rukhsana Hasnain LLB, Dip LP

SUB-EDITOR

Jacey Sivadasam LLB, Dip LP

House of Lords

The Lord High Chancellor of Great Britain:

Lord Falconer of Thoroton

Lords of Appeal in Ordinary

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Saville of Newdigate

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Court of Appeal

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England and Wales: Lord Woolf
(President of the Criminal Division)

The Master of the Rolls: Lord Phillips of Worth Matravers
(President of the Civil Division)

The President of the Family Division: Dame Elizabeth Butler-Sloss

The Vice-Chancellor: Sir Robert Andrew Morritt

Lords Justices of Appeal

Sir Paul Joseph Morrow Kennedy
Sir Christopher Dudley Roger Rose
(Vice-President of the Criminal Division)
Sir Peter Leslie Gibson
Sir Robin Ernest Auld
Sir Malcolm Thomas Pill
Sir Alan Hylton Ward
Sir Mathew Alexander Thorpe
Sir Mark Howard Potter
Sir Henry Brooke (Vice-President
of the Civil Division)
Sir Igor Judge (Deputy Chief Justice)
Sir George Mark Waller
Sir John Frank Mummery
Sir John Murray Chadwick
Sir Richard Joseph Buxton
Sir Anthony Tristram Kenneth May
(Vice-President of the Queen's
Bench Division)
Sir Simon Lane Tuckey
Sir Anthony Peter Clarke
Sir John Grant McKenzie Laws

Sir Stephen John Sedley
Sir Jonathan Hugh Mance
Sir David Nicholas Ramsey Latham
Sir John William Kay (died 2 July 2004)
Sir Bernard Anthony Rix
Sir Jonathan Frederic Parker
Dame Mary Howarth Arden
Sir David Wolfe Keene
Sir John Anthony Dyson
Sir Andrew Centlivres Longmore
Sir Robert John Anderson Carnwath
Sir Thomas Scott Gillespie Baker
Dame Janet Hilary Smith
Sir Roger John Laugharne Thomas (Senior
Presiding Judge for England and Wales)
Sir Robert Raphael Hayim (Robin) Jacob
Sir Nicholas Peter Rathbone Wall
Sir David Edmond Neuberger
Sir Maurice Ralph Kay
Sir Anthony Hooper

High Court of Justice

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England and Wales

The President of the Family Division

The Vice-Chancellor

The Senior Presiding Judge for England and Wales

The puisne judges of the High Court

Chancery Division

The Lord High Chancellor of Great Britain

The Vice-Chancellor

Sir John Edmund Frederic Lindsay
Sir Edward Christopher Evans-Lombe
Sir William Anthony Blackburne
Sir Gavin Anthony Lightman
Sir Colin Percy Farquharson Rimer
Sir Hugh Ian Lang Laddie
Sir Timothy Andrew Wigram Lloyd
Sir Andrew Edward Wilson Park
Sir Nicholas Richard Pumfrey

Sir Michael Christopher Campbell Hart
Sir Lawrence Anthony Collins
Sir Nicholas John Patten
Sir Terrence Michael Elkan Barnet Etherton
Sir Peter Winston Smith
Sir Kim Martin Jordan Lewison
Sir David Anthony Stewart Richards
Sir George Anthony Mann

Queen's Bench Division

The Lord Chief Justice of England and Wales

Sir Stuart Neil McKinnon
Sir Douglas Dunlop Brown
Sir Michael Morland (retired 16 July 2004)
Sir Roger John Buckley
Sir Peter John Cresswell
Sir Christopher John Holland
Sir Richard Herbert Curtis
Sir Anthony David Colman
Sir John Thayne Forbes
Sir Rodger Bell
Sir Michael Guy Vicat Harrison
Sir William Marcus Gage
Sir Thomas Richard Atkin Morison
Sir Andrew David Collins
Sir Alexander Neil Logie Butterfield
Sir George Michael Newman
Sir David Anthony Poole
Sir Martin James Moore-Bick
Sir Gordon Julian Hugh Langley
Sir Robert Franklyn Nelson

Sir Roger Grenfell Toulson
Sir Michael John Astill
Sir Alan George Moses
Sir David Eady
Sir Jeremy Mirth Sullivan
Sir Anthony Philip Gilson Hughes
Sir David Herbert Penry-Davey
Sir Stephen Price Richards
Sir David William Steel
Sir Charles Anthony St John Gray
Sir Nicolas Dusan Bratza
Sir Michael John Burton
Sir Rupert Matthew Jackson
Dame Heather Carol Hallett
Sir Patrick Elias
Sir Richard John Pearson Aikens
Sir Stephen Robert Silber
Sir John Bernard Goldring
Sir Peter Francis Crane
Dame Anne Judith Rafferty

[continued on next page]

Queen's Bench Division *(continued)*

Sir Geoffery Douglas Grigson
Sir Richard John Hedley Gibbs
Sir Richard Henry Quixano Henriques
Sir Stephen Miles Tomlinson
Sir Andrew Charles Smith
Sir Stanley Jeffrey Burnton
Sir Patrick James Hunt
Sir Christopher John Pitchford
Sir Brian Henry Leveson
Sir Duncan Brian Walter Ouseley
Sir Richard George Bramwell McCombe
Sir Raymond Evan Jack
Sir Robert Michael Owen
Sir Colin Crichton Mackay
Sir John Edward Mitting
Sir David Roderick Evans
Sir Nigel Anthony Lamert Davis

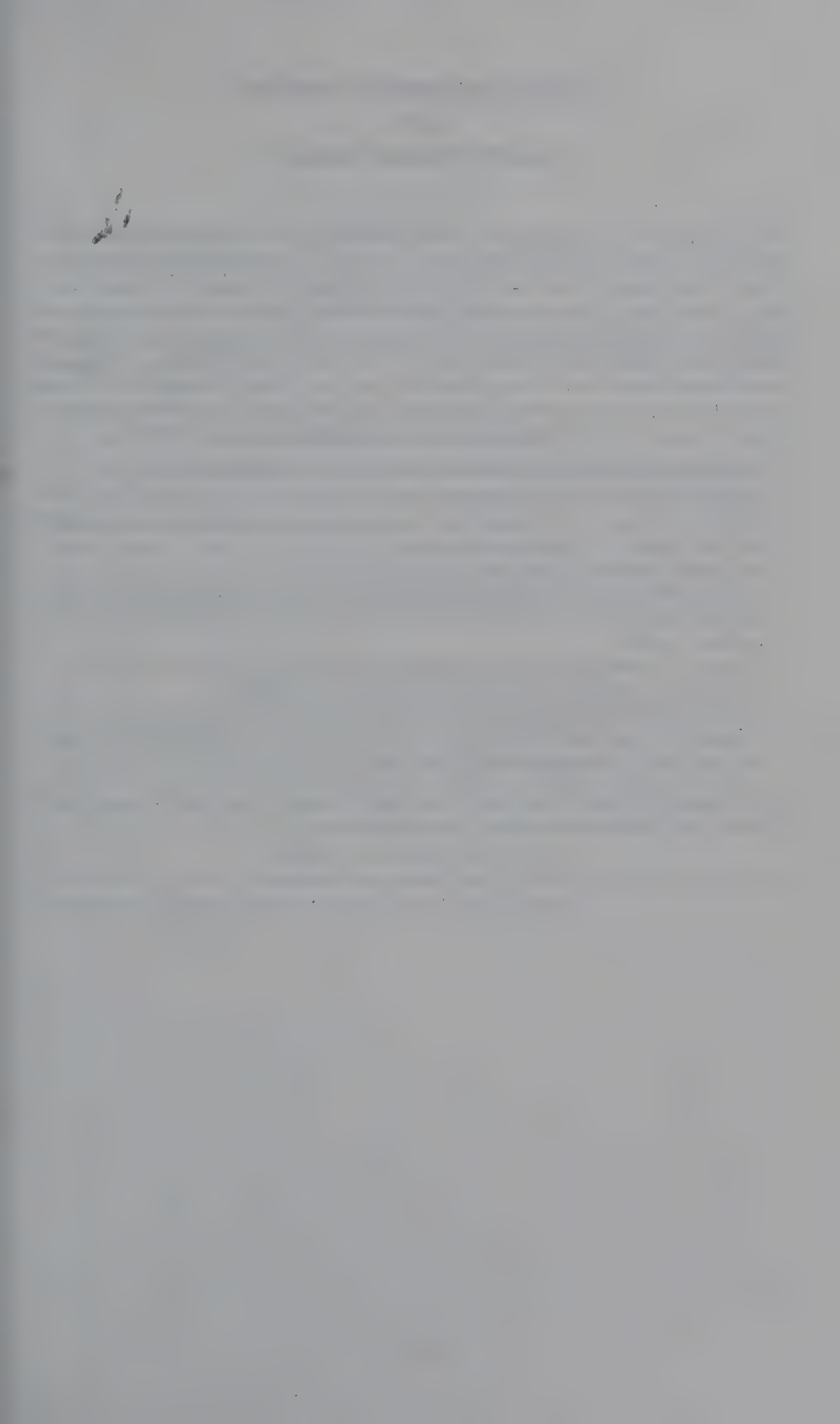
Sir Peter Henry Gross
Sir Brian Richard Keith
Sir Jeremy Lionel Cooke
Sir Richard Alan Field
Sir Christopher John Pitchers
Sir Colman Maurice Treacy
Sir Peregrine Charles Hugo Simon
Sir Roger John Royce
Dame Laura Mary Cox
Sir Adrian Bruce Fulford
Sir Jack Beatson
Sir Michael George Tugendhat
Sir David Clive Clarke
Sir Richard MacLennan Wakerley
Dame Elizabeth Gloster
Sir David Michael Bean (appointed 19 July 2004)

Family Division

The President of the Family Division

Sir Robert Lionel Johnson (retired 4 May 2004)
Dame Joyanne Winifred Bracewell
Sir Jan Peter Singer
Sir Nicholas Allan Roy Wilson
Sir Andrew Tristram Hammett Kirkwood
Sir Hugh Peter Derwyn Bennett
Sir Edward James Holman
Dame Mary Claire Hogg
Sir Christopher John Sumner
Sir Arthur William Hessin Charles

Sir David Roderick Lessiter Bodey
Dame Jill Margaret Black
Sir James Lawrence Munby
Sir Paul James Duke Coleridge
Sir Mark Hedley
Dame Anna Evelyn Hamilton Pauffley
Sir Roderic Lionel James Wood
Dame Florence Jacqueline Baron
Sir Ernest Nigel Ryder



Official Judgment Numbers and Paragraph References

Since 11 January 2001, official judgment numbers have been given to all judgments delivered in the House of Lords, Privy Council, both divisions of the Court of Appeal and the Administrative Court. All such judgments have fixed paragraph numbering, as do judgments delivered on or after 11 January 2001 in those parts of the High Court which did not then adopt the system of official judgment numbers (see Practice Note (judgments: neutral citation) [2001] 1 All ER 193 for the Court of Appeal and the High Court). On 14 January 2002 the system of judgment numbers was extended to all parts of the High Court (see Practice Direction (High Court judgments: neutral citation) [2002] 1 All ER 351). We have adopted the following practice in respect of judgments with official judgment numbers and official paragraph numbering:

- The official judgment number is inserted immediately beneath the case name;
- Official paragraph numbers are in bold in square brackets;
- Holding references in the headnotes, and any other cross-references, are to an official paragraph number, not to a page of the report;
- When such a judgment is subsequently cited in another report,
 - (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;
 - (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;
 - (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2004] 3 All ER

REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) para 9 refers to paragraph 9 on page 11 of the 2004 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

Halsbury's Statutory Instruments

The reference 14 *Halsbury's Statutory Instruments* (2001 issue) 201 refers to page 201 of the 2001 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

Cases reported in volume 3

	Page		Page
A v Chief Constable of West Yorkshire Police [HL]	145	Dunnachie v Kingston-upon-Hull City Council [HL]	1011
Aaron v Shelton [QBD]	561	Eastwood v Magnox Electric plc [HL]	991
Adams v Bracknell Forest BC [HL]	897	Edwards (on the application of), R v Environment Agency (Rugby Ltd, interested party) [QBD].. .. .	21
Allardyce v Roebuck [Ch D]	754	Egg Stores (Stamford Hill) Ltd, Beanby Estates Ltd v [Ch D].. .. .	184
Amicus Healthcare Ltd, Evans v [CA]	1025	Environment Agency (Rugby Ltd, interested party), R (on the application of Edwards) v [QBD]	21
Aon Ltd, Dar International FEF Co v [CA].. .. .	986	Essex Strategic Health Authority, Kataria v [QBD]	572
Atkinson v DPP [DC]	971	Evans v Amicus Healthcare Ltd [CA]	1025
Autologic Holdings plc v IRC [CA]	957	F, Re [Ch D]	277
Barros Mattos Jnr v General Securities and Finance Co Ltd [Ch D]	299	Financial Services Compensation Scheme, R (on the application of Geologistics Ltd) v [CA]	39
Barros Mattos Jnr v MacDaniels Ltd [Ch D]	299	Flynn v Scougall [CA]	609
Bayoumi v Women's Total Abstinence Educational Union Ltd [CA]	110	Freshfields Bruckhaus Deringer, Marks and Spencer plc v [Ch D]	773
Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd [Ch D]	184	G (on the application of), R v Immigration Appeal Tribunal [QBD]	286
Birch (H-M) Ltd, Re [Ch D]	56	Gaca v Pirelli General plc [CA]	348
Birch (WG) Developments Ltd, Re [Ch D].. .. .	56	Galloway, Blake v [CA]	315
Birmingham Deputy Coroner, R (on the application of Davies) v [CA]	543	Gdynia American Shipping Lines (London) Ltd, Chelminski v [CA]	666
Blake v Galloway [CA].	315	General Securities and Finance Co Ltd, Barros Mattos Jnr v [Ch D]	299
BNP Paribas, McPherson v [CA].	266	Geologistics Ltd (on the application of), R v Financial Services Compensation Scheme [CA]	39
Bracknell Forest BC, Adams v [HL]	897	George, Parsons v [CA]	633
Brady, R v [CA]	520	Ghaidan v Mendoza [HL]	411
Bruce-Williams, Pelling v [CA]	875	Gibson (on the application of), R v Winchester Crown Court [DC]	475
Burton Marsden Douglas (a firm), Re [Ch D]	222	Governor and Company of the Bank of England, Three Rivers DC v (No 5) [CA]	168
Bushell (on the application of), R v Newcastle Licensing JJs [CA]	493	Gray (decd), Re [Ch D]	754
C, R v [CA]	1	Guide Dogs for the Blind Association, Marsden v [Ch D]	222
CA Webber (Transport) Ltd v Railtrack plc [CA]	202	Hancock, Hashtroodi v [CA]	530
Cadogan Estates Ltd, Norfolk Capital Group Ltd v [Ch D]	889	Harbour Estates Ltd v HSBC Bank plc [Ch D]	1057
Campbell v South Northamptonshire DC [CA]	387	Haringey London BC v Marks & Spencer plc [DC]	868
Chelminski v Gdynia American Shipping Lines (London) Ltd [CA]	666	Hashtroodi v Hancock [CA]	530
Chief Constable of Thames Valley Police, Taylor v [CA]	503	Higham, Horton v [CA]	852
Chief Constable of West Yorkshire Police, A v [HL]	145	Hiscock, Oxley v [CA]	703
Clift (on the application of), R v Secretary of State for the Home Dept [CA]	338	Horsham DC, Williams v [CA]	30
Cornwall CC, McCabe v [HL]	991	Horton v Higham [CA]	852
Czyzewski, R v [CA]	135	HSBC Bank plc, Harbour Estates Ltd v [Ch D]	1057
D (a child), v O [Ch D]	780		
Dar International FEF Co v Aon Ltd [CA]	986		
Davies (on the application of), R v Birmingham Deputy Coroner [CA].	543		
Designer Room Ltd (The), Re [Ch D].. .. .	679		
Dica, R v [CA]	593		
Do v Secretary of State for the Home Dept [HL]	785		
DPP, Atkinson v [DC]	971		

	Page		Page
Immigration Appeal Tribunal, R (on the application of G) v [QBD]	286	Parsons v George [CA]	633
Immigration Appeal Tribunal, R (on the application of M) v [QBD]	286	Pelling v Bruce-Williams [CA]	875
IRC, Autologic Holdings plc v [CA]	957	Pharis (on the application of), R v Secretary of State for the Home Dept [CA]	310
Kataria v Essex Strategic Health Authority [QBD]	572	Pirelli General plc, Gaca v [CA]	348
Kay Trustees, Somerset-Leeke v [Ch D]..	406	Plymouth Hospitals NHS Trust, Page v [QBD]	367
Kent & Medway Towns Fire Authority, Matthews v [CA]	620	Powell v Wiltshire [CA]	235
Kingston-upon-Hull City Council, Dunnachie v [HL].. .. .	1011	R v Brady [CA].	520
Kozeny, Marlwood Commercial Inc v [CA]	648	R v C [CA]	1
Kozeny, Omega Group Holdings Ltd v [CA]	648	R v Czyzewski [CA].	135
Liverpool City Council v Somerfield Stores plc [DC]	868	R v Dica [CA]	593
Lloyd's of London, R (on the application of West) v [CA]..	251	R v S [CA]	689
Lloyd-Wolper v Moore [CA]	741	R v Senior [CA]	9
London Central Bus Co, Sharratt v (No 2) [CA]	325	R (on the application of Bushell) v Newcastle Licensing JJs [CA]	493
M (on the application of), R v Immigration Appeal Tribunal [QBD].. .. .	286	R (on the application of Clift) v Secretary of State for the Home Dept [CA]	338
McCabe v Cornwall CC [HL]	991	R (on the application of Davies) v Birmingham Deputy Coroner [CA]	543
MacDaniels Ltd, Barros Mattos Jnr v [Ch D]	299	R (on the application of Edwards) v Environment Agency (Rugby Ltd, interested party) [QBD]	21
Macepark (Whittlebury) Ltd v Sargeant [Ch D]	1090	R (on the application of G) v Immigration Appeal Tribunal [QBD]	286
McFarlane v McFarlane [CA]	921	R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme [CA]	39
McPherson v BNP Paribas [CA]	266	R (on the application of Gibson) v Winchester Crown Court [DC]	475
Magnox Electric plc, Eastwood v [HL] ..	991	R (on the application of M) v Immigration Appeal Tribunal [QBD]	286
Marlwood Commercial Inc v Kozeny [CA]	648	R (on the application of Mullen) v Secretary of State for the Home Dept [HL] ..	65
Marks and Spencer plc v Freshfields Bruckhaus Deringer [Ch D]	773	R (on the application of Pharis) v Secretary of State for the Home Dept [CA]	310
Marks & Spencer plc, Haringey London BC v [DC].	868	R (on the application of Razgar) v Secretary of State for the Home Dept [HL] ..	821
Marsden v Guide Dogs for the Blind Association [Ch D]	222	R (on the application of Ullah) v Special Adjudicator [HL].. .. .	785
Matthews v Kent & Medway Towns Fire Authority [CA]	620	R (on the application of West) v Lloyd's of London [CA].	251
Mendoza, Ghaidan v [HL]	411	Railtrack plc, CA Webber (Transport) Ltd v [CA]	202
Moore, Lloyd-Wolper v [CA]	741	Razgar (on the application of), R v Secretary of State for the Home Dept [HL] ..	821
Mullen (on the application of), R v Secretary of State for the Home Dept [HL].	65	Redrow Homes (North West) Ltd, Roberts v [CA]	98
Newcastle Licensing JJs, R (on the application of Bushell) v [CA]	493	Redrow Homes (Yorkshire) Ltd, Wright v [CA]	98
Norfolk Capital Group Ltd v Cadogan Estates Ltd [Ch D]	889	Roberts v Redrow Homes (North West) Ltd [CA]	98
Nugent Care Society, Taylor v [CA]. ..	671	Rodencroft Ltd, Re [Ch D]	56
O, D (a child) v [Ch D]	780	Roebuck, Allardyce v [Ch D]	754
Omega Group Holdings Ltd v Kozeny [CA]	648	S, R v [CA]	689
Omilaju v Waltham Forest LBC [EAT] ..	129		
Oxley v Hiscock [CA]	703		
Page v Plymouth Hospitals NHS Trust [QBD]	367		
Parlour v Parlour [CA]	921		

	Page		Page
Sargeant, Macepark (Whittlebury) Ltd v [Ch D]	1090	St Peter's Church, Limpsfield, Re [Con Ct] ..	978
Scougall, Flynn v [CA]	609	Taylor v Chief Constable of Thames Valley Police [CA] 503	
Secretary of State for the Home Dept, Do v [HL].	785	Taylor v Nugent Care Society [CA]	671
Secretary of State for the Home Dept, R (on the application of Clift) v [CA] ..	338	Three Rivers DC v Governor and Company of the Bank of England (No 5) [CA]	168
Secretary of State for the Home Dept, R (on the application of Mullen) v [HL] ..	65	Tinsley, Yorkshire Bank plc v [CA].	463
Secretary of State for the Home Dept, R (on the application of Pharis) v [CA] ..	310	Ullah (on the application of), R v Special Adjudicator [HL].. .. .	785
Secretary of State for the Home Dept, R (on the application of Razgar) v [HL] ..	821	Waltham Forest London BC, Omilaju v [EAT]	129
Senior, R v [CA]	9	West (on the application of), R v Lloyd's of London [CA]	251
Sharratt v London Central Bus Co (No 2) [CA]	325	Williams v Horsham DC [CA]	30
Shelton, Aaron v [QBD]	561	Wiltshire, Powell v [CA]	235
Somerfield Stores plc, Liverpool City Council v [DC]	868	Winchester Crown Court, R (on the application of Gibson) v [DC] ..	475
Somerset-Leeke v Kay Trustees [Ch D] ..	406	Women's Total Abstinence Educational Union Ltd, Bayoumi v [CA]	110
South Northamptonshire DC, Campbell v [CA]	387	Wright v Redrow Homes (Yorkshire) Ltd [CA] ..	98
Special Adjudicator, R (on the application of Ullah) v [HL]..	785	X (restraint order), Re [QBD]	1077
		Yorkshire Bank plc v Tinsley [CA]	463

Digest of cases reported in volume 3

ARREST – Arrest without warrant – Statutory provision requiring person to be informed of grounds for arrest – Test for determining whether person has been so informed – Application of test in cases of arrest for offence of violent disorder									
Taylor v Chief Constable of Thames Valley Police	..	..	..	..	..	..	..	..	CA 503
BARRISTER – Pupillage – Statutory provision rendering it unlawful for trade organisation to discriminate against disabled person in respect of application for ‘membership’ of organisation – Whether application for pupillage an application for ‘membership’ of chambers for purposes of disability discrimination legislation									
Horton v Higham	..	..	..	..	..	..	..	..	CA 852
CHARITY – Sale of charity estate – Statutory provision protecting purchasers in respect of ‘disposition’ of land held by charity – Whether contract for sale constituting ‘disposition’									
Bayoumi v Women’s Total Abstinence Educational Union Ltd	..	..	..	..	..	..	..	..	CA 110
—Sale of charity estate – Statutory requirement that charity trustees decide that proposed sale on best terms reasonably obtainable – Whether agreement for sale made before compliance with statutory requirement valid									
Bayoumi v Women’s Total Abstinence Educational Union Ltd	..	..	..	..	..	..	..	..	CA 110
CHILDREN – Court proceedings in relation to child – Statutory provisions prohibiting identification of child in children proceedings and requiring such proceedings to be heard in private – Whether provisions compatible with convention rights to public hearing and freedom of expression									
Pelling v Bruce-Williams	..	..	..	..	..	..	..	..	CA 875
CLAIM FORM – Service – Rule of procedure empowering court to extend period for service on application made before expiry of claim form – Whether showing good reason for extension a threshold condition for exercise of power									
Hashtroodi v Hancock	..	..	..	..	..	..	..	..	CA 530
COMPANY – Administration order – Administrator – Powers – Administrator’s powers to pay dividend directly to preferential creditors									
Re The Designer Room Ltd	..	..	..	..	..	..	..	..	Rimer J 679
—Compulsory winding-up – Secretary of State taking view that it is expedient in the public interest that company be wound up – Whether contributory entitled to oppose petition									
Re Rodencroft Ltd	..	..	..	..	..	..	..	..	Ch D 56
COMPENSATION – Crime – Claimant’s conviction quashed on grounds of abuse of process preceding trial – Whether compensation payable under statutory or ex gratia schemes									
R (on the application of Mullen) v Secretary of State for the Home Dept	..	..	..	..	..	..	..	..	HL 65
COSTS – Assessment – Conduct of parties – Whether paying party entitled to rely at assessment on conduct of receiving party when conduct in question could have been raised on making of costs order									
Aaron v Shelton	..	..	..	..	..	..	..	..	Jack J 561
—Employment tribunal – Employee withdrawing complaint for medical reasons having previously obtained adjournment of hearing – Whether unreasonable conduct									
McPherson v BNP Paribas	..	..	..	..	..	..	..	..	CA 286

COSTS (CONT'D) – Order for costs – Claimants paying claims handling service after-the-event premium in respect of risk of incurring liability in proceedings – Flat fee paid for investigation of claims affecting calculation of amount of premium recoverable – Whether flat fee recoverable

Sharratt v London Central Bus Co (No 2)	CA	325
--	----	----	----	----	----	----	------------

—Order for costs – Costs orders for or against inferior courts or tribunals appearing in public law proceedings – Principles and guidance

R (on the application of Davies) v Birmingham Deputy Coroner	CA	543
---	----	----	-----------	------------

—Security for costs – Claimant resident in Monaco – Rules of procedure empowering court to order security for costs against such a claimant – Claimant providing no information as to assets in Monaco

Somerset-Leeke v Kay Trustees	Jacob J	406
---	----	----	----	----	----	----	----------------	------------

—Security for costs – Whether Court of Appeal having jurisdiction to make order in favour of appellant defendant for security for its costs below

[illegible]

—Taxation – Executor instructing solicitor in business as sole practitioner – Solicitor going into partnership – Partnership rendering bill to executor – Whether partnership liable for repayment of any overpayment contained in bill

Re Burton Marsden Douglas (a firm)	Lloyd J	222
---	----	----	----	----	----	----	----------------	------------

COURT OF APPEAL – Practice – Express application for stay of deportation process necessary in asylum and immigration cases where notice of appeal lodged against refusal of permission to apply for judicial review

R (on the application of Pharis) v Secretary of State for the Home Dept .. CA 310

CRIMINAL EVIDENCE – Answers and statements to customs officer – Customs officer suspecting travellers of having committed offence and asking travellers routine questions – Whether evidence of questions and answers admissible in absence of caution

[illegible]

- Complaints in sexual cases – Degree of consistency required for evidence of recent complaint to be admissible – Direction to be given by judge where there was obvious inconsistency between complainant's evidence and that of witness to whom recent complaint had been made

R v S " " " " " " " " " " " " CA 689

—Disclosure – Lawfulness of disclosure of material obtained by Official Receiver following investigation into conduct of company – Insolvency Act

R v Brady.. " " " " " " " " " " " CA 520

CRIMINAL LAW – Custody time limits – Extension of time limits – Whether judge able to grant extension when prosecution not acting with all due diligence when that failure not cause of delay – Whether inability of state to provide suitable judge or courtroom for trial ground for extension

R (on the application of Gibson) v Winchester Crown Court DC 475

— Rape – Judicial decision marking removal of marital exemption to rape – Husband raping wife before judicial decision – Husband convicted of rape of wife after judicial decision – Whether conviction abuse of process – Whether conviction retrospective penalty

[illegible]

CRIMINAL LAW (CONT'D) – Whether recklessly infecting another person with sexually transmitted disease through consensual sexual intercourse capable of constituting offence of inflicting grievous bodily harm – Whether consent of victim to risk of contracting disease constituting defence to such offence		
R v Dica	CA	593
DAMAGES – Personal injury – Deduction of proceeds of insurance policy – Employers taking out personal accident insurance policy for benefit of employees – Employee injured and receiving payment under policy – Whether payment under policy deductible from damages		
Gaca v Pirelli General plc	CA	348
— Personal injury – Discount rate for future pecuniary loss – Whether claimant entitled to recover as damages predicted costs of investment advice and fund management charges incurred in managing award		
Page v Plymouth Hospitals NHS Trust	Davis J	367
DISCOVERY – Legal professional privilege – Whether communications between solicitors and client advising on presentation of evidence and submissions to inquiry attracting legal professional privilege		
Three Rivers DC v Governor and Company of the Bank of England (No 5)	CA	168
— Use of documents other than in proceedings for the purpose of which they were disclosed – Serious Fraud Office requesting from parties documents disclosed in proceedings – Serious Fraud Office acting on request of Secretary of State acting in response to request received from overseas authority – Whether documents to be produced to Serious Fraud Office		
Marlwood Commercial Inc v Kozeny	CA	648
DIVORCE – Financial provision – Order for periodical payments where capital insufficient to effect immediate clean break but payer's income substantially exceeding parties' needs or reasonable requirements – Approach to be adopted in such cases		
McFarlane v McFarlane	CA	921
EASEMENT – Right of way – Extent – Claimants owning land with express right of way over defendants' land – Whether right of way could be used for purpose of accessing motor racing circuit		
Macepark (Whittlebury) Ltd v Sargeant	Gabriel Moss QC	1090
ECCLESIASTICAL LAW – Memorial within churchyard to person not buried there – Parishioners petitioning for faculty to erect monument in churchyard commemorating former churchwarden whose ashes had been scattered elsewhere – Whether permissible		
Re St Peter's Church, Limpsfield	Con Ct	978
EMPLOYMENT – Breach of contract – Damages – Whether prohibition of common law claims for damages arising from manner of dismissal precluding employee from bringing common law claims for damage suffered before dismissal as result of employer's failure to act fairly when taking steps leading to dismissal		
Eastwood v Magnox Electric plc	HL	991
— Discrimination – Male to female transsexual applying to become police constable – Requirement that constable carrying out search be of same sex as person searched – Gender of transsexual for purposes of search		
A v Chief Constable of West Yorkshire Police	HL	145

EMPLOYMENT (CONT'D) – Retained firefighters employed part-time – Whether retained firefighters treated less favourably than full-time firefighters – Whether employed under same type of contract – Whether engaged in same or broadly similar work									
Matthews v Kent & Medway Towns Fire Authority.	..	..	..	..	..	..	..	CA	620
—‘Worker’ – Contract to perform work or services personally – Whether bricklayers working under standard contract for building company ‘workers’									
Wright v Redrow Homes (Yorkshire) Ltd	..	..	..	..	..	..	..	CA	98
EMPLOYMENT APPEAL TRIBUNAL – Rule of procedure providing that time for bringing appeal running from date on which extended reasons sent – Whether time running from date of posting or from date of deemed delivery									
Chelminski v Gdynia American Shipping Lines (London) Ltd	..	..	..	..	..	..	..	CA	566
EQUITY – Undue influence – Mortgage entered into by husband and wife voidable as against husband for undue influence – Lender fixed with constructive notice – Whether replacement mortgage with same lender over different property voidable									
Yorkshire Bank plc v Tinsley	..	..	..	..	..	..	..	CA	463
ESTOPPEL – Res judicata – Whether estoppel per rem judicatum binding person claiming under person against whom judgment had been given if interest obtained from that person before judgment									
Powell v Wiltshire	..	..	..	..	..	..	..	CA	235
HIGH COURT – Jurisdiction – Statutory procedure for tax appeals – Taxpayers bringing proceedings in High Court against Inland Revenue claiming damages and restitution for breaches of EC Treaty – Whether taxpayers required to follow statutory procedure for tax appeals									
Autologic Holdings plc v IRC	..	..	..	..	..	..	..	CA	957
IMMIGRATION – Appeal – Failed asylum seekers unsuccessfully applying for statutory review of Immigration Appeal Tribunal’s refusal of permission to appeal – Whether availability of judicial review ousted by provision of statutory review – Whether refusal of judicial review breach of right to fair and public hearing									
R (on the application of G) v Immigration Appeal Tribunal	..	..	..	..	..	..	..	Collins J	286
—Deportation – Deportation of asylum seeker not leading to torture or inhuman or degrading treatment or punishment – Whether asylum seeker’s right to respect for private and family life capable of being engaged									
R (on the application of Razgar) v Secretary of State for the Home Dept..	..	..	..	..	..	..	..	HL	821
—Deportation – Deportation of asylum seekers not leading to torture or inhuman or degrading treatment or punishment – Whether other rights and freedoms of asylum seekers therefore excluded from consideration									
R (on the application of Ullah) v Special Adjudicator	..	..	..	..	..	..	..	HL	785
INSURANCE – Employer’s liability insurance – Employers seeking indemnity for defence costs from Financial Services Compensation Scheme – Whether Scheme required to pay such costs – Construction of words ‘in respect of’									
R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme .	..	..	..	..	..	..	..	CA	39
JUDICIAL REVIEW – Applicant seeking to challenge decisions of committee of Lloyd’s of London – Whether decisions amenable to judicial review – Whether Lloyd’s exercising public function									
R (on the application of West) v Lloyd’s of London.	..	..	..	..	..	..	..	CA	251

JUDICIAL REVIEW (CONT'D) – Application for judicial review – Environment Agency carrying out public consultation exercise – Applicant taking no part in consultation exercise – Other objectors ineligible for public funding – Applicant applying for judicial review – Applicant obtaining legal funding certificate – Whether applicant having sufficient interest – Whether claim abuse of process

R (on the application of Edwards) v Environment Agency

(Rugby Ltd, interested party) Keith J 21

LAND – Right in, to or on property conveyed – Statutory provision providing that every conveyance effectual to pass such right – Whether applying only to right touching and concerning land

Harbour Estates Ltd v HSBC Bank plc CA 1057

LANDLORD AND TENANT – Business premises – Application for new tenancy – Whether court having power to allow tenant to amend claim for new tenancy by adding or substituting party after expiry of limitation period

Parsons v George CA 633

— Business premises – Computation of time – Landlord's notice terminating tenancy sent by recorded delivery – Whether notice served on date of posting or date of delivery

Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd Nueberger J 184

— Business premises – Computation of time – Landlord's notice terminating tenancy sent by recorded delivery – Whether notice served on date of posting or date of delivery

CA Webber (Transport) Ltd v Railtrack plc CA 202

— Improvements – Tenant serving notice on landlord of intention to carry out works of improvement – Landlord offering to carry out works in consideration of reasonable increase in rent in accordance with statutory provision – Whether landlord entitled to carry out works notwithstanding tenant's withdrawal of notice

Norfolk Capital Group Ltd v Cadogan Estates Ltd Etherton J 889

— Option to determine – Break clause – Lease containing break clause expressed to be personal to original tenant but allowing assignment of benefit in specified circumstances – Whether benefit of break clause passing on assignment of lease as right touching and concerning land or having reference to subject matter of lease

Harbour Estates Ltd v HSBC Bank plc CA 1057

— Rent restriction – Death of tenant – Homosexual partner – Whether surviving same-sex partner entitled to succeed to deceased partner's statutory tenancy as 'spouse'

Ghaidan v Mendoza HL 411

LICENSING – Licence – Special removal on the ground that premises for which licence granted are or are about to be pulled down or occupied for any public purpose – Date on which question whether premises are or are about to be pulled down or occupied to be asked – Date on which specified conditions must subsist

R (on the application of Bushell) v Newcastle Licensing JJs CA 493

— Statutory provision rendering it an offence for a 'person' in licensed premises to sell intoxicating liquor to person under 18 – Whether 'person' including owner of business or employer who was not licensee and/or individual involved in sale

Haringey London BC v Marks & Spencer plc DC 868

LIMITATION OF ACTION – Period of limitation – Claim made by claimant relating to failure of defendant to assess and treat him for dyslexia – Whether claim for personal injury – Test for constructive knowledge – Whether special features justifying court in exercising power to disapply limitation period										
Adams v Bracknell Forest BC	..	..	..	..	..	..	..	..	..	HL 897
LOCAL GOVERNMENT – Council tax – Sole or main residence – Council taxpayer owning cottage – Council taxpayer and his wife moving to house provided by employer – Whether cottage sole or main residence										
Williams v Horsham DC	..	..	..	..	..	..	..	..	..	CA 30
MAGISTRATES – Jurisdiction – Laying of information by means of data entries in computer system – Time of laying of information where data entries capable of being added to or amended										
Atkinson v DPP.	..	..	..	..	..	..	..	..	..	DC 971
MEDICAL TREATMENT – Consent to treatment together of each of male and female gamete providers in treatment involving in vitro fertilisation, freezing and storage of embryos – Whether consent effective after couple separating – Whether implantation of embryo in female gamete provider ‘treatment together’ – Whether requirement for consent by both partners contrary to right to respect for private and family life and discriminatory										
Evans v Amicus Healthcare Ltd	..	..	..	..	..	..	..	..	..	CA 1025
MEDICINE – Medical practitioner – National Health Service – National disqualification – Review of disqualification – Family Health Services Appeal Authority Tribunal – Scope of powers										
Kataria v Essex Strategic Health Authority	..	..	..	..	..	..	..	..	..	Stanley Burnton J 572
MOTOR INSURANCE – Insurer liable to pay amount in respect of liability of a person not insured by a policy – Causing or permitting use of vehicle giving rise to liability										
Lloyd-Wolper v Moore	..	..	..	..	..	..	..	..	..	CA 741
NEGLIGENCE – Duty of care – Breach of duty – Horseplay – Test for determining whether participant in horseplay breaching duty of care by causing injury to another participant										
Blake v Galloway	..	..	..	..	..	..	..	..	..	CA 315
POWER OF ATTORNEY – Enduring power of attorney – Hostility between attorney and relative – Whether attorney unsuitable – Whether hostility impeding proper administration of estate or causing distress to donor of power										
Re F.	..	..	..	..	..	..	..	..	..	Patten J 277
PRACTICE – Claimant bringing proceedings and making late application to join existing group action subject to group litigation order – Claimant’s application refused – Whether claimant’s existing parallel claim abuse of process.										
Taylor v Nugent Care Society	..	..	..	..	..	..	..	..	..	CA 671
—Payment into court – Withdrawal or reduction of payment in – Whether application for reduction of payment in operating as automatic stay on acceptance if issued within 21-day period for acceptance and before acceptance										
Flynn v Scougall	..	..	..	..	..	..	..	..	..	CA 609

PRACTICE (CONT'D) – Rule of procedure empowering court to permit change of parties after expiry of limitation period under any enactment allowing such a change or under which such a change was allowed – Whether rule only applying to enactments which expressly allowed change of parties after expiry of limitation period									
Parsons v George	..	..	..	..	..	..	..	..	CA 633
PRISON – Release on licence – Secretary of State having discretionary power to release on licence only prisoners serving determinate sentences of 15 years or more when their release was recommended by Parole Board – Whether Secretary of State's power discriminatory breach of right to liberty and security									
R (on the application of Clift) v Secretary of State for the Home Dept	..								CA 338
RESTITUTION – Unjust enrichment – Defence – Change of position – Illegality – Whether innocent recipient precluded from relying on change of position defence if change illegal									
Barros Mattos Jnr v MacDaniels Ltd	..	..	..	..	..	..	..	Laddie J	299
RESTRAINT ORDER – Variation of order prior to conviction – Whether order variable on application of general creditor									
Re X (restraint order)	..	..	..	..	..	..	..	Davis J	1077
SENTENCING – Imprisonment – Length of sentence – Fraudulent evasion of duty chargeable on goods – Aggravating and mitigating factors – Appropriate sentence – Guidelines									
R v Czyzewski	..	..	..	..	..	..	..	..	CA 135
SOCIAL SECURITY – Housing benefit – Proposed amendments to housing benefit regulations referred to independent advisory committee informally for decision as to whether proposed amendments be referred to it formally – Whether amendments ultra vires – Whether amendments impliedly presented as neutral in effect									
Campbell v South Northamptonshire DC	..	..	..	..	..	..	..	CA	387
—Housing benefit – Whether agreements pursuant to which church members occupying church-owned property on a commercial basis – Whether taking into account factors manifesting church members' religious beliefs breaching right to freedom of thought, conscience and religion									
Campbell v South Northamptonshire DC	..	..	..	..	..	..	..	CA	387
SOLICITOR – Duty – Conflict of interest – Acting for both parties in transaction – Whether conflict arising only when solicitor acting for both parties in same transaction									
Marks and Spencer plc v Freshfields Bruckhaus Deringer	..							Lawrence Collins J	773
—Retainer – Executor instructing solicitor in sole practice in administration of estate – Solicitor entering into partnership – Whether novation of retainer taking place									
Re Burton Marsden Douglas (a firm)	..	..	..	..	..	..	..	Lloyd J	222
TRUST AND TRUSTEE – Constructive trust – Unmarried couple – House acquired by joint efforts for joint benefit in sole name of one – Principles applicable in determining beneficial interests in property									
Oxley v Hiscock	..	..	..	..	..	..	..	..	CA 703
UNFAIR DISMISSAL – Compensation – Amount which is just and equitable having regard to the loss sustained by employee – Whether compensation recoverable for non-economic loss brought about by manner of unfair dismissal									
Dunnachie v Kingston-upon-Hull City Council	..	..	..	..	..	..	..	HL	1011

UNFAIR DISMISSAL (CONT'D) – Constructive dismissal – Whether finding of constructive dismissal precluded where final act of employer in series of actions precipitating resignation was reasonable conduct by employer										
Omilaju v Waltham Forest LBC	..	..	..	..	..	..	..	..	EAT	129
VARIATION OF TRUSTS – Bare trust – Variation of statutory power of advancement										
D (a child) v O	..	..	..	..	..	..	..	..	Lloyd J	780
WILL – Option – Will providing for testator's house to be offered for purchase to claimant – Will specifying periods for acceptance and completion – Whether principle requiring option to be accepted in strict compliance with terms also requiring strict compliance with conditions for completion										
Re Gray (decd)	..	..	..	..	..	..	..	..	Rimer J	754

House of Lords petitions

This list, which covers the period 16 June 2004 to 22 July 2004, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Crest Nicholson Residential (South) Ltd v McAllister [2004] 2 All ER 991. Leave to appeal refused 14 July 2004 (Lord Hope of Craighead, Lord Scott of Foscote and Lord Walker of Gestingthorpe).

c

R v C

[2004] EWCA Crim 292

COURT OF APPEAL, CRIMINAL DIVISION

d

JUDGE LJ, NELSON AND MCCOMBE JJ

5 FEBRUARY, 18 MARCH 2004

e

Criminal law – Rape – Husband and wife – Marital exemption – Judicial decision marking removal of marital exemption to rape – Husband raping wife before judicial decision – Husband convicted of rape of wife after judicial decision – Whether conviction abuse of process – Whether conviction retrospective penalty – Human Rights Act 1998, Sch 1, Pt I, art 7.

f

The defendant was convicted in 2002 of the rape of his then wife in 1970. He appealed against conviction on the basis of abuse of process, contending: (i) that it had not been not until the Court of Appeal so held in March 1991 (in a decision affirmed that same year by the House of Lords) that a man could be convicted of raping his wife during the subsistence of a marriage; (ii) that before that time, in law a woman was deemed to have given irrevocable consent to sexual intercourse with her husband; (iii) that the count alleging rape would not have been treated as an offence of rape at the time it was committed, nor prosecuted; and (iv) that the trial had infringed art 7(1)^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provided that no one was to be held guilty of any criminal offence on account of any act or omission which had not constituted a criminal offence at the time when it was committed. He accepted that the European Court of Human Rights had considered and approved the decisions of the Court of Appeal and House of Lords, notwithstanding the terms of art 7 of the convention but submitted that that reasoning depended on the fact that by 1989, when the incidents the subject of those decisions took place, an individual husband who forced his wife to have sexual intercourse with him against her will would have been able to anticipate with reasonable certainty that such actions would be regarded as criminal, while that would not have been so in 1970.

g

h

j

Held – Article 7 of the convention did not prevent the proper conviction of a man for the rape of his wife at a time before what was, on analysis, the fiction of

a Article 7, so far as material, is set out at [7], below

deemed consent had finally been dissipated in March 1991. It followed from the reasoning of the European Court of Human Rights, analysis of the supposed immunity and a true understanding of the limits of its ambit, that a distinction based on the dates when the rapes the subject of the Court of Appeal and House of Lords decisions had occurred and the date of the rape in the instant case could not be sustained. Accordingly, the appeal would be dismissed (see [15]–[17], [19], [23]–[26], below).

R v R (rape: marital exemption) [1991] 4 All ER 481 and *SW v UK* (1996) 21 EHRR 363 considered.

Notes

For the prohibition of retrospective laws, see 8(2) *Halsbury's Laws* (4th edn reissue) para 148.

For the Human Rights Act 1998, Sch 1, Pt I, art 7, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

Cases referred to in judgment

R v Clarence (1888) 22 QBD 23, [1886–90] All ER Rep 133, CCR.

R v Clarke [1949] 2 All ER 448.

R v Jackson [1891] 1 QB 671, [1891–4] All ER Rep 61, CA.

R v Kowalski (1987) 86 Cr App R 339, CA.

R v L (Graham) (7 May 2003, unreported), CA.

R v Miller [1954] 2 All ER 529, [1954] 2 QB 282, [1954] 2 WLR 138, Assizes.

R v O'Brien [1974] 3 All ER 663.

R v R (rape: marital exemption) [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL; *affg* [1991] 2 All ER 257, [1992] 1 AC 599, [1991] 2 WLR 1065, CA.

R v Roberts [1986] Crim LR 188, CA.

R v Steele (1976) 65 Cr App R 22, CA.

S v HM Advocate 1989 SLT 469, HC of Just.

SW v UK (1996) 21 EHRR 363, [1995] ECHR 20166/92, ECt HR.

Appeal against conviction

The defendant C appealed with leave of the Court of Appeal against his conviction for the offence of rape on 18 April 2002 after a trial before Judge Cracknell and a jury in the Crown Court at Kingston-upon-Hull. The facts are set out in the judgment.

Geoffrey Marson QC (assigned by the Registrar of Criminal Appeals) for the appellant.

Andrew Campbell QC (instructed by the Crown Prosecution Service, Hull) for the Crown.

Cur adv vult

18 March 2004. The following judgment of the court was delivered.

JUDGE LJ.

[1] This appeal against conviction, brought with leave of the full court, raises a short but interesting point of principle.

[2] Barry C is 58 years old. On 18 April 2002, before Judge Cracknell and a jury in the Crown Court at Kingston-upon-Hull, he was convicted of a number of counts in a 17-count indictment alleging sexual and violent offences against four different women over a 20-year period from 1967–1987.

a [3] The victim in counts 1–4 was the appellant's then wife, PN. He was convicted on counts 1, 2 and 4 of assaulting her occasioning actual bodily harm. He was also convicted on count 3 of rape. That conviction forms the subject of the present appeal.

b [4] For completeness we must add that counts 5–10 related to offences of rape, wounding with intent and assault occasioning actual bodily harm on a former partner, count 11 to a count of assault occasioning actual bodily harm of another former partner, and counts 12–15 to rape and indecent assault on that partner's daughter. The total sentence was 12 years' imprisonment.

c [5] The material facts are straightforward. The appellant and PN were married in 1967, when she was 19 years old. They had two children. There was a history of matrimonial abuse and violence, and the marriage came to an end in 1971. The incident of rape occurred while they were married, after PN had suffered a miscarriage, which led to her admission to hospital. On her return, the appellant wanted to have sexual intercourse with her, when she did not agree. We derive a summary of the incident from the summing up.

d 'She was weak ... "I said I didn't want sex but he started hitting me. I had a tampax to control the bleeding but he pulled my knickers off and the tampax came out and he sat there sniffing them. I had to take the tampax out. He carried on hitting me with his feet and hands and his feet. He got me on the floor and raped me on the floor of the living room. He made me feel sick. I didn't agree with sex. He called me 'frigid' or a 'frigid bitch' and afterwards he said: 'If you'd done as you were told it wouldn't have happened.'"

e [6] That is a sufficient description of the relevant facts. On the victim's account this was a clear case of rape. By its verdict, the jury accepted her evidence and rejected his denial: hence this conviction.

f [7] Neither the trial, nor the verdict are impugned. The appeal arises from the trial judge's refusal to stay count 3 as an abuse of process. The argument, persuasively deployed by Mr Marson QC, is simply expressed. In our jurisdiction it was not until the decision of the Court of Appeal in March 1991 in *R v R (rape: marital exemption)* [1991] 2 All ER 257, [1992] 1 AC 599 that a man could be convicted of raping his wife during the subsistence of a marriage. Before then, in law a woman was deemed to have given irrevocable consent to sexual intercourse with her husband. This count, alleging rape, would not have been treated as an offence of rape at the time when it was committed, nor prosecuted. Therefore it was an abuse of process. The trial contravened art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which encapsulates the common law presumption against the retrospective application of penal statutes, and provides:

j 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

[8] Mr Marson immediately faced up to the problem created for him by the decision of the European Court of Human Rights in *SW v UK* (1995) 21 EHRR 363 where, notwithstanding the terms of art 7 of the convention, the decision in *R v R* (that is the same appellant described in the European Court of Human Rights as

CR) was considered and approved. Mr Marson suggested that the reasoning depended on the fact that by 1989 an individual husband who forced his wife to have sexual intercourse with him against her will would have been able to anticipate with 'reasonable certainty' that such actions would be regarded as criminal. That would not have been so in 1970, when this appellant raped his wife.

[9] To sustain his argument, Mr Marson methodically sought to demonstrate the historical basis for his contention that a man could not be convicted of raping his wife while the marriage subsisted, and what he described as the continuing acceptance of this principle, beginning with the decision of Byrne J in *R v Clarke* [1949] 2 All ER 448. The defendant was charged with raping his wife. Counsel moved to quash the indictment on the basis that it did not reveal an offence known to law. The application failed. A non-cohabitation clause had been made by justices in favour of the wife. That was sufficient to revoke her consent to sexual intercourse. However Byrne J started with what was described as the 'general' proposition that a husband 'cannot be guilty of a rape on his wife'. The proposition was taken from Sir Matthew Hale's *History of the Pleas Of The Crown* (1 Hale PC (1736) 629): '... by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'

[10] We are not required to address the question whether, sitting on circuit, Byrne J was right to accept Hale's statement of principle. We notice however that this was not a view shared by all the judges in the Crown Cases Reserved in *R v Clarence* (1888) 22 QBD 23, [1886-90] All ER Rep 133. Even the judgment of Hawkins J, which was most emphatic in its support of this matrimonial 'privilege', acknowledged ((1888) 22 QBD 23 at 51, [1886-90] All ER Rep 133 at 148) that it would be unlawful for the privilege to be exercised if the result would be to infect his wife and endanger her health:

'So to endanger her health and cause her to suffer from loathsome disease contracted through his own infidelity, cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it ... I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power, nay, even to the death, if necessary, the sexual embraces of a husband suffering from such contagious disorder.'

[11] We also believe that Hale's proposition would have been pressed to withstand the approach of the Court of Appeal in *R v Jackson* [1891] 1 QB 671, [1891-4] All ER Rep 61, a decision which we immediately acknowledge was not concerned with the issue of rape in marriage, but with the survival of medieval concepts of the wide general dominion which husbands were entitled to exercise over their wives.

[12] Mrs Jackson refused to live with her husband. He obtained an order for restitution of conjugal rights. She still refused to live with him. His response was to capture her and keep her in confinement in order as he put it, to regain her 'affection'. Lord Halsbury LC was scathingly dismissive of the 'dominion' argument ([1891] 1 QB 671 at 678-681, [1891-4] All ER Rep 61 at 65-66):

'More than a century ago it was boldly contended that slavery existed in England; but, if anyone were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country ... I only mention the

- a subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute dominion of the husband over the wife ... I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect.'
- b [13] We highlight the reference to the way in which 'any civilised country' should approach these problems. This concept is re-echoed in art 7(2) of the convention which creates a specific and critical exception to the broad ambit of art 7(1):
- c 'This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'
- [14] In his judgment in *R v Jackson*, Lord Esher MR was no less forceful than Lord Halsbury LC ([1891] 1 QB 671 at 682–683, [1891–4] All ER Rep 61 at 66–67):
- d 'A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband ... I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested.'
- e [15] The obstructed development of the common law, and the delayed identification of Hale's proposition as a fiction is readily understood. The issue was never taken to conclusion in a higher court. Faced with a count of rape by a husband on his wife, the court would be invited to quash the count, or to uphold a submission that there was no case for him to answer. If it did, or accepted the submission, the prosecution did not then enjoy any right of appeal. And even if a
- f judge allowed the case to proceed to the jury, it still could not reach the Court of Appeal unless there was a conviction. So, by a series of decisions which did not require the principle to be addressed in this court, a number of exceptions were grafted onto the principle for which Hale provided the untested authority. These included, for example, the existence of a decree nisi (*not* a decree absolute) (*R v O'Brien* [1974] 3 All ER 663), an undertaking given by the husband not to molest his
- g wife (*R v Steele* (1976) 65 Cr App R 22) and the existence of a formal deed of separation (*R v Roberts* [1986] Crim LR 188). In *R v Steele* we notice that Geoffrey Lane LJ suggested that the wife's deemed matrimonial consent could be eliminated by agreement between the spouses. It was not necessary to decide whether in modern society such an agreement would be inferred from the marriage promises
- h made by each spouse to the other, or whether the agreement might be tacit, either through the development of the marriage, or indeed, as the matrimonial courts long recognised, when the husband married his wife 'tamquam soror'.
- [16] These exceptions demonstrated that Hale's unqualified statement that a wife could not retract her consent to sexual intercourse was wrong. At the time
- j perhaps their cumulative significance was not fully appreciated, because in each of the cases in question, the exceptional circumstances enabled justice to be done.
- [17] At the same time, another line of authorities demonstrated that even if a wife might be deemed to consent to full sexual intercourse, her husband might nevertheless be found guilty of indecently assaulting her and of assaulting her occasioning actual bodily harm or wounding or inflicting grievous bodily harm. In *R v Kowalski* (1987) 86 Cr App R 339, the defendant was charged with indecent

assault, and assault occasioning actual bodily harm, but not rape of his wife. The precise circumstances do not require repetition. She was forced at knifepoint to fellate him, and then to have sexual intercourse. Dismissing an appeal against conviction for indecent assault, even if it was a preliminary to sexual intercourse, it was held that marriage did not imply consent to fellatio. As it was plainly absent the offence was established. Without a count alleging rape the court did not have to grapple with what then would have been the difficult task of deciding what 'acts in the nature of familiarity or preliminaries to sexual intercourse would fall within the shadow of the protection that a husband has against prosecution for rape ... of his wife'. In *R v Miller* [1954] 2 All ER 529, [1954] 2 QB 282 it was held that a husband who had forcible sexual intercourse with his wife after she had presented a petition for divorce could not be convicted of rape, but that he could be convicted of occasioning his wife actual bodily harm. *Lynskey J* ([1954] 2 All ER 529 at 534, [1954] 2 QB 282 at 292) reflected a longstanding view that if a husband used force or violence in order to have sexual intercourse with his wife against her will, he would make himself liable, not for rape, but for whatever offence of violence might be appropriate, including wounding, or causing actual bodily harm, or common assault, and that actual bodily harm included 'shock' or 'an injury to the state of [the wife's] mind'. It is difficult to imagine any incident of rape which would not at the very least cause some such injury.

[18] We have taken some time to describe the historical development of this issue because Mr Marson forcefully reminded us more than once that the incident with which this conviction is concerned occurred in 1970. He suggested that one way of testing the issue of foreseeability identified in the European Court of Human Rights' decision in *SW v UK* (1996) 21 EHRR 363 was to consider what his client would have been told if he had sought legal advice in about 1970. His solicitors would no doubt have warned him that it was morally wrong to force himself on his wife, and that he should not do so, but if they were to give him conscientious advice about the true state of the law, they would have to say that if he raped his wife he would not be committing a criminal offence. This represented the common understanding of the legal position.

[19] We do not agree that this is anything like a complete statement of appropriate legal advice in 1970. The solicitor would have started by pointing out to his client that to rape his wife would be barbaric, and that he would not condone it. He would then have told his client that the courts had developed and could be expected to continue to develop exceptions to the supposed rule of irrevocable consent, and that if ever the issue were considered in this court, the supposed immunity of a husband from a successful prosecution for rape of his wife might be recognised for what it was, a legal fiction. He would in any event also have told his client that depending on the circumstances he might be convicted of indecent assault on his wife, punishable with imprisonment, and would be liable to be convicted of offences of violence ranging from common assault, by putting her in fear of violence, up to and including wounding or causing grievous bodily harm if he injured her in order to force her to have sexual intercourse. Any such offences, too, would be punishable by imprisonment. What is more, in 1970, the solicitor would have had to advise his client that persistent and unreasonable demands for sexual intercourse, if his wife was unwilling, and a single incident of rape, would have enabled her to found a petition for divorce on the grounds of cruelty, or depending on precisely when the incident occurred, his unreasonable behaviour. This conduct would also have entitled her either to a non-molestation order, or a non-cohabitation clause, depending on the jurisdiction in which she sought relief.

- a The solicitor's advice would be that if he raped his wife after that, the supposed immunity would be gone, and he would then certainly be liable for the specific crime of rape. Before such an order, notwithstanding the repetition of Hale's principle in the authorities, he might be liable for rape, probably liable for indecent assault, and certainly liable for the appropriate offence of violence. On this view therefore he would have been told that he could not rape his wife with complete
- b impunity. To the extent that the European Court of Human Rights in *SW v UK* proceeded on the basis that he could, its analysis was not fully informed.

- [20] Eventually, in 1989 and 1990 the issue of deemed consent was, at last, properly examined in the High Court of Justiciary in Scotland (*S v HM Advocate* 1989 SLT 469) and this court in England (*R v R (rape: marital exemption)* [1991] 2 All ER 257, [1992] 1 AC 599). In Scotland, Lord Emslie, the Lord Justice General, observed
- c that rape had always been essentially a crime of violence and aggravated assault, and doubted (1989 SLT 469 at 473) whether it was ever contemplated by the common law that a wife 'consented to intercourse against her will and obtained by force'. In *R v R*, in a constitution of five judges presided over by Lord Lane CJ, sitting with the President, and three other Lord Justices, this court decided with
- d Lord Emslie that ([1991] 2 All ER 257 at 265–266, [1992] 1 AC 599 at 610–611)—

- 'the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale CJ meant) is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the
- e criminal law ... We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with the victim.'

- [21] The House of Lords agreed that a husband was 'criminally liable for
- f raping his wife'. In a speech with which each member of the House agreed, Lord Keith of Kinkel pointed out ([1991] 4 All ER 481 at 488, [1992] 1 AC 599 at 621)—

- 'that part of Hale's proposition which asserts that a wife cannot retract to the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is
- g no good reason why the whole proposition should not be held inapplicable in modern times.'

- He expressly agreed ([1991] 4 All ER 481 at 490, [1992] 1 AC 599 at 623) with Lord Lane CJ's observation ([1991] 2 All ER 257 at 266, [1992] 1 AC 599 at 611)
- h that a new offence was not being created, but rather 'it is the removal of a common law fiction which has become anachronistic and offensive ...'

- [22] We need not discuss either the 'declaratory' theory of the effect of judicial decision relating to the development of the common law, nor whether by its decision, the House of Lords was retrospectively creating a new offence where
- j none existed before. The stark fact is that R was convicted and S's conviction in Scotland was approved. The decision applied to events that had already taken place, as well as those in the future.

[23] In *SW v UK*, the European Court of Human Rights was considering complaints that there had been a violation of art 7(1) because SW and CR had been found guilty of raping, or attempting to rape their wives, although when the relevant acts took place, the husbands would have been immune from

prosecution. Towards the end of the judgment, the court observed ((1996) 21 EHRR 363 at 402 (para 44/42)):

‘The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords ... cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no-one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.’

[24] Accordingly, looking at art 7(1) and (2) together, and examining the entire purpose of the convention, the wife was entitled to protection from inhuman or degrading treatment, and indeed from the ‘destruction of any of the rights and freedoms protected by the Convention’. As the opinion of Mrs Liddy (at 378–379) concurring in the result, explained, this precluded the husband from relying on art 7 to support a finding that his rights were infringed by his trial and conviction. Article 7(2) provides ample justification for a husband’s trial and punishment for the rape of his wife, according to the general principles recognised by civilised nations. Indeed, as it seems to us, it would be surprising to discover that the law in any civilised country protected a woman from rape, with the solitary and glaring exception of rape by the man who had promised to love and comfort her.

[25] Consistently with the outcome in *R v R*, it is now clearly established by the unreported decision of this court in *R v L (Graham)* (7 May 2003, unreported), that a man may properly be convicted of raping his wife when the incident occurred before the decision of *R v R*. The reasoning of the European Court of Human Rights, together with our analysis of the supposed immunity, and a true understanding of the limitations on its ambit before March 1991, lead us to conclude that the distinction Mr Marson sought to base on the dates when the different rapes occurred in *SW v UK*, and again in *R v L (Graham)*, and the present case is not sustained. The prosecution of this appellant for rape did not infringe his rights under the convention.

[26] As a man may properly be convicted today of having raped his wife before the fiction of deemed consent was finally dissipated in March 1991, it cannot be said that a prosecution for rape must be deemed to be an abuse of process. There may, of course, be other well-known grounds for a successful application for the proceedings to be stopped, and in any event the proceedings will not start unless there is a reasonable prospect of a successful prosecution. This appellant knew perfectly well that to rape his wife was wrong, and that his marriage certificate did not entitle him to force his unwanted sexual attentions on her, nor did he suggest that he believed that he would be immune from prosecution if he did so. There was nothing particular about the facts of this case which would have justified an order to stop it. Accordingly, the decision of the judge was right, and this appeal must be dismissed.

Appeal dismissed.

R v Senior and another

[2004] EWCA Crim 454

COURT OF APPEAL, CRIMINAL DIVISION

POTTER LJ, HOOPER AND ASTILL JJ

16 FEBRUARY, 4 MARCH 2004

Criminal evidence – Answers and statements to customs officer – Admissibility – Absence of caution – Customs officer suspecting travellers of having committed offence – Customs officer asking travellers routine questions – Whether evidence of questions and answers admissible in absence of caution – Police and Criminal Evidence Act 1984, s 78 – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, para 10.1.

On the defendants' arrival at an airport in the United Kingdom, their luggage was examined by a customs officer before it emerged on the luggage belt. A paste found in one suitcase field-tested positive for cocaine. The defendants collected their two suitcases and went through the customs channel for travellers with nothing to declare (the green channel), where the customs officer asked, and the defendants answered, a series of preliminary questions routinely asked of persons who were stopped when arriving with their baggage in the green channel in order to establish whether there were good grounds for suspicion that they had committed an offence and, in the case of persons travelling together, where it was regarded as inappropriate to detain one or both unless the one who was the owner of a particular bag had been identified, to identify the owner. They were then arrested and examination of their luggage revealed that the two suitcases contained over 20 kg of cocaine. At trial, for the offence of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cocaine, it was contended, unsuccessfully, that, since the customs officer had ascertained that one of the suitcases contained drugs and had seen the suitcase collected by the defendants, his suspicions had been such that he should have cautioned the defendants before asking his first question, affording them the protection of the Police and Criminal Evidence Act 1984 and para 10^a of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C), and that the evidence of the questions and answers ought to be excluded. Paragraph 10.1 of Code C then provided that a person whom there were grounds to suspect of an offence had to be cautioned before any questions about it were put to him regarding his involvement in the offence, but stated that a person did not need to be cautioned if the questions were for other necessary purposes. The defendants were convicted and appealed, submitting that the judge had erred in holding that there had been no breach of Code C and contending that the evidence of the questions and answers should have been excluded under s 78^b of the 1984 Act on reasons of fairness.

^a Paragraph 10, so far as material, is set out at [18], below

^b Section 78, so far as material, provides: '(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

Held – (1) The good sense and propriety of routine questioning of persons who were stopped when arriving with baggage through the green channel as a proper protection against error and/or wrongful arrest did not preclude the need to approach each case on the basis of the state of knowledge of the investigating officers in relation to the individual traveller under investigation. In the instant case the customs officer had already seen the defendants travelling together and assisting each other in relation to a suitcase heavy with drugs. It must have been plain, in addressing preliminary questions to them which were directed towards both of them, that the answers which one gave in the other's presence were likely to be given in evidence in any proceedings which followed. In those circumstances, the proper procedure had been immediately to ask each to identify her bag without preliminary questions of a kind which might later be treated as admissions or inconsistencies at trial and thereafter to administer a caution. Accordingly, there had been a breach of para 10.1 of Code C (see [31]–[36], below); *R v Okafor* [1994] 3 All ER 741 considered.

(2) Fairness had not required exclusion of the questions and answers under s 78 of the 1984 Act. The questions were of a type which any traveller would expect to face upon entry to the country. It followed that there had been no surprise or unfairness at the time the questions were asked. Nor had there been any dispute over the content of the questions and answers. Moreover, the defendants had not been put under any difficulty or disadvantage in the trial process in explaining their position to the jury. Furthermore, even if fairness had required exclusion of the questions and answers, their inclusion had in no way affected the safety of the convictions. Accordingly, the appeals would be dismissed (see [37], [40], [41], below).

Notes

For the discretion to exclude relevant prosecution evidence, and for the relevance of Codes of Practice, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1060, 1132.

For the Police and Criminal Evidence Act 1984, s 78, see 17 *Halsbury's Statutes* (4th edn) (2002 reissue) 491.

Cases referred to in judgment

R v Okafor [1994] 3 All ER 741, CA.

R v Cox (1992) 96 Cr App R 464, CA.

R v Nelson, R v Rose [1998] 2 Cr App R 399, CA.

R v Walsh (1989) 91 Cr App R 161, CA.

Appeals against conviction

Dianne Senior and Samantha Senior appealed with leave of the single judge against their convictions on 10 March 2003 in the Crown Court at Isleworth after a trial before Recorder Mackie and a jury for the offence of being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods contrary to s 170(2) of the Customs and Excise Management Act 1979. The facts are set out in the judgment of Potter LJ.

Samuel Stein (assigned by the Registrar of Criminal Appeals) for Dianne Senior.

Charles Judge (assigned by the Registrar of Criminal Appeals) for Samantha Senior.

Jeffrey Lamb (instructed by the Solicitor for Customs and Excise) for the Crown.

a 16 February 2004. The court announced that the appeal would be dismissed for reasons to be given later.

4 March 2004. The following judgment of the court was delivered.

POTTER LJ.

b [1] On 16 February 2004 we dismissed the appeal against conviction in this case, stating that we would give our reasons later. Those reasons are now set out below.

c [2] On 10 March 2003 in the Crown Court at Isleworth before Mr Recorder Mackie and a jury the appellants Dianne Senior and her daughter Samantha Senior, were convicted by a majority verdict (ten to two) of being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods (cocaine) contrary to s 170(2) of the Customs and Excise Management Act 1979. On 16 April 2003 Dianne Senior was sentenced to 15 years' imprisonment and Samantha Senior was sentenced to 14 years' imprisonment. They appeal against conviction by leave of the single judge, an extension of time of seven days having d been granted in respect of Dianne Senior's application for leave to appeal.

e [3] The appellants both live in North London. Before these offences they had been unemployed for some time. Samantha has a son aged six called Milan. The appellants had made four trips to the Caribbean in the six months prior to 14 October 2002: ten days in April/May, eleven days in July, seven days in August and seven days from 7–14 October. Each of those journeys was paid for in cash f by someone other than the appellants. Shortly after they landed they were involved in two sets of telephone calls. The first, prior to the collection of their luggage, consisted of five calls to someone whom Samantha said was her boyfriend 'Joe'. After collection of the luggage, Samantha was seen to use her mobile telephone to take calls before going through customs, the first of which f was said by Samantha to have come from 'Cheryl' who was the sister of Kevin Berkley.

g [4] Having landed, the appellants proceeded to collect their luggage from the luggage belt. There were two suitcases and one black bag. One suitcase, an 'Eminent' suitcase, was examined by a customs officer before it emerged on the luggage belt. On opening it contained a chemical smell. The officer 'spiked' the case and saw some paste which he field-tested as cocaine. Once in the open, the officers saw Samantha take off the suitcases with assistance from Dianne. The black bag was left on the belt. As the appellants came through the green channel ('Nothing to Declare'), they were stopped and asked a series of questions which they answered as follows:

h 'Officer [O'Donoghue]: Where have you come from?

Dianne: San Maarten. Paris before that.

Officer: Are you home now?

Dianne: Yes, we live here.

j Officer: Are you travelling together?

Dianne: Yes.

Officer: How are you related?

Dianne: Mother and daughter.

Officer: How long have you been away?

Dianne: Eight days.

Officer: What was the reason for your trip?

Dianne: To visit her boyfriend. [Referring to Samantha.]

Samantha: Pleasure. [These last two answers were spoken more or less simultaneously.]

Officer: Which are your bags, please? [Dianne Senior then identified the Eminent suitcase as hers and Samantha identified the second case as hers.]

Officer [addressing Dianne]: Did you pack your bags yourself?

Dianne: Yes.

Officer: Are you carrying anything for anybody else?

Dianne: No.

Officer: Did anybody give you anything to bring back?

Dianne: No.'

[5] The appellants were then arrested and placed into separate rooms. The second suitcase which had been identified as Samantha's was then field-tested and also proved positive for cocaine. A short while later a customs officer heard Dianne say to no one in particular: 'I knew it was too good to be true. No one can be so kind.' He also saw Dianne mouth to her daughter through a glass partition: 'I'm sorry.'

[6] The suitcases were then examined on behalf of the Customs and Excise. One was found to have a false lid. It contained 10 kg of cocaine powder and 7.77 kg of liquid cocaine. The other case contained two separate lots of liquid cocaine weighing 3.7 kg and 4.7 kg respectively. The purity of the cocaine was 100%.

[7] The prosecution case was that the appellants were involved in a professional drug-smuggling operation. The defence advanced by Dianne Senior at trial was that, while she knew she was importing cocaine, she had been acting under duress. It was the defence of Samantha that she did not know that any drugs were in the suitcases or that she was importing cocaine. Following their arrest, the defendants received advice from solicitors before giving their interviews. At interview Samantha answered 'No comment' throughout to questions put to her. Dianne on the other hand gave short and evasive answers to questions about the trip such as: 'I can't'; 'I'm scared'; 'I've been used as well'; 'I'm upset'; 'I don't feel good'; 'I'm frightened'; 'I'm in shock'. When asked if a friend had paid for the trip, she replied: 'Some friend'.

[8] At the close of the prosecution case it was submitted for the appellants that the question and answer session between the officer and the appellants should be excluded. That was because, before asking his first question, the officer had ascertained that one of the suitcases contained drugs, had opened and spiked it and noticed a strong smell of chemicals, and had seen it collected off the carousel by the two appellants. It was submitted that his suspicions were such that he should have cautioned the appellants at once so they could have been afforded the protection of the Police and Criminal Evidence Act 1984 (PACE) and Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) thereunder. It was submitted that in relation to the answers to the questions asked (which we have rehearsed above), the appellants were denied a proper interview procedure and access to legal advice. In those circumstances, they had not been able to understand the significance or importance of what they were saying and there was no guarantee that what was later recorded by the officer (when making up his notes an hour or so afterwards) was accurate.

[9] The recorder ruled that there had not been a breach of PACE or of Code C but that, even if there had been, it would not have been appropriate to exclude the evidence. He said this in his written reasons given later:

‘7. I do not consider that there has been a breach of Code C, para 10. The questions are those put to anyone stopped in the green channel and we hear them in this court in case after case. The context is a process in which every traveller half expects to be stopped, knowing that, if asked, he or she has to do so and to answer questions. It is a context different from being stopped by a policeman in the street. The requirement of Code C, para 10 is that a suspect must be cautioned before any questions are “put to him regarding his involvement or suspected involvement in that offence”. It seems to me that the questions here are put for the “other purposes” mentioned in the Code, those of customs routine and not interrogation about involvement in an offence. As soon as the routine questions were completed, the officer cautioned the defendants who were interviewed later that day. The offence is not importing cocaine but being knowingly concerned in doing so. It does not seem to me that there are grounds for suspicion of knowledge until at least something is asked about the traveller’s state of mind. It seems to me that there is no breach of the Code or its spirit unless the questions move away from the conventional into areas of interrogation such as those later found at interview.

8. If I am wrong and there has been breach of the Code, it does not seem to me to be sufficiently serious to warrant the exercise of my discretion to exclude the exchanges under s 78 [of PACE]. Both sides have focused on the passages of *Archbold’s Criminal Pleading, Evidence and Practice* (2003 edn) p 1479–1480 (para 15–370) to consider the question of whether the breaches, if there were any, were significant and substantial. The defence rely on the gravity of the charges and the consequences faced by the defendants. There is also the importance of the charges to the Crown. There is no suggestion of improper conduct or bad faith by Mr O’Donoghue in asking what appeared to be the standard questions. There is no significant difference between prosecution and defence about what was actually said. There is nothing overtly unfair or oppressive about the questions. The questions seek basic information about the defendants and their journey in conventional terms. The jury would have a false picture if deprived of the knowledge of what happened when these defendants came into England, and of what was said. Looking at all the circumstances of this case I do not consider the inclusion of this evidence would have such an adverse effect that justice requires it to be excluded.’

[10] In her evidence, Dianne Senior said that she had met Kevin Berkley at the beginning of 2001 and had formed a friendship with him. He had paid for her and her daughter, and on one occasion Milan, to travel to San Maarten in the Caribbean. She knew that Berkley had business dealings there. She went on four trips with him, being again accompanied by Samantha on the fourth trip in October 2002. In San Maarten they were met by a cousin of Berkley’s, staying in at least two different hotels. On this trip her relationship with Berkley had become a sexual one.

[11] She said that everything was fine until the Saturday before they were due to leave when he had asked her a favour by the swimming pool. He told her he wanted her to bring cocaine back into the United Kingdom. She refused and he

ducked her head under the water three times. He insisted she should do it, saying that she could easily disappear in his country. She said that Berkley had threatened to push her off a cliff and that they had had a struggle during which she had hurt her knee. He also grabbed her right breast and pushed himself over her. He had threatened her that harm would come to her daughter and Milan. a

[12] Dianne Senior said she had left Berkley and gone back to her room where she saw Samantha. Samantha had asked her what was wrong and she (Dianne) had made up a story about having had an argument about another man and said she would be no longer seeing Berkley. She then telephoned Milan's father. She then went to do some last-minute shopping and when she came back to the room, Berkley, his cousin and others were there in the room where the suitcases were kept. She said that she had not totally unpacked when she had arrived and that she had simply thrown things into the back of the suitcases. At her daughter's insistence they had then gone out to celebrate the last night of the holiday. That night she and her daughter had shared a room. b

[13] She said that, once back in the United Kingdom, she had received a call from Cheryl to Samantha. She could not talk so she passed the telephone to her daughter. She said that Samantha had taken both suitcases and then been intercepted by the officer. When it was put to her that the suitcases must have been much heavier than justified by her own packing (the total of the drugs in one suitcase was 10 kg and in the other over 7 kg), she said she had not seen the suitcases until they were at the check-in on the following day and she had had no opportunity to feel their weight. She said that Berkley had also produced the black bag at the last minute containing wrapped presents for Milan. When she had thrown things into the suitcases she had swept up cosmetics and put them into the suitcases, giving them little thought as Berkley's trade included cosmetics. She had not smelt anything out of the ordinary when packing. She said it had occurred to her that drugs might have been in the black bag (which was left on the carousel) but not the suitcases. In respect of the second set of phone calls (see [3], above) she denied that one of the calls had been from Berkley, maintaining it was from Cheryl. She said she was scared about what Berkley would do because of fears for Milan. She said no one had witnessed the episode by the pool. She said the suitcases were the same as the ones she had taken away with her. She said there had been plenty of opportunity to put the drugs in the suitcases without her knowledge. She had no idea how Berkley would have accessed the drugs in the suitcases except that, on leaving he had said to her: 'See you in a couple of days.' c

[14] She said that when answering Mr O'Donoghue's questions on arrival, she was not giving much thought to her replies because she was thinking about Milan and what might happen to him. She was also trying to put all thoughts about Berkley out of her mind before being stopped. She said that Berkley was not Samantha's boyfriend. Samantha's boyfriend was called Joe and Samantha had been very anxious to ring him once they had landed. She agreed she had made no mention of threats from Berkley in interview. She said she was constantly thinking about the welfare of Milan. d

[15] When Samantha gave evidence, she said she had met Berkley in a restaurant in Dalston. He had plenty of money and gave the appearance of someone who was a successful importer of Afro skin and beauty products. When he had paid for her to go to San Maarten, she had jumped at the chance to go on a free holiday especially when on one occasion she had been able to take Milan. She said Berkley had made the arrangements for the fourth trip. She also said the e

a suitcases brought back were the same ones she and her mother had taken out. She had not heard any commotion by the pool, although she was aware that her mother and Berkley had broken up before he went back. When it came to packing she had thrown stuff into the suitcases or given them to her mother. Her mother had reminded her to pack the bottles of cosmetics which had been given to them⁴. She said there was nothing unusual about the bottles. She too had not
b smelt anything. She recalled Berkley saying he would see them a couple of days later when they were at the airport. When they had arrived back in England there had been a phone call from Cheryl. She explained that, when questioned by Officer O'Donoghue, Dianne's answer that Berkley was her boyfriend was a lie, but not a big lie.

c [16] In cross-examination she said there was nothing odd about having someone else pay for a trip to the Caribbean or that one of the trips was only six weeks after the last. She said that the suitcases had been purchased on the third trip. Coming back on the fourth trip, the suitcases had been carried by the men to the airport in San Maarten. She said she had not made her own position clear in interview about not knowing about the drugs, because she had relied upon her
d solicitor's advice to say nothing.

[17] The grounds of appeal on behalf of both appellants are that the recorder erred in finding that there had been no breach of PACE Code C, para 10.1 (failure to administer caution) and in failing to exclude the evidence of the questions and answers set out at [4], above under s 78 of PACE.

e [18] We have been referred to a number of authorities upon the proper approach of the court in relation to cases where a breach of Code C is asserted and is found by the court to have been committed by officers concerned in the questioning of a suspect.

[19] Code C, para 11.1A provides that:

f 'An interview is the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences which, by virtue of paragraph 10.1 of Code C, is required to be carried out under caution.'

Paragraph 10.1 in turn provides:

g 'A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions which provide the grounds for suspicion) are put to him regarding his involvement or suspected involvement in that
h offence if his answers or his silence (i.e. failure or refusal to answer a question or to answer satisfactorily) may be given in evidence to a court in a prosecution. He therefore need not be cautioned if questions are put for other purposes, for example, ... in furtherance of the proper and effective conduct of a search (for example to determine the need to search in the exercise of powers of stop and search or to seek cooperation while carrying out a search) ...'

j [20] This rule applies to customs officers as well as police officers (see *R v Okafor* [1994] 3 All ER 741).

[21] In that case, the appellant, a Nigerian national, arrived at Gatwick airport from Nigeria with a single item of luggage, namely a suit carrier. He was asked a number of questions, in particular whether he had packed the luggage himself and whether everything in it belonged to him, following which his luggage was searched. Packages of cocaine were discovered in his luggage but he was not

arrested or informed of what had been found, the officer wishing him to be released in order to see whether he would lead customs officers to anybody else involved in the importation. He agreed to undergo a body search. Whilst this was in progress (and other officers being deployed by way of surveillance) he was asked various questions and gave various answers without being cautioned or advised of his entitlement to have legal advice before being interviewed. Objection was taken at trial to the admission in evidence of the conversation during the body search.

[22] The trial judge found breaches of the Code but allowed the evidence to be admitted on the basis that the appellant would not be unfairly prejudiced by admitting the disputed conversation. This court stated (at 747 per Lord Taylor of Gosforth CJ):

‘We have come to the conclusion that the learned judge ought to have excluded this conversation. There were clear breaches of the rules and breaches which were of significance in the context of this case. Therefore we conclude, because it seems that this matter has been ventilated by Mr Issard-Davies with a view to future conduct by the Customs and Excise, that where a customs officer has reason to suspect that an offence has been committed, he must either avoid asking questions in relation to the offence or he must follow the provisions of the code and administer a caution. In the circumstances of the present case it would have been an option for the customs officer to talk about anything other than the case whilst conducting the search, and to have allowed the suspect to go into the concourse and then ask him questions only when he was ultimately arrested. In that way the object of trying to catch others who might be waiting to meet the suspect could have been pursued.’

[23] Counsel for the appellants has placed substantial reliance upon that case and also upon the decision in *R v Nelson, R v Rose* [1998] 2 Cr App R 399. In the latter case the court stated (at 404) that, in relation to persons who come under suspicion of drug importation (notably two sisters and a brother who despite buying their tickets and travelling together prior to arrival, split up and proceeded separately through customs):

‘The appropriate time to administer the caution in a situation such as this is when, on an objective test, there are grounds for suspicion, falling short of evidence which would support a *prima facie* case of guilt, not simply that an offence has been committed, but committed by the person who is being questioned.’

[24] In *R v Nelson* the trial judge had made no finding as to whether, and if so when, a customs officer had grounds to suspect that one of the defendants had committed an offence and the court itself proceeded to that task. This court stated (at 407):

‘We are satisfied that there were grounds for suspecting that Nelson had committed a drug related offence before [the officer] started to ask her any of the questions that he asked. As is apparent from the extracts of his evidence that we have quoted, [the officer] conceded that he suspected that Nelson had brought the drugs into the country. He asked questions without first cautioning her because he wanted to be 100 per cent sure that the bag belonged to the suspect. His interpretation of the department’s policy was that

- a questions could be asked without caution in order to “tie the passenger to the baggage”. There may well be circumstances in which the requirement that there be grounds for suspicion will not be satisfied unless the officer is sure that the suspect can be “tied to the baggage”. We would also accept that the mere fact that the officer suspects a person of having committed an offence is not determinative of the question whether he had grounds for entertaining that suspicion. In our judgment, however, the fact that an experienced officer does have such a suspicion is powerful evidence that there were grounds for having it. Moreover, we remind ourselves that the requirement that there be grounds for suspicion is substantially less stringent than the *prima facie* case test.’
- b

- c [25] In this case it is submitted for the appellants that the information known at the time when they were first approached in the green channel provided grounds for suspicion that they were jointly involved in an offence. That being so, the absence of the caution at the outset was a clear breach of Code C, para 10.1.

- d [26] Elaborating upon the case for suspicion, counsel for the appellants points out that the officer was aware of the following prior to the interception of the appellants. The suspect suitcase bore a label marked Samantha Senior; Samantha Senior was travelling with Dianne Senior; the side of the case was unusually thick and heavy; there was a chemical and mothball smell within the case (a common attempt to disguise); an off-white paste was removed from within; the field test proved positive for cocaine; the two suitcases were claimed by the appellants together; Samantha Senior was using her mobile telephone once the luggage had been collected. Counsel submits that this was sufficient for the test for suspicion clearly to have been met; yet the appellants were none the less asked questions relating to their suspected involvement in an offence, in particular those as to the reason for their trip and the packing of their luggage. The questions asked were not within the exceptions to the Code as stated therein and it was obvious that such ‘dialogue’ might be given in evidence to the court in a prosecution.
- e
- f

- g [27] It is submitted that the failure to caution was a ‘significant and substantial’ breach (cf *R v Walsh* (1989) 91 Cr App R 161). At trial the prosecution placed reliance on the answers given and used them to attack the credibility of the appellants and it cannot be said that, had the caution been given, the position would have been the same.

- h [28] It is submitted that the reasons given by the recorder for holding that there had been no breach of the Code (which reasons we have already quoted at [9], above) were wrong. In particular, the fact that the questions asked were in the nature of routine or accepted practice could not override the proper application of Code C to the individual case. This was not a random stop and search, without suspicious facts being already known. Accordingly there was a duty on the officer to act in accordance with the Code, the test not being what the traveller might expect, but what the officer suspected in the particular case. Further, the breach being serious and significant, the accepted good faith of the officer did not constitute an excuse (see *R v Walsh*).

- j [29] In support of their assertion that the breaches were serious and significant, the appellants’ counsel analysed the matter as follows. Had the caution been administered at once and the appellants refused to answer questions thereafter, there were grounds on which they could and should have been arrested. This would have triggered the requirement of Code C, para 11.1 that they ‘must not be interviewed about the relevant offence except at a police station or other authorised place of detention’; of Code C, paras 6 and 11.2 (information and entitlement to

free legal advice); and Code C, para 11.7 (proper records of interview) (see *R v Cox* (1992) 96 Cr App R 464 at 470–471).

[30] Finally, with specific reference to the question of fairness under s 78 of PACE, it is submitted that the effect of the breaches was to give material to the prosecution on which to cross-examine the appellants at trial. The appellants had been asked questions by the customs officers in each other's presence and thus their defences were inextricably intertwined. The answers to the questions were used to test the defence of duress subsequently advanced by Dianne Senior. In particular, it was put to her that, had her plea of duress been true, she would have advanced it at the time, instead of asserting that the purpose of the trip was to visit her daughter's boyfriend. In the case of the daughter, she was cross-examined on the basis that she joined in, or at any rate she did not contradict, her mother's lie because she knew it to be untrue but was intent on backing her mother's story as a matter of solidarity in the course of a joint enterprise.

[31] For the respondents, by his written skeleton argument, Mr Lamb has sought to support the ruling of the judge. He has also confirmed to us that the series of preliminary questions asked by the customs officer in this case is routinely asked of persons who are stopped when arriving with their baggage through the green channel in order to establish whether there are good grounds for suspicion that they have committed an offence and that, in the case of persons travelling together, it is in principle regarded as inappropriate to detain one or both unless the one who is the owner or custodian of the bag has been identified. That having been done, it is customary to ask that person whether he or she has packed the bag themselves and whether they are carrying it or any of its contents on behalf of someone else. Once such routine has been performed, a judgment will then be formed on whether or not to detain the person for formal interview on grounds of suspicion of the offence of fraudulent evasion of the prohibition on importation of drugs.

[32] It seems to us that, in principle at least, that is a sensible and proper procedure and that the judge rightly found no reason to doubt the bona fides of the officers in this case in carrying it out. Certainly, in making application to the judge for exclusion of the evidence, the defence did not require the officers to give evidence as to the time at which, or the grounds upon which, they decided that their suspicions were sufficiently well-founded to detain both appellants, and their good faith was not challenged.

[33] That said, however, the good sense and propriety of such routine questioning as a proper protection against error and/or wrongful arrest does not preclude the need to approach each case on the basis of the state of knowledge of the investigating officers in relation to the individual traveller under investigation. In this case the judge appears to have taken the view that the routine questions may in every case be regarded as put for the 'other ... purposes' referred to in Code C, para 10.1 and that in every case it is right to take the view that proper grounds for suspicion will not be established until some question has been directed to the state of mind of the traveller, given that the ingredients of the offence require knowledge. We do not think that is so. When objection is taken in cases of this kind on the basis that Code C has been breached, it must be adjudicated on the merits of the individual case rather than by rule of thumb. By the same token, however, it would be incorrect to proceed (as the appellants' arguments suggest) on the basis that, simply because two persons are apparently travelling together and one may be seen to help the other with a bag which is known to contain drugs, both are involved in the offence of fraudulent evasion. In principle, it seems to us that it

a will usually be right to seek by questions to both persons to establish who is the custodian of the bag and in an appropriate case the circumstances in which he or she is in possession of it.

b [34] In recognition that this is indeed the proper approach, Mr Lamb for the respondents modified his position in his oral submissions to us. He maintained his argument that the preliminary questions to both women up to and including the words 'Which are your bags?' were no more than routine and proper questions, properly administered to any traveller whom it has been decided to question on passage through the green channel. As such, he submitted that the questions were within the exception contained in example (c) in Code C, para 10.1, so that no caution was required. However, he conceded that thereafter, upon identification by Dianne Senior of the bag known to contain drugs as hers, a caution should have c been administered to her before asking her the last three questions which were indeed directed to her. In the case of Samantha, he submitted that there was simply no breach of the Code at all, because suspicion of her position did not harden to the point where arrest was justified until the questioning of Dianne was complete.

d [35] We pause for a moment to observe, in relation to the final limb of that submission that, if it is submitted that the position in relation to Samantha was sufficiently suspicious to arrest her immediately following those last three questions, it must surely have been so before, because the last three questions were addressed entirely to Dianne Senior and answered by her in a manner which did nothing to further the cause for suspicion against Samantha beyond the fact that she was travelling with her mother following a holiday with her.

e [36] However, we consider that the argument for the Crown falls down upon a broader ground than that. As a result of what he had seen and already knew, Mr O'Donoghue had already seen the two travelling together and assisting each other in relation to a suitcase heavy with drugs. They had been watched and were approached together and it must have been plain that, in addressing preliminary f questions to them which were directed towards both of them, the answers which one gave in the other's presence were likely to be given in evidence in any proceedings which followed, following the tying of one to the suspect suitcase. In those circumstances, as it seems to us, the proper procedure was immediately to ask each to identify her bag without preliminary questions of a kind which might later be treated as admissions or inconsistencies at trial.

g [37] In the absence of evidence from the customs officers to suggest a different position, we would infer that the officers suspected both women of being involved in a smuggling operation. Even if that were not so, on the basis that the state of mind of the officers was such that all they needed was confirmation that the bag belonged to one of the appellants, it seems clear to us that the question as to h ownership should have been asked at the outset and, thereafter, a caution administered to both, if both were to be questioned further.

i [38] Even so, and accepting such breach of the Code as having been significant and substantial, we do not consider that this is a case where fairness required exclusion of the questions and answers under s 78 of PACE. As to surprise or j unfairness at the time the questions were asked, like the judge we consider that the questions were of a type which any traveller, and certainly one involved in drug-smuggling, must expect to face upon entry to this country, and to suggest that the appellants might not have so expected and were not ready to answer the questions without the presence of a solicitor is in our view fanciful. Nor, as pointed out by the judge, is this a case where there was dispute over the content of the questions and answers; thus the absence of protection as to the recording of the

'interview' is of no significance whatever. The questions were straightforward and able to be answered without any difficulty or error of understanding. Any refusal to answer them at that stage following caution (if one had been administered) and whether with or without a solicitor, would have been bound to give rise to a degree of prejudice in the eyes of the jury in the sense of opening the appellants to adverse inference by reason of their refusal to answer. Nor were the appellants under any difficulty or disadvantage in the trial process in explaining their position to the jury.

[39] The core of the suggestion of unfairness against Dianne Senior is that, as a result of her admittedly untruthful answer that the appellants had been abroad to see Samantha's boyfriend, it was used to discredit the late advancement of her plea of duress. However, it was submitted by Mr Lamb and acknowledged by Mr Stein on behalf of Dianne Senior that the gravamen of the attack upon her was less her statement at the outset as to the reason for the trip than her total failure, with the benefit of advice, her solicitor present and ample opportunity to ask for protection from the authorities, to advance the defence of duress in her interviews, when, albeit stressed and distressed as she asserted she was, she had full opportunity to do so. Furthermore, at the beginning of her interview, when the questions and answers previously asked and given were repeated over to her, she agreed them to be fair and the answers correct. Thus any prejudice to Dianne Senior stemmed in reality from the interview, the evidence as to which was admissible and was dealt with by her as best she could.

[40] As to Samantha Senior, when the question of her silence and/or her reply, 'Pleasure' as the reason for her trip in contrast to her mother's reply was put to her in cross-examination, she explained to the jury that they had given their replies simultaneously and that, though she had heard the answer of her mother to the effect that they had been visiting her (Samantha's) boyfriend, it did not appear significant as it was only a little lie.

[41] Finally, we are quite satisfied that, if (contrary to our view) fairness required the exclusion of the questions and answers, their inclusion in no way goes to the safety of the conviction. The reasons are essentially those already given. So far as Dianne Senior was concerned, there was no evidence whatever to support her assertion of duress, either from Samantha or elsewhere. She was plainly convicted on the basis that the jury did not believe that defence. In her case, the judge gave no weight to the 'boyfriend' answer, but invited the jury to consider the defence in the light of her failure to raise it during the interview and the conviction plainly depended upon the jury's assessment of her overall credibility in respect of a somewhat exiguous plea. So far as the knowledge of Samantha was concerned, the jury no doubt regarded as incredible, as do we, her plea of absence of knowledge bearing in mind her close relationship with her mother, her free trips on previous occasions, her insistence with her mother that the suitcases brought back were the same as had been taken out and the increase in weight of the suitcases which must have been apparent with the addition of 17 kg of drugs in one case and over 8kg in the other.

[42] For the reasons above, both appeals are dismissed.

Appeals dismissed.

Stephen Leake Barrister.

a **R (on the application of Edwards) v
Environment Agency and another
(Rugby Ltd, interested party)**

[2004] EWHC 736 (Admin)

b QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
KEITH J

19 MARCH, 2 APRIL 2004

c *Judicial review – Application for judicial review – Application for permission to apply for judicial review – Locus standi of applicant – Sufficient interest – Environment Agency carrying out public consultation exercise before permitting company to make trial use of alternative source of fuel – Applicant taking no part in consultation exercise – Other objectors ineligible for public funding – Applicant applying for judicial review – Applicant obtaining legal funding certificate – Whether applicant having sufficient*
d *interest to apply for judicial review – Whether claim abuse of process.*

The interested party (the company) operated a cement plant near Rugby town centre and required a permit from the Environment Agency to authorise the use of tyre chips as a partial substitute for fuels used in its operations at the plant. The agency carried out an extensive consultation exercise and then issued the permit on a trial basis. That decision resulted in substantial and vociferous local opposition. The local primary care trust, the borough council, and a local pressure group opposed the decision. The claimant was a resident of Rugby. He had not made any representations to the agency, or attended any of the public meetings during the consultation exercise, or registered his objections with the agency in any way. He applied for permission to apply for judicial review of the decision to issue the permit, submitting inter alia, that members of the public had been denied an opportunity to express their response to the company's view as to the anticipated impact of the trials on the environment as an environmental statement had not been published as required by the applicable EC Council directive. The claimant's circumstances were such that he was eligible for, and secured, a community legal services funding certificate. The agency contended, inter alia: (i) that the claimant did not have a sufficient interest to bring the claim as he had not taken part in the consultation exercise, and could therefore have no interest in whether an environmental statement should have been published; and (ii) that it would be an abuse of the court's process for the claimant to bring the claim for judicial review as he had been put up as a claimant in order to secure public funding for the claim by the Legal Services Commission. The issue before the court was that of the claimant's standing, with the question whether permission should be given for the claim to proceed to be decided at a subsequent hearing.

j **Held** – An individual should not be debarred from subsequently challenging the decision made at the end of a consultation exercise on the ground of inadequate consultation simply because he had chosen not to participate in the consultation exercise, provided he was affected by its outcome. Nor would it be an abuse of the court's process for the claim to be brought in the claimant's name. The claimant had a sufficient interest in the decision to issue the permit because as an inhabitant of Rugby he would be affected by any adverse impact on the

environment which the trials on the use of tyre chips might have. The Legal Services Commission had been aware of the relevant facts and had to be taken to have addressed the question of whether granting a funding certificate to the claimant would be an abuse of the system under which cases were selected for public funding and to have decided that the withdrawal of funding was not justified. The claimant therefore had standing to bring the claim and his application for permission would go forward to a full hearing (see [8], [16], [19]–[21], below).

Notes

For the requirement of sufficient interest to apply for judicial review, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 66.

Cases referred to in judgment

R (on the application of WB) v Leeds School Organisation Committee [2002] EWHC 1927 (Admin), [2003] ELR 67.

R (on the application of WB) v Leeds School Organisation Committee [2002] EWCA Civ 884.

R v Richmond upon Thames London BC, ex p C [2001] LGR 146, CA.

Cases referred to in skeleton arguments

Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403, ECJ.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Berkeley v Secretary of State for the Environment [2000] 3 All ER 897, [2001] 2 AC 603, [2000] 3 WLR 420, HL.

Castle Cement v Environment Agency [2001] EWHC Admin 224, [2001] 2 CMLR 393. *EC Commission v Italian Republic* Case C-58/90 [1991] ECR I-4193, ECJ.

R (on the application of Goodman) v Lewisham London BC [2003] EWCA Civ 140, (2003) 2 P & CR 262.

R (on the application of Horner) v Environment Agency [2002] EWHC 513 (Admin).

R (on the application of Levy) v Environment Agency [2003] EWCA Civ 968.

R (on the application of Lowther) v Durham CC [2001] EWCA Civ 781, (2001) 1 P & CR 283.

R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions Case C-201/02 [2004] 1 CMLR 1027, ECJ.

R v Independent Television Commission, ex p TSW Broadcasting Ltd [1996] EMLR 291, HL.

R v Legal Aid Board, ex p Bateman [1992] 3 All ER 490, [1992] 1 WLR 711, DC.

R v North West Leicestershire DC, ex p Moses [2000] JPL 1287, CA.

R v Somerset CC, ex p Dixon (1998) 75 P & CR 175.

Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen Case 51/76 [1977] 1 CMLR 413, [1997] ECR 113, ECJ.

World Wildlife Fund (WWF) v Autonome Provinz Bozen Case C-435/97 [2000] 1 CMLR 149, [1999] ECR I-5613, ECJ.

Application for permission to apply for judicial review

David Edwards applied for permission to apply for judicial review of the decision of the Environment Agency and the First Secretary of State to issue a permit to Rugby Ltd (the company) on 12 August 2003 under reg 10 of the Pollution

- a Prevention and Control (England and Wales) Regulations 2000 authorising the company to use tyre chips as a partial substitute for existing fuels used in its operation of a cement plant at Rugby. The Secretary of State was not represented. The facts are set out in the judgment.

David Wolfe (instructed by *Richard Buxton*, Cambridge) for Mr Edwards.

- b *David Elvin QC* and *Kassie Smith* (instructed by the *Solicitor for the Environment Agency*, Bristol) for the agency.
Stephen Tromans (instructed by *Michael Collins*, Egham) for the company.

Cur adv vult

- c 2 April 2004. The following judgment was delivered.

KEITH J.

THE ISSUE OF THE PERMIT

- d [1] Rugby Ltd (the company) operates a cement plant near Rugby town centre. The operations had been authorised under the integrated pollution control regime enforced by the Environment Agency (the agency) under Pt I of the Environmental Protection Act 1990. A new statutory regime governed by the Pollution Prevention and Control (England and Wales) Regulations 2000, SI 2000/1973 subsequently came into force in order to implement Council
e Directive (EC) 96/61 concerning integrated pollution prevention and control (OJ 1996 L257 p 26). Accordingly, if the company was to continue operations from the plant, it had to obtain a permit under the 2000 regulations.

- [2] On 12 August 2003, the agency issued a permit (the permit) to the company under reg 10 of the 2000 regulations authorising the company to continue operations at the plant. The permit also authorised the use of tyre chips
f as a partial substitute for the existing fuels used in the operations subject to the satisfactory completion of trials.

THE CHALLENGE TO THE ISSUE OF THE PERMIT

- [3] Prior to the issue of the permit, the agency had embarked on an extensive
g consultation exercise. It acknowledged that the use of tyre chips as an alternative source of fuel even on a trial basis was a sensitive issue, and that there was considerable local concern about the effect of the trials on the environment. However, local opposition to the burning of tyre chips continued after the issue of the permit, and this claim for judicial review of the grant of the permit has been
h brought by a local inhabitant of Rugby, Mr David Edwards. The issue of the permit was attacked on three grounds in the judicial review claim form, but the principal line of attack was that the requirements of Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175 p 40), as amended (the directive) had not been complied with in connection with the issue of the permit.

- j [4] In summary, the purpose of the directive was to ensure that a planning decision which involves the grant of 'development consent' for a 'project' as defined by the directive and which may affect the environment is made on the basis of full information, which has been obtained by a procedure known as an environmental impact assessment. An essential element in that procedure is the publication by the developer of a statement (an environmental statement), in which information relating to the anticipated impact of the development on the

environment is to be given. In that way members of the public are given an opportunity to express an opinion on the topic to enable the planning decision to be made in the light of such views. The non-compliance with the requirements of the directive of which Mr Edwards complains is that an environmental statement was not published (the directive issue).

[5] The agency's case (and that of the First Secretary of State, who was also named as a defendant because he was responsible for transposing the directive into English law) is that the issue of the permit was not 'development consent' for a 'project' as defined by the directive, and an environmental statement was therefore unnecessary. It had been necessary in 1995 when planning permission for new cement works had originally been submitted, and an environmental statement of the kind contemplated by the directive had been published then. In any event, the agency contends that in the process leading up to the issue of the permit it had substantially complied with the requirements of the directive.

[6] The other two grounds on which the issue of the permit was attacked were that: (a) the agency had failed to ensure that the proposal used the 'best available techniques' (the BAT issue), and (b) the agency had failed to consider whether burning waste tyres was the 'best practicable environmental option' for dealing with the waste stream involved in the operation (the BPEO issue). The BPEO issue is no longer pursued.

[7] The claim was considered by Sullivan J without a hearing. He refused Mr Edwards permission to proceed with the claim. He did not think that Mr Edwards had a sufficient interest to bring the claim. He noted that the BAT issue was completely unparticularised. And he thought that insufficient information had been given about how the alleged non-compliance with the directive had affected the issue of the permit or what its impact on Mr Edwards had been. Mr Edwards now renews his application for permission to proceed with his claim. The problem with the particularisation of his claim has now been remedied. The BAT issue has been particularised (albeit only a week or so before the hearing), and the extremely skeletal grounds in the claim form relating to the directive issue have been very considerably fleshed out in the skeleton argument of Mr Edwards' counsel, Mr David Wolfe (albeit received by the Administrative Court Office on the day before the hearing).

[8] In the course of the hearing, it became apparent that it would take some time to determine the arguability of the two remaining issues, the directive and BAT issues, as well as the question of Mr Edwards' standing to bring the claim. The estimate of two hours may have been sufficient for a judge who has had to consider issues arising from the directive before, but not for one who had not. Accordingly, the parties agreed that the appropriate course for me to take was to decide the issue of standing, and if I concluded that Mr Edwards had the standing to bring the claim, I should direct that the question whether permission should be given for the claim to proceed should be decided at a full hearing of the claim, with a time estimate of two to two-and-a-half days. I agreed to take this course in view of what I knew about the arguments relating to Mr Edwards' standing. I thought that it was a discrete issue which could be decided irrespective of the merits of the claim. After the argument on the issue of Mr Edwards' standing concluded, I reserved judgment, and this is my judgment on that issue.

THE FACTS RELATING TO MR EDWARDS' STANDING

[9] I begin where the agency begins. It notes that the substantial and vociferous local opposition to the agency's decision to permit the company to burn tyre chips in its cement plant has not resulted in this claim for judicial review

a being brought by known opponents of the decision—for example, the Rugby Primary Care Trust or Rugby Borough Council or representatives of a local pressure group, Rugby in Plume. Instead, it has been brought by someone who did not make any representations to the agency during the extensive consultation process which took place, who did not attend any of the public meetings, who did not express his opposition to the company's proposal by sending to the agency a pre-printed postcard which had been provided by local campaigners as an easy means for members of the public to register their objections, and who did not make himself known to the agency at all.

[10] So what is known about Mr Edwards? The claim form gives little away. It simply said that he was 'a resident of Rugby who is affected by the operation of the [company's] works and is concerned about the effects of the operations now permitted'. It did not even give his address. In a subsequent witness statement, c he said that he had lived in Rugby all his life, except while serving in the Royal Air Force, and he identified a large number of addresses in Rugby at which he had lived. A local councillor has said that at least at some of the places he had lived, he would have been affected by pollution from the company's works. But she d made no comment about his last address (wherever that was), and she states that he is currently homeless—though still in Rugby, I was told.

[11] That is not to say that he is not concerned about the environmental effect of the decision he is seeking to challenge. He may not have taken an active part in the campaign, but the local councillor says that he has expressed his concern to her about the effect which the cement works has on Rugby and its inhabitants. e And in his witness statement he said:

'I have not only kept myself informed about the issues involved with the Rugby Cement Works, but I have attended meetings, and recently even spoke, at one "Rugby in Plume" meeting. Although I distance myself nowadays from "formally" joining any organisations, I would consider myself firmly aligned with the "Rugby in Plume" camp. I have visited with members of Rugby in Plume often and been presented with more information than I could possibly fully analyse in a short time. The internet has proved useful, also. The information that I have seen, and understood, worries me greatly.'

g [12] So how did Mr Edwards come to be the claimant in this claim? He does not say, but the answer may not be hard to find. The public campaign against the use of tyres was essentially expressed through Rugby in Plume. Its leading light was Mrs Lillian Pallikaropoulos. She has claimed to speak for between 50,000 and 90,000 local residents who are 'affected' by the installation, to have instructed the solicitors now acting for Mr Edwards, to have committed substantial funds of her own to the campaign, and to be committed to a legal challenge to the agency's decision to issue the permit. However, Rugby Borough Council decided, following the receipt of advice from leading counsel, not to pursue a claim for judicial review of the agency's decision. Following that decision, Mrs Pallikaropoulos was reported as saying that she had 'already forked out £20,000 of her own money during the legal fight', and as 'pledging to carry on the battle using legal aid'. But she was also reported as saying:

'I'm too rich [to get legal aid], because I own my own house, so someone in Rugby has to come forward who feels strongly enough to take the case forward under the legal aid scheme.'

Another report quoted Mrs Pallikaropoulos as saying: 'The council has proved it is out of touch [with] the people of Rugby, so we need someone who is able to take the case forward on a legal aid basis. I can't afford it.' The report concluded by saying that Mrs Pallikaropoulos had asked anyone who may be able to help to contact her on a telephone number which was then given. a

[13] Mr Edwards does not say that he responded to this request for assistance, but it may be that his alignment with Rugby in Plume only began after Mrs Pallikaropoulos' call for a volunteer. As it is, it is difficult to resist the inference that Mr Edwards has been put up as a claimant in order to secure public funding of the claim by the Legal Services Commission (the commission) when those who are the moving force behind the claim believe that public funding for the claim would not otherwise have been available. That possibility was raised in the agency's summary grounds for contesting the claim dated 24 November 2003, and in the witness statement of 25 November 2003 of Mr David Sheldon, a process industries regulation technical adviser employed by the agency. There is no evidence that it has ever been denied. b

[14] On these facts, two issues arise. First, since s 31(3) of the Supreme Court Act 1981 provides that 'the court shall not grant leave [to proceed with a claim for judicial review] unless it considers that the [claimant] has a sufficient interest in the matter to which the [claim] relates', does Mr Edwards have a sufficient interest to bring this claim? Secondly, even if he does, is it an abuse of the court's process for him to bring the claim? I deal with each issue in turn, though there is plainly much overlap between them. c

MR EDWARDS' INTEREST e

[15] In contending that Mr Edwards does not have a sufficient interest to bring the claim, Mr David Elvin QC for the agency did not suggest that Mr Edwards was bringing his claim as an individual, and not on behalf of himself and other local inhabitants of Rugby. It would have been open to Mr Elvin to make that suggestion on the basis of the material in the claim form and Mr Edwards' witness statement. But such a suggestion would not have sat easily with the contention that Mr Edwards had been put up to front the claim by those who were the moving force behind it. So what Mr Elvin placed at the forefront of his argument was the nature of Mr Edwards' principal challenge to the decision. Since an environmental statement had not been published, members of the public had been denied an opportunity to express their response to the company's view of the anticipated impact of the tyre trials on the environment. In that respect, the consultation exercise had not been conducted in the manner contemplated by the directive. But in the consultation exercise which *had* taken place, Mr Edwards had played no part whatever. He therefore could have had no interest in whether an environmental statement of the kind supposedly required by the directive should have been published. f

[16] I cannot go along with this argument. Apart from the fact that it takes no account of the other ground on which Mr Edwards challenges the decision to issue the permit (the BAT issue), the argument does not acknowledge that Mr Edwards was entitled to leave it to bodies like the Rugby Primary Care Trust and Rugby Borough Council to look after the interests of local people, and to pressure groups like Rugby in Plume to be active in its opposition to the permit on behalf of local people. You do not have to be active in a campaign yourself to have an interest in its outcome. If the consultation exercise ends with a decision which affects your interests, you are no less affected by that decision simply g

- a because you took no part in the exercise but left it to others to do so. You should not be debarred from subsequently challenging the decision on the ground of inadequate consultation simply because you chose not to participate in the consultation exercise, provided that you are affected by its outcome. It has been said that it is easier to identify a sufficient interest than to define it, but as a local inhabitant, Mr Edwards has a sufficient interest in the decision to issue the permit
- b even if he is temporarily homeless, because as an inhabitant of Rugby he will be affected by any adverse impact on the environment which the trials on the use of tyre chips may have.

ABUSE OF PROCESS

- c [17] The argument relating to the abuse of the court's process is at first blush a more promising line of attack for the agency, though here the issue is not really one of standing. The question of someone being chosen to bring a claim because he or she would be more likely to obtain public funding for the claim than a more obvious candidate for bringing the claim was discussed in *R v Richmond upon Thames London BC, ex p C* [2001] LGR 146. The case concerned the rights of
- d parents to have their child educated at a school of their preference. Parents whose child has not been admitted to the school of their preference have a right of appeal to an appeals committee. Kennedy LJ said (at 152):

- e '... I am satisfied that where a parent wishes to challenge a local education authority or an appeals committee in relation to the handling of a parent's expression of preference as to the school at which his or her child should attend it is the parent and not the child who should mount the challenge. I accept that the child may have a sufficient interest to mount a challenge, and in some exceptional cases it may be appropriate for the child to make the application for permission to apply for judicial review, but normally, as it
- f seems to me, the only reason why the application is made in the name of the child is to obtain legal aid, and to enable the parents to protect themselves in relation to costs. That I regard as an abuse. Our legal system works upon the basis that those who seek a remedy should expose themselves in relation to costs. If the device is used in future, permission to apply for judicial review
- g may well be refused on that ground.'

Ward LJ said much the same thing (at 159). Having commented that it is the parents' appeal, not the child's, he said: 'The system is open to abuse if the child applies for legal aid and that abuse must be curtailed.'

- h [18] These dicta were considered in another education case, *R (on the application of WB) v Leeds School Organisation Committee*, which was a challenge to a decision to close a school. The claims were brought by two children rather than their parents. Permission to proceed with the claim was refused at first instance, but when the Court of Appeal granted permission for the claim to proceed, Sedley LJ said ([2002] EWCA Civ 884 at [7]):

- j 'The proposition, for which the Leeds School Organisation Committee relies on a passage of the judgment of Kennedy LJ in (*R v Richmond on Thames London BC, ex p C* [2001] LGR 146 at 152), goes not to standing but to abuse and hence discretion. It merits careful consideration, but it is obiter and in our respectful view not easy to apply. We are not persuaded that the fact that some of the parents who were objectors are ineligible for public funding

and have a sufficient interest is necessarily enough to render the claim an abuse, and we think the concept of a device needs elaboration.’ a

When the case was heard on its merits ([2002] EWHC 1927 (Admin), [2003] ELR 67) Scott Baker J (as he then was) said (at [34]) that there was ‘no indication that [the] observations [of Kennedy and Ward LJ] were intended for any wider application than the particular type of case with which they were concerned’. His conclusion (at [37]) was: b

‘Both parents and children have a sufficient interest to bring proceeding[s] for judicial review in school closure or reorganisation cases. Ordinarily, it is likely to be the parents who have the real and primary interest in bringing the case. It is ... the parents and not the children who have the right to be consulted under the legislation and the parents whose objections are required to be taken into account under the DfEE guidance. It may be an abuse of process for proceeding[s] to be brought in the name of a child rather than a parent where this is done for the purposes of obtaining public funding and protection against a possible costs order. However, clear evidence would be needed to establish this and there is no such evidence in the present case.’ c
d

[19] Although these cases were in the field of education, I do not think that they preclude the refusal of permission to proceed with a claim in another field if the claim has been brought in the name of someone solely for the purpose of obtaining public funding, and if in the circumstances it can really be said to amount to an abuse of the court’s process. Nor do I think it necessary for it to be shown that the purpose was not merely to obtain public funding but also to avoid exposure to an adverse order for the costs of other parties. The latter is usually the consequence of the former. Each case will depend on its own particular facts. Having said that, there is a clear distinction between this case and the case of parents who wish to challenge an appeal committee’s refusal to admit their child to the school of their preference. Although the child is plainly affected by the outcome of the appeal, he or she does not have a sufficient interest in bringing the claim, because the interest in bringing the claim is that of his or her parents since it was *their* appeal which was dismissed. That is to be contrasted with the position of Mr Edwards. Not only is he affected by the decision to issue the permit, but there is in addition nothing which actually prevents him from having a sufficient interest in bringing the claim. e
f
g

[20] Moreover, in a case of this kind, it is not so much the court’s process which is being abused, but rather the possibility that it is the Commission which may have decided to fund Mr Edwards’ claim without being fully informed of the facts. In fact, the Commission is aware of the relevant facts, because the head of the company’s United Kingdom legal department set them out in a letter to the Commission dated 20 November 2003. The letter concluded: h

‘This must in our view raise very serious questions as to whether it is reasonable to grant funding to Mr Edwards under the Funding Code. In particular it is questionable whether the proceedings are for the benefit of Mr Edwards as an eligible individual (see para. 4.5 of the Code) or whether they are really for the benefit of other individuals who are not eligible. We would also comment that those individuals are presumably unwilling to expose themselves to the risk of an adverse order of costs, and that the provision of funding is intended to take advantage of the protection offered j

a by section 11 of the Access to Justice Act 1999, for the benefit of campaigners who themselves would not qualify for funding and hence would not have the benefit of that section.'

b Since Mr Edwards still has a community legal services funding certificate, the Commission must have decided that the facts on which the company relied did not justify the withdrawal of funding. In the light of the Commission's Funding Code guidance, it probably thought that it was appropriate for the claim to be brought in Mr Edwards' name, and that the claim was one which could produce real benefits for a large group of people, though if it thought that they could reasonably be expected to contribute to the cost of the litigation, they could be required to make an appropriate contribution as a condition of the grant of public funding. The commission must therefore be taken to have addressed the question of whether granting a funding certificate to Mr Edwards would be an abuse of the system under which cases are selected for public funding.

CONCLUSION

d [21] For these reasons, I have concluded that it would not be an abuse of the court's process for this claim to be brought in Mr Edwards' name, even if he has been put up to front the claim in order to secure public funding for it, when it was thought by those who were the moving force behind the claim that funding would not otherwise have been available. Since Mr Edwards has the standing to bring the claim, it will now go forward to the further hearing to which I have already referred. In the circumstances, it has not been necessary for me to consider Mr Wolfe's wider argument that, whatever the position of Mr Edwards, the claim should be allowed to proceed on the basis that the issues which the claim raises need to be decided, that the court has a free-standing obligation to monitor compliance with a Council directive, and that the court should be slow to prevent a serious claim that a Council directive has been ignored from being heard. It is not contested that the Secretary of State for the Environment, Food and Rural Affairs should be joined as a defendant, given his responsibility for the environment and for the 2000 regulations, and I order that he be so joined.

f *Order accordingly.*

Dilys Tausz Barrister.

Williams v Horsham District Council

[2004] EWCA Civ 39

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, BUXTON AND KEENE LJJ

21 JANUARY 2004

Local government – Council tax – Sole or main residence – Council taxpayer owning cottage – Council taxpayer and his wife moving to house provided by employer – Whether cottage sole or main residence – Local Government Finance Act 1992, s 6(2), (5).

The claimant council taxpayer owned a cottage. Between January 1993 and August 1996 he was employed as a housemaster by a nearby school. The school provided the taxpayer with a house, in which he and his wife lived during his employment and following his retirement, until July 1997. The cottage and the house were in different billing authority areas for the purposes of council tax. The taxpayer and his wife moved most of their furniture and belongings into the house. Their names were on the electoral roll for both addresses. They remained registered with the same doctor and dentist, the move taking them only 15 minutes further away. Between January 1993 and July 1997 neither the taxpayer nor his wife spent a single night at the cottage, although the taxpayer paid visits periodically for maintenance and to mow the lawn. The school declared that the house was the taxpayer's main home for council tax purposes and paid council tax in full on his behalf. The taxpayer had continued to pay council tax in full in relation to the cottage, and applied for a 50% rebate from the defendant council for the period from January 1993 to July 1997. The council considered that during that period the cottage fell to be considered as the taxpayer's sole or main residence for the purposes of s 6^a of the Local Government Finance Act 1992. Under s 6(2)(a) of the 1992 Act a person was liable to pay council tax if he was a resident of a chargeable dwelling and had a freehold interest in the whole or any part of it. Section 6(5) defined 'resident' in relation to any dwelling as an individual who had attained the age of 18 years and had his sole or main residence in the dwelling. The taxpayer appealed and the valuation tribunal affirmed the council's decision. The judge allowed the taxpayer's appeal, holding that the tribunal had taken an incorrect approach in assessing the relevant factors to be taken into consideration. The council appealed.

Held – The words 'sole or main residence' in s 6(5) of the 1992 Act referred to premises in which a taxpayer actually resided. The qualification 'sole or main' addressed the fact that a person could reside in more than one place. Usually, a person's main residence would be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as that person's home at the material time. While reference to decided cases could be of assistance in identifying factors relevant to the question of which residence was a person's main residence, it did not follow that because in a particular case one individual factor had been treated as of particular significance it carried the same significance in a different factual scenario. The circumstances in the instant case would lead

^a Section 6, so far as material, is set out at [10], [12], below

- a** any reasonable onlooker to conclude that the taxpayer and his wife had moved their home from the cottage to the house provided by the school between January 1993 and July 1997. No reasonable tribunal that had applied a proper test to the material facts could have come to any conclusion other than that the house provided by the school had been the taxpayer's, and his wife's, main residence during the relevant period. The appeal would, accordingly, be dismissed, and the council directed to pay the sums due as a consequence of the failure to grant a 50% council tax discount (see [22], [23], [26], [29], [30], below).
- b**

Frost (Inspector of Taxes) v Feltham [1981] STC 115 applied.

Notes

- c** For persons liable to pay council tax, see 39(1) *Halsbury's Laws* (4th edn reissue) para 829.

For the Local Government Finance Act 1992, s 6, see 25 *Halsbury's Statutes* (4th edn) (2001 reissue) 1062.

d Cases referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Bradford Metropolitan City Council v Anderton [1991] RA 45.

Doncaster BC v Stark [1998] RVR 80.

- e** *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, HL.

Frost (Inspector of Taxes) v Feltham [1981] STC 115, [1981] 1 WLR 452.

Ward v Kingston upon Hull City Council [1993] RA 71.

f Cases referred to in skeleton arguments

Bennett v Copeland BC [2003] EWHC 990, [2003] RVR 296.

Blunt v Blunt [1943] 2 All ER 76, [1943] AC 517, HL.

Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd [1980] 2 All ER 72, [1981] AC 22, [1980] 2 WLR 653, HL.

- g** *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90, [1973] AC 691, [1973] 2 WLR 28, HL.

Appeal

- h** Horsham District Council appealed, with permission granted by Sedley LJ on 15 August 2003, from the decision of McCombe J on 26 June 2003 ([2003] EWHC 1862 (Admin), [2003] RVR 298) allowing the appeal of Martin Williams from the decision of the West Sussex Valuation Tribunal on 11 December 2002 that he and his wife had their sole or main residence at Pump Cottage, Henfield, West Sussex for the purposes of s 6 of the Local Government Finance Act 1992 for the period between January 1993 and July 1997. The facts are set out in the judgment of the court.
- j**

Jonathan Easton (instructed by *Ian R Davison*, Horsham) for the council.
Mr Williams did not appear.

21 January 2004. The following judgment of the court was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

[1] This is the judgment of the court.

INTRODUCTION

[2] The respondent, Mr Williams, owns a cottage called Pump Cottage, Henfield, West Sussex where he now lives in retirement with his wife. Between January 1993 and August 1996 Mr Williams was employed as a housemaster by Hurstpierpoint College (the college). The college provided him with a house at Hurstpierpoint called The Oaks. Mr Williams and his wife lived at The Oaks during this period. They stayed on there, by agreement with the college, until July 1997. By a decision dated 11 December 2002 the West Sussex Valuation Tribunal held that Mr Williams had to pay council tax in respect of Pump Cottage on the grounds that he and his wife had their sole or main residence there during this period. It is Mr Williams' contention that he and his wife had their main residence at The Oaks.

[3] By a judgment dated 26 June 2003 (sub nom *R (on the application of Williams) v Horsham DC* [2003] EWHC 1862 (Admin), [2003] RVR 298), McCombe J allowed an appeal by Mr Williams against the tribunal's decision. He held that the tribunal had erred in their decision in that they had wrongly treated themselves as bound by case precedent to treat two of the relevant factors that they considered as of overriding importance. He remitted the case to the tribunal for reconsideration.

[4] The Horsham District Council now appeals against McCombe J's judgment with permission granted by Sedley LJ on 15 August 2003. The council contends that the weight to be attached to the relevant factors was a matter for the tribunal and it was not open to McCombe J to set aside the tribunal's decision on the ground that disproportionate weight had been attached to two of those factors.

THE FACTS

[5] Before Mr and Mrs Williams moved to The Oaks, they were registered with a doctor and dentist in the neighbourhood of Pump Cottage. They remained so registered after their move. They were on the electoral roll for Pump Cottage, but also had their names placed on the roll for The Oaks. The college provided The Oaks part-furnished. Mr and Mrs Williams moved most of their belongings and furniture from Pump Cottage to The Oaks. They left some furniture at Pump Cottage in case they should choose to stay there in the holidays. In fact they did not do so. Neither of them spent as much as a night in Pump Cottage during the relevant period, although Mr Williams paid periodic visits to it for the purpose of maintenance and in order to mow the lawn. When Mr Williams' employment as housemaster came to an end in August 1996, the college agreed that he and his wife could remain in residence at The Oaks until July the following year but made a charge for accommodation and council tax.

[6] The attitude of the college at the time that Mr Williams took up his appointment as housemaster is indicated by this passage in a letter dated 10 November 1992 written by the bursar to all members of staff living in college accommodation following discussions with Mid-Sussex District Council:

'The College will be obliged to declare that the school accommodation which you occupy is your "main home" for Council Tax purposes. This means that if you own a house elsewhere in the UK you may be liable to pay Council Tax thereon. If your house is let the tenant will be responsible for

a the Council Tax; if it is empty then you will qualify for a 50% discount on the full Council Tax for the property.'

[7] The provision of accommodation at The Oaks was part of Mr Williams' contractual emoluments and was treated as such for tax purposes. The same is true of council tax which the college paid in full on behalf of Mr Williams.

b [8] While employed by the college, Mr Williams continued to pay council tax, without discount, to Horsham District Council. On 3 September 1998, however, he wrote to the council asking for a rebate for the period between January 1993 and July 1997 on the ground that Pump Cottage was unoccupied while he and his wife were living at The Oaks. The council responded asserting that Pump Cottage fell to be considered as the Williams' sole or main residence, and that
c The Oaks should be considered to be their second home so that a discount of 50% should be recovered from the Mid-Sussex District Council in respect of council tax paid on the latter property.

[9] Mid-Sussex District Council was then made aware of the situation and refunded to the college 50% of the council tax paid in respect of The Oaks while
d Mr and Mrs Williams were in residence.

THE STATUTORY PROVISIONS

[10] Section 6 of the Local Government Finance Act 1992 provides, so far as material:

e '*Persons liable to pay council tax.*—(1) The person who is liable to pay council tax in respect of any chargeable dwelling and any day is the person who falls within the first paragraph of subsection (2) below to apply, taking paragraph (a) of that subsection first, paragraph (b) next, and so on.

f (2) A person falls within this subsection in relation to any chargeable dwelling and any day if, on that day—(a) he is a resident of the dwelling and has a freehold interest in the whole or any part of it; (b) he is such a resident and has a leasehold interest in the whole or any part of the dwelling which is not inferior to another such interest held by another such resident; (c) he is both such a resident and a statutory, secure or introductory tenant of the whole or any part of the dwelling; (d) he is such a resident and has a contractual licence to occupy the whole or any part of the dwelling; (e) he is such a resident; or
g (f) he is the owner of the dwelling.'

[11] The critical issue before the tribunal was whether Mr Williams was liable to pay council tax in respect of Pump Cottage as a resident with a freehold interest in it under s 6(2)(a), or as the owner under s 6(2)(f). This was critical by
h reason of the provision for discount made by the following subsections of s 11 of the 1992 Act:

j '(2) Subject to section 12 below, the amount of council tax payable in respect of any chargeable dwelling and any day shall be subject to a discount equal to twice the appropriate percentage of that amount if on that day—(a) there is no resident of the dwelling ...

(3) In this section ... "the appropriate percentage" means 25 per cent ...'

[12] A resident is defined by s 6(5) of the 1992 Act as follows: '... "resident", in relation to any dwelling, means an individual who has attained the age of 18 years and has his sole or main residence in the dwelling.'

THE TRIBUNAL'S DECISION

[13] The tribunal attached importance to three decisions, which it is necessary briefly to summarise. *Bradford Metropolitan City Council v Anderton* [1991] RA 45 concerned liability for community charge payable in respect of a person's sole or main residence.

[14] The charge payer was a merchant seaman who spent most of his life at sea. About 90 days a year, when he was on leave, he lived with his wife in respect of which the charge was levied. His wife lived there all the time. The rest of the time he lived at sea aboard the Atlantic Conveyor. The tribunal held that this vessel was his main residence. On appeal, Hutchinson J considered a number of authorities, which led him to the conclusion that a merchant ship plying the high seas could not constitute a person's residence. Hutchinson J held (at 59) that, even if this was not correct, the cases establish that—

‘the respondent's sole or main residence is the house, because that is where his home is, where he has his settled and usual abode, which he leaves only when the exigencies of his occupation compel him to go to sea, for “temporary or occasional absences of long or short duration”.’

[15] *Ward v Kingston upon Hull City Council* [1993] RA 71 is another community charge case. In that case the husband and wife jointly owned a house in Hull where she lived. He, however, spent most of the year living in tied accommodation in Saudi Arabia where he worked, returning to Hull when on leave. The tribunal, in holding that the house in Hull was his sole or main residence, attached importance to the fact that he had security of tenure in Hull, but not in Saudi Arabia. The issue on appeal was whether this was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). Auld J held that it was not. After referring to *Anderton's* case, he said ([1993] RA 71 at 80):

‘There is the obvious distinction between that case and this in that there the judge was concerned with the occupation by the applicant of a ship, when he was working as a seaman at sea, and of his matrimonial home when he was ashore. Here the case concerns two houses on dry land, but, apart from that distinction, there are a number of common factors. The most important of those are: that Mr Ward has security of tenure in his home in Hull, which he clearly does not have in his tied accommodation in Saudi Arabia; that the only home that he owns is the one in Hull; that he lives in the accommodation in Saudi Arabia, when he does, only because he works there; and that as in (*Anderton's*) case, he spends longer away from his matrimonial home than he does in it.’

[16] The two cases to which I have referred were cited to Potts J, in the final case, *Doncaster BC v Stark* [1998] RVR 80. In that case a corporal in the RAF owned a house jointly with his wife. She lived there all the time, but he was required to live on the air force base when he was not on leave. The issue was whether the council tax payable should be subject to a discount on the ground that his wife was the only resident in the house, or whether he also had to be treated as a resident. In holding that Mr Stark was a resident, Potts J, after considering a number of authorities, said (at 82):

‘Implicit in this is that accommodation obligatorily occupied by the taxpayer for the purposes of work, and occupation of which prevents him

a from returning to his usual abode, is not necessarily to be considered as his "sole or main residence".

Potts J went on to hold (at 83) that, had the tribunal considered the following factors, it would have been bound to conclude that Mr Stark's house was his sole or main residence:

b '(1) Corporal Stark's security of tenure at the Mexborough house; (2) the fact that he spent his time there when off duty; (3) the fact that if he was not employed by the Royal Air Force he would return to that house; and (4) the fact that the house was his marital home.'

c [17] Before the tribunal Mr Williams represented himself and the council was represented by Miss Eveleigh. She referred to the three authorities which we have summarised, and submitted that a prime consideration was the lack of security of tenure in the accommodation provided by the college. This submission appears to have found favour with the tribunal. The reasons given for their decision were as follows:

d 'The sole duty of the tribunal was to determine whether or not The Pump Cottage was the sole or main residence of Mr and Mrs Williams. The successive decisions of the High Court and the Court of Appeal in the *Anderton*, *Ward* and *Stark* cases were particularly relevant in resolving this dispute. On the face of it, the taxpayers had security of tenure in the appeal dwelling and fully intended to return there when Mr Williams was no longer employed by Hurstpierpoint College. Furthermore, the other criteria set by the courts were broadly satisfied. There were however two reasons why the current case could be distinguished from the established law on this subject. Firstly, Mr Williams' wife accompanied him while he was residing in the college property unlike the spouses of the taxpayers in the three cases before the courts. Secondly, Mr Williams stated that at no time had he or his wife stayed overnight at the appeal dwelling. In the opinion of the tribunal neither of these factors could cause the balance of the scales to be tilted sufficiently in favour of the taxpayers in the current case, since the most important and persuasive criteria were the security of tenure in The Pump Cottage as compared with the college accommodation and the fact that there was an undoubted intention to return there when Mr Williams' employment came to an end. The tribunal was not convinced that these additional circumstances would be likely to upset the now well-established corpus of the law.'

h MCCOMBE J'S DECISION

[18] The relevant part of the judgment of McCombe J ([2003] RVR 298) appears in the following paragraphs:

j '30. It is also right that earlier in the decision on the second page, in dealing with *Ward*, the tribunal set out several factors that had to be taken into account, including: (a) an intention to return, (b) the period of and reason for the absence, (c) the legal interest in the dwelling, and (d) the security of tenure, (e) the whereabouts of personal belongings, (f) the place where the spouse and children, if any, resided and (g) the registration of the taxpayer for dental, medical and electoral purposes. Clearly they had those matters firmly in mind and identified the distinguishing features.

31. However, to my mind while the tribunal correctly identified those factors in the important part of their decision it seems to have regarded two of those relevant factors, namely security of tenure and an intention to return to Pump Cottage in due course as the overriding criteria above the others. I have already cited the relevant passage. They put it that the most important and persuasive criteria were the security of tenure in Pump Cottage as compared with college accommodation and the fact that there was undoubted intention to return when Mr Williams' employment came to an end.

32. The next sentence indicates to me that they seem to regard those as being most important and persuasive having regard to the well established corpus of law, as they put it. Therefore, it seems to me that they elevated those two factors or seem to have elevated those two factors over and above that to which they truly deserve into overriding principles of law.

33. Counsel for the respondent submitted that provided the correct factors were taken into account, and provided the weight given to each of those factors is not *Wednesbury* unreasonable, the court should not interfere. I would agree.

34. However, that does not seem to me to get over the clear impression created that, notwithstanding the important distinctions in this case from those in the previously decided cases, these two factors were trump cards. Notwithstanding that undoubtedly Mr Williams' home in his own mind was The Oaks, and indeed his wife lived there and indeed that he had not spent any time at Pump Cottage at all, the other two factors were somehow more important in law.'

THE COUNCIL'S SUBMISSIONS

[19] Mr Easton, on behalf of the council, submitted both orally and in his helpful skeleton argument that it was not open to McCombe J to interfere with the decision of the council unless the test to be derived from the speeches of the House of Lords in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48 at 53, [1956] AC 14 at 29 was satisfied. Mr Easton put forward the formulation of that test by Potts J in *Stark's* case [1998] RVR 80 at 81:

'whether the tribunal has misdirected itself in law or has reached a conclusion that is inconsistent with the only reasonable conclusion that a tribunal properly directed on the law could have reached.'

[20] Mr Easton submitted that the question of whether the Williams' property was their sole or main residence was one of fact and degree for the tribunal at first instance, relying on the judgment of Nourse J in *Frost (Inspector of Taxes) v Feltham* [1981] STC 115 at 118, [1981] 1 WLR 452 at 455, a case where the issue was whether a house was used as the main residence. As the tribunal had had regard to all the relevant factors, he submitted that the test in *Edwards v Bairstow* was not satisfied.

CONCLUSIONS

[21] McCombe J held, as we read his judgment, that the tribunal adopted an approach that was unsound in law. We think that he may well be right. One reading of their decision is that they gave particular weight to the question whether Mr and Mrs Williams had security of tenure of The Oaks, and to the fact that they intended to return to live at Pump Cottage because they believed that

a the decided cases required them to do so. If so, this was not the correct approach to legal authority in a case such as this.

[22] Reference to decided cases may be of assistance in identifying factors relevant to the question of which is a person's main residence. But, because in a particular case one individual factor has been treated as of particular significance, it does not follow that it carries the same significance in a different factual scenario. However, whether McCombe J was right or wrong in his conclusion as to the reasoning of the tribunal, there is, we believe, a more fundamental ground for challenging their decision.

[23] There was and could be no suggestion that Pump Cottage constituted the Williams' sole residence during the relevant period. The issue before the tribunal was whether during that period Pump Cottage or The Oaks was their main residence. The tribunal's starting point should have been to consider the meaning of this phrase. *Frost v Feltham* might have assisted them in that task. Nourse J appears to have accepted that 'main' in this context means 'principal' or 'most important' (see [1981] STC 115 at 117, [1981] 1 WLR 452 at 455). Perhaps more significantly, he made the observation that a residence is a place where someone lives. The precise meaning of the word 'residence' can vary according to its context. The *Shorter Oxford English Dictionary* (3rd edn, 1944) includes the following material definitions of residence: 'a) "the place where a person resides; his dwelling place; the abode of a person; b) a dwelling, esp. one of a superior kind".'

[24] Mr Easton submitted that we should give 'residence' the latter meaning in the present context. We do not agree.

[25] Where an estate agent's brochure speaks of a 'desirable residence' it gives the word the latter meaning. In the present case, residence is used as part of the definition of the word 'resident'. The primary meaning of 'resident' given by the dictionary is: 'One who resides permanently in a place.' The relevant definition of 'reside' is: 'To dwell permanently or for a considerable time; to have one's settled abode; to live in or at a particular place.'

[26] All this reinforces the conclusion (which is one that we would have reached without reference to the dictionary) that in s 6(5) of the 1992 Act 'sole or main residence' refers to premises in which the taxpayer actually resides. The qualification 'sole or main' addresses the fact that a person may reside in more than one place. We think that it is probably impossible to produce a definition of 'main residence' that will provide the appropriate test in all circumstances. Usually, however, a person's main residence will be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as that person's home at the material time. That test may not always be an easy one to apply, but we have no doubt as to the conclusion to which it leads in the present case.

[27] Mr Williams, upon whom we did not need to call, in a lengthy and lucid written argument, contended that the facts of his case are very different from the three considered by the tribunal. We agree. In each of those cases there was: a matrimonial home in which the wife resided; the taxpayer had to live elsewhere as a condition of his employment, but when on leave or holiday returned to the matrimonial home; and in each of those cases the reasonable onlooker would have concluded that the residence subject to community charge or council tax remained at all material times the taxpayer's home. Where a person ceases to reside in the house which has been his sole or main residence for a period of time, an issue may arise as to whether during that period the house in question ceases

to be his sole or main residence. The answer will depend on the particular circumstances; it will be a matter of fact and degree. a

[28] In the present case the tribunal had regard to the fact that, during the material period, Mr and Mrs Williams never stayed at Pump Cottage, but failed to have regard to a number of circumstances that made that fact of particular significance. The first is the length of time that they lived elsewhere. Then there is the fact that Pump Cottage in West Sussex is very close to The Oaks in Mid-Sussex. That explains why Mr and Mrs Williams kept their doctor and dentist. According to Mr Williams, a visit to either only entailed driving for an extra 15 minutes or so. Another factor is that schoolmasters have much longer holidays than most people. Had Mr and Mrs Williams wished to live in Pump Cottage, there must have been lengthy periods when they would have been free to do so. Certainly the proximity of the two houses would have facilitated this. b

The next circumstance is that they opted to stay on in The Oaks at their own expense for nearly a year after Mr Williams' employment as housemaster ceased. c

[29] These circumstances would, in our view, lead any reasonable onlooker to conclude that Mr and Mrs Williams moved their home from Pump Cottage to The Oaks, and that between January 1993 and July 1997, a period of four-and-a-half years, The Oaks was their home. Furthermore, we do not consider that any reasonable tribunal that applied a proper test to the material facts could have come to any conclusion other than that The Oaks, rather than Pump Cottage, was Mr and Mrs Williams' main residence during the relevant period. Indeed it could be argued that it was their sole residence. d

[30] Accordingly, we dismiss this appeal and direct the council to pay to Mr Williams whatever sums may be due as a consequence of their failure to grant them a discount of 50% of the council tax that would have otherwise been due in respect of Pump Cottage during the relevant period. e

Appeal dismissed.

Kate O'Hanlon Barrister.

**a R (on the application of Geologistics Ltd) v
Financial Services Compensation Scheme**

[2003] EWCA Civ 1905

b COURT OF APPEAL, CIVIL DIVISION

THORPE, WALLER AND LATHAM LJ

27 NOVEMBER, 18 DECEMBER 2003

c *Insurance – Employer’s liability insurance – Costs – Employers seeking indemnity for defence costs from Financial Services Compensation Scheme – Whether Scheme required to pay such costs – Construction of words ‘in respect of’ – Policyholders Protection Act 1975, s 6(5).*

d The respondent policyholder took out insurance in respect of its employers’ liability, with an insurance company which subsequently became insolvent. Such insurance cover was compulsorily required under the Employers’ Liability (Compulsory Insurance) Act 1969. By virtue of the Policyholders Protection Act 1975, where an insurance company had become insolvent the Financial Services Compensation Scheme (the Scheme) was obliged to indemnify the policyholder **e** for any damages and costs for which it was found liable to an employee. By the terms of the policy in the instant case, a claimant’s costs were to be allowed where they were ‘in connection’ with the claim to which the indemnity applied and defence costs were similarly indemnified if they were ‘in relation to’ the claim. A dispute arose as to whether the Scheme was liable to pay the policyholders’ costs for defending the claim against its employee. Inter alia s 6(5)^a of the 1975 Act **f** stated that the indemnity did not apply, ‘... otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance’. The judge at first instance had found that the Scheme was liable to pay the policyholders’ costs of defending the claim and the Scheme appealed arguing that s 6(5) was to be narrowly construed so that it only related to established liabilities **g** in respect of which the policy holder was obliged to have compulsorily insured.

h **Held** – Section 6(5) contemplated that under a policy which was required to be taken out, the policyholder would be entitled to recover against the insurance company an indemnity beyond that for which the statute compelled insurance, but that that right of indemnity had to be ‘in respect of’ ‘the liability subject to compulsory insurance’. These words were descriptive of the type of liability covered by the policy and were not intended to describe an actual established liability. The words ‘in respect of’ were intended to mean or at least include ‘in connection with’. Once the narrow construction was rejected, and ‘in connection with’ became the route to the claimant’s costs being recovered, there **j** was no reason why the defence costs ‘in connection with’ or ‘in relation to’ fell into some different or irrecoverable category. Accordingly the appeal would be dismissed (see [23], [25], [28], [30], below).

Decision of Davis J [2004] 1 All ER 198 affirmed.

a Section 6(5) is set out at [11], below.

Notes

For the Financial Services Compensation Scheme see 18(1) *Halsbury's Laws* (4th edn reissue) paras 431–433. a

For the Policyholders Protection Act 1975, s 6(5), see *Halsbury's Statutes* (4th edn) (2000 reissue) 93.

Cases referred to in judgments

British and Commonwealth Holdings plc v Barclays Bank plc [1996] 1 All ER 381, [1996] 1 WLR 1, CA. b

Paterson v Chadwick, Paterson v Northampton and District Hospital Management Committee [1974] 2 All ER 772, [1974] 1 WLR 890.

Rodan International Ltd v Commercial Union Assurance Co plc [1999] Lloyd's Rep IR 495, CA. c

Trustees Executors & Agency Co Ltd v Reilly [1941] VLR 110, Vic SC.

Appeal

The Financial Services Compensation Scheme appealed with permission of Davis J from his decision on 4 March 2003 ([2003] EWHC 629 (Admin), [2004] 1 All ER 198, [2003] 1 WLR 1696) ordering it to pay the costs incurred by Geologistics Ltd in respect of litigation against one of its employees. The facts are set out in the judgment of Waller LJ. d

Sir Sydney Kentridge QC and Rory Phillips QC (instructed by *Herbert Smith*) for the Scheme. e

Colin Edelman QC and Colin Wynter (instructed by *Davies Arnold Cooper*) for Geologistics.

Cur adv vult

18 December 2003. The following judgments were delivered. f

WALLER LJ (giving the first judgment at the invitation of Thorpe LJ).

[1] This is an appeal from a decision of Davis J given on 4 March 2003 ([2003] EWHC 629 (Admin), [2004] 1 All ER 198, [2003] 1 WLR 1696). He had to consider the extent of the obligation of the Financial Services Compensation Scheme (the Scheme) under s 6(4) and (5) of the Policyholders Protection Act 1975. These subsections deal with the extent of the indemnity provided by the Scheme to policyholders where an insurance company has become insolvent and where the policyholder has taken out 'compulsory' insurance. g

[2] Under the policy which the respondent Geologistics Ltd (Geologistics) had with the Independent Insurance Co Ltd (Independent), Geologistics had cover for employers' liability ie insurance that they were 'compulsorily' required to take out, and other cover which they were not so required. If Independent had not become insolvent, Geologistics would have recovered under the policy: (1) damages payable by Geologistics as employer to an employee; (2) costs, payable by Geologistics to the employee, of any action brought by the employee; and (3) costs incurred in defending any claim. h

[3] Once Independent became insolvent there has never been any dispute that by virtue of s 6(4) and (5) of the 1975 Act the Scheme was obliged to indemnify Geologistics for: (1) any damages for which Geologistics had been found liable to pay to the employee; (2) any costs which Geologistics had been found liable j

a to pay the employee. The dispute related to whether the Scheme was obliged to pay the costs which Geologistics were as at the time of Independent's liquidation bound to pay their solicitors Davies Arnold Cooper (DAC) for defending the claim.

[4] The judge found that the Scheme was liable to pay the costs of defending the claim but he gave permission to appeal.

b [5] The judge set out in his judgment the relevant terms of the policy, and the relevant terms of both the 1975 Act and other legislation on which submissions turned, with comments and explanations which are not in issue. I append to this judgment a section from his judgment setting the background to the submissions made on the appeal (see Schedule 1, below).

c [6] The judge was of the view that the object of the 1975 Act was to provide a degree of protection for policyholders, and that s 6 was to provide protection to corporate policyholders because they had been compelled to insure. Sir Sydney Kentridge QC, as Mr Phillips QC had done in the court below, challenged the judge's view as to the object of the 1975 Act, and in particular s 6 of that Act. Reliance was placed on the long title and to the reference to the 'Act ... protecting policyholders and others' (my emphasis). So it was submitted that the primary purpose of s 6 was to protect the third parties who were intended to be the beneficiaries of the compulsory insurance referred to in that section. Why, Sir Sydney submitted, should there be the exception to the general rule that corporate policyholders should not recover unless it was to protect the third parties in favour of whom compulsory insurance was required to be taken out?

e [7] The answer seems to me to be first that the 1975 Act as a whole is clearly by the provisions such as s 8(2) concerned with protecting policyholders albeit in that context private policyholders, and only to the extent of 90%. The language of ss 8(2) and 6(4) is the same save for the fact that the indemnity is 100% and corporate policyholders are now included. Furthermore the fact that corporate bodies are included and the extent of the indemnity is increased to 100%, is consistent with the notion that, because insureds have been forced to take out insurance and pay premiums, therefore, if insurance companies become insolvent, all policyholders ought to be protected completely.

f [8] Obviously there is benefit to the third party victims as well; and that Parliament may also have had in mind. The critical point is that Sir Sydney wished to use the argument that the object was to protect third party victims so as to construe s 6(4) and (5) as if their sole or at least primary purpose was to assist victims as opposed to indemnifying policyholders. In my view that is not a legitimate construction of the statute.

g [9] Sir Sydney also relied on the provisions of the 1975 Act other than s 6 to show that the Scheme is funded by the insurance industry, and to show the Scheme was not intended to provide a complete indemnity. In the context of insurance that is not compulsory, corporate policyholders get no rights against the Scheme at all, and even private policyholders get only 90%. So, submitted Sir Sydney, it should be a matter of no surprise that a corporate or indeed a private policyholder should bear the risk of paying their own costs of defending a claim where the insurance company has become insolvent.

j [10] Mr Edelman QC also sought to place s 6 in the context of the whole Act. He submitted that the intention of Parliament can be divined from first looking at s 8(2), seeing as I have already indicated the same language being used in s 6(4). Then he pointed out that s 6(5) is followed by s 6(6). He submitted that what Parliament must have had in mind was the providing of a complete indemnity

where the policy was a policy 'required' by one of the statutes, and a complete indemnity covering anything that would normally have been covered by such a policy. That, he submitted, is what s 6(5) is designed to achieve and that is apparent and confirmed, he submitted, by s 6(6) which provides for recovery by private policyholders and only to the extent of 90% for aspects which would not be covered by a 'compulsory' policy if that was the only type of insurance covered.

[11] The correct approach to the construction of s 6(4) and (5) to which the above submissions go is clearly important, and I confess to being inclined to Mr Edelman's submission, but the language of the subsections must be the starting point. For convenience I repeat s 6(4) and (5):

'(4) Subject to sections 9, 13 and 14 below and the following provisions of this section, it shall be the duty of the Board [the Scheme] to secure that a sum equal to the full amount of any liability of a company in liquidation towards any policyholder or security holder under the terms of any policy or security to which this section applies is paid to the policyholder or security holder as soon as reasonably practicable after the beginning of the liquidation.

(5) Subsection (4) above does not apply by reference to any liability of a company in liquidation under the terms of a policy to which this section applies arising otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance.'

[12] Subsection (5) is certainly capable of a very narrow construction. That construction, which was essentially that put forward by Sir Sydney, involves saying that the liability of the insurance company to which sub-s (4) would apply on its natural language, is to be construed as not encompassing any liability other than an *established* liability of a policyholder which he is *obliged to have compulsorily insured*. Sir Sydney sought to support this narrow construction by reference to certain authorities. He argued that the authority relied on by the judge dealing with the words 'in respect of' advocated too wide an interpretation of those words and that other authorities demonstrated that a narrower construction was apposite.

[13] There was cited to the judge, the decision of Boreham J in *Paterson v Chadwick, Paterson v Northampton and District Hospital Management Committee* [1974] 2 All ER 772, [1974] 1 WLR 890. As the judge said, that was a decision on the ambit of the phrase 'in respect of' as used in s 32 of the Administration of Justice Act 1970, a very different statutory context to the present. In the course of his judgment, Boreham J referred to some observations of Mann CJ in the Australian case of *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110, itself a decision on an Australian statute, the Farmers Protection Act 1940. Boreham J said this, having referred to the fact that certain authorities had been cited to him, including *Reilly's* case ([1974] 2 All ER 772 at 775, [1974] 1 WLR 890 at 893):

'I refer to [that case] for this reason: that it is the one case in which reference was made and an explanation attempted—an explanation rather than a definition—of these words "in respect of", again in the particular context in which Mann CJ found them. It is right that one should say this. This was a decision given under the Farmers Protection Act 1940, by s 5 of which farmers were protected from process or proceedings "in respect of" a debt unless a notice had been served on the farmer in question. In the

a decision, Mann CJ was faced with the contention that the proceedings were ejectment proceedings; that they were not proceedings in respect of a debt, but in respect of failure to deliver up possession. In the course of giving his judgment ([1941] VLR 110 at 111), Mann CJ attempted this explanation of the words "in respect of": "The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression
b intended to convey some connection or relation between the two subject-matters to which the words refer." I think it unnecessary for me to go any further. For me those words of Mann CJ provide helpful guidance, at any rate as to the ordinary meaning of the words "in respect of", and I accept that guidance.'

c [14] Boreham J went on to express the view that, in the light of the arguments of counsel before him, nothing was said to induce him to take the view that anything except the ordinary and natural meaning of those words should be applied in construing s 32(1) of the 1970 Act. He went on to say:

d 'In my judgment the words "in respect of" in s 32(1) convey some connection or relation between the plaintiff's claim and the personal injuries that she sustained, that is, a claim against her ex-solicitors.'

[15] The authorities to which Sir Sydney directed our attention were *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, and *Rodan International Ltd v Commercial Union Assurance Co plc* [1999] Lloyd's Rep IR 495. In the first Aldous LJ found the authorities which had placed
e a more restrictive meaning on 'in respect of' in their statutory context more persuasive in relation to the statute with which he was dealing, than the broader interpretation preferred by Mann CJ in *Reilly's* case, followed by Boreham J in *Paterson's* case.

f [16] In the second Hobhouse LJ was concerned with wording in an insurance policy, and the proper construction of 'in respect of an occurrence'. He said ([1999] Lloyd's Rep IR 495 at 500):

g 'The phrase "in respect of" carries with it a requirement that the liability relate to the identified Occurrence. It is not sufficient that it should simply have had some connection with the Occurrence.'

That, submitted Sir Sydney, supported a narrow construction on the words 'in respect of' in s 6(5).

[17] I do not get much assistance from the authorities. They simply demonstrate that the proper construction of the words will depend on their
h context.

[18] I come back therefore to the wording of s 6(4) and (5) of the 1975 Act. If the narrow construction advocated by Sir Sydney were adopted in relation to s 6(5), that construction would have the following consequences: first there would be covered the damages for which Geologistics have been found liable in
j this case because those are damages for breach of an employer's duty to an employee, and the liability has been established; second unless the costs which Geologistics have been ordered to pay their employee whether in relation to the unsuccessful defence of the claim or the unsuccessful appeal are something in relation to which Geologistics were required 'compulsorily' to carry insurance, those costs would be irrecoverable; third if the employee had in some interlocutory proceeding recovered an order for costs, but had then abandoned

their action conceding there was no liability, those costs would not be recoverable (even in this instance if there was a requirement to compulsorily insure against the same); fourth costs of defending this claim against the claimant although recoverable under the terms of the policy if Independent had remained solvent, would not be recoverable unless there was a requirement to compulsorily insure against the same; fifth costs of defending any claim successfully, incurred with the approval of Independent and recoverable under the policy if Independent remained solvent, would be irrecoverable.

[19] Mr Phillips before the judge conceded that the costs which Geologistics have been ordered to pay in favour of the employee were recoverable. He it seems accepted 'after some prompting', that that was not because Geologistics were required to take out compulsory insurance in respect of the same. He was thus not putting the matter on the basis of the narrow construction advocated by Sir Sydney. He accepted that s 6(5) allowed for recovery in respect of a liability of the policyholder beyond that which was required to be compulsorily insured, but he sought to place a narrower interpretation on the effect of s 6(5) than those representing Geologistics, an interpretation to which I will return.

[20] Sir Sydney sought to persuade us that an obligation to pay the claimant's costs was something against which Geologistics were required to insure. He referred us to s 1 of the Employers' Liability (Compulsory Insurance) Act 1969 quoted above and then took us to the Employers' Liability (Compulsory Insurance) Regulations 1998, SI 1998/2573 passed by virtue of the 1969 Act. Regulation 3 of those regulations provides as follows:

'Limit of amount of compulsory insurance.—(1) Subject to paragraph (2) below, the amount for which an employer is required by the 1969 Act to insure and maintain insurance in respect of relevant employees under one or more policies of insurance shall be, or shall in aggregate be not less than £5 million in respect of—(a) a claim relating to any one or more of those employees arising out of any one occurrence; and (b) any costs and expenses incurred in relation to any such claim.

(2) Where an employer is a company with one or more subsidiaries, the requirements of paragraph (1) above shall be taken to apply to that company with any subsidiaries together, as if they were a single employer.'

[21] Sir Sydney argued that the words 'any costs and expenses incurred in relation to any such claim' referred only to the claimant's costs and expenses and that thus s 1 of the 1969 Act taken with reg 3 demonstrated that the claimant's costs were required to be the subject of insurance.

[22] In my view first reg 3 is simply fixing a limit and providing for what may be taken into account in fixing that limit. Second the words relied on seem to me to include both defence costs and claimant's costs. If anything the use of words 'any costs' points to the fact that employers' liability policies almost invariably provide for the recovery of both claimant's and defence costs. Third in any event it is s 1 of the 1969 Act which governs what must be the subject of insurance. That section deals with liability for bodily injury or disease sustained by employees. Sir Sydney suggested that even on the words of s 1 itself liability should be construed as including liability for the claimant's costs, but I can see no way in which that can be right.

[23] In any event it seems to me that the narrow construction placed on s 6(5) of the 1975 Act by Sir Sydney is inconsistent with there being the two subsections. If s 6(4) and (5) were intended to provide an indemnity against only that which

- a was required to be the subject of compulsory insurance, s 6(4) could have so provided without the need for s 6(5). That alone supports the view that the words 'otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance', must be intended to produce the result that what the policyholder can recover under s 6(4) goes beyond the liability which must be compulsorily insured. What is contemplated is therefore that
- b under a policy which is required to be taken out, the policyholder will be entitled to recover against the insurance company some indemnity beyond that for which statute compels insurance, but by virtue of s 6(5) that right to indemnity must still be 'in respect of ... the ... liability subject to compulsory insurance'.

- [24] It is at this stage that it is helpful to look at the liability under the policy. The policyholder as appears from the terms already quoted, was covered under
- c various sections of the policy. Some of the cover related to compulsory insurance such as employers' liability but some did not. Under the general policy extensions the policyholder had some further entitlements in relation to costs. For convenience I repeat those provisions:

- d '(1) Claimant's Costs and Expenses
The Company will provide indemnity against legal liability for all costs and expenses recoverable by any claimant in connection with any claim to which the indemnity expressed in Sections 1, 2 or 3 applies.

- (2) Defence Costs and Expenses
The company will provide indemnity in respect of all (a) costs incurred
- e with the Company's written consent of legal representation at any ...
(ii) proceedings in any court in respect of any act or omission causing or relating to the occurrence (b) other costs and expenses incurred with the Company's written consent in relation to any matter which may be the subject of indemnity under Sections 1, 2 or 3.'

- f [25] The policyholder thus has an indemnity covering costs recovered by any claimant 'in connection with' any claim to which the indemnity applied. If the insurance company became insolvent the question under s 6(5) would be whether those costs were incurred 'in respect of' the liability the subject of compulsory insurance. The answer to my mind is Yes because the words 'liability subject to compulsory insurance' are descriptive of the type of liability covered
- g by the policy and not intended to describe an actual established liability, and 'in respect of' is in its context intended to mean or at least include 'in connection with'.

- [26] What then of defence costs? Under the policy the policyholder would be entitled to recover costs incurred with the insurance company's written consent
- h for legal representation in any proceedings at an inquest or inquiry or in court or other costs incurred 'in relation to' any matter the subject of indemnity. If the costs have been incurred 'in relation to' any matter which may be the subject of indemnity covering the employer's liability with the consent of the insurers, the question if the insurance company becomes insolvent, is whether those costs
- j have been incurred 'in respect of a liability of the policyholder which is a liability subject to compulsory insurance'. If a 'liability subject to compulsory insurance' is descriptive and 'in respect of' means 'in connection with' or 'in relation to', the answer has to be the same as in the case of the claimant's costs.

[27] Sir Sydney, on the basis that the narrow construction advocated by him might be rejected, referred us to Mr Phillips' skeleton argument for the way in which even if the narrow construction were rejected, the Scheme suggested that

the claimant's costs were recoverable though the defence costs were not. They say putting it in summary form: (1) the liability for the claimant's costs was a liability to the same person as was receiving the damages; the liability for DAC's costs are not; (2) the liability to pay costs to the claimant went hand-in-hand with the liability to pay damages; the liability for DAC's costs arise even if no damages were awarded, and could be recovered from Geologistics; (3) the liability to pay costs to the claimant arose from there having been a liability to pay damages; the liability to pay DAC arose from there having been a claim which DAC were instructed to defend. Reliance was also placed on the statutory purpose and it being more consistent with that purpose to indemnify the liability to the victim than to indemnify a liability to DAC.

[28] The points made do not in my view face up to the interpretation of the language of s 6(5). In s 6(5) the words are descriptive of the type of insurance. 'In respect of' has to mean 'in connection with', and that is the reason why a claimant's costs are recoverable. Once the narrow construction is rejected, and 'in connection with' becomes the route to the claimant's costs being recovered, I do not see how defence costs 'in connection with' or 'in relation to' fall into some different or irrecoverable category. Certainly the object or purpose of the statute relied on does not require a strained construction to be placed on s 6(5) to achieve that result.

[29] What then it may be said is s 6(5) concerned with? The answer is clear. Many policies as indeed the very policy with which this appeal is concerned, cover matters for which insurance is not compulsory. One could have claims falling both under a section relating to compulsory insurance and a section of the policy concerned with non-compulsory insurance. Clearly the Scheme was not intended by s 6(4) to cover matters which were not the subject of compulsory insurance nor any costs incurred in respect of the same. Section 6(5) is intended to make that position clear and no more.

[30] Essentially therefore for the reasons given by the judge I would dismiss this appeal.

LATHAM LJ.

[31] I agree.

THORPE LJ.

[32] I also agree.

Appeal dismissed.

Stephen Leake Barrister.

SCHEDULE 1

Extract from the judgment of Davis J in *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme* [2003] EWHC 629 (Admin), [2003] 2 All ER (Comm) 165, [2003] 1 WLR 1696 given on 4 March 2003:

[3] The policy in question taken out by the claimant with Independent was a composite policy. Thus it did not cover solely employers' liability but extended to various other areas of liability as well. The policy, which I gather

a was Independent's standard form of policy in this context, is entitled on the cover sheet "Business Liability". It provided that Independent would indemnify the insured within the terms, exceptions and conditions of the policy against the events set out in the operative sections and occurring in connection with the business for the relevant period of insurance. There then followed several pages of general policy definitions, exceptions and conditions. General policy conditions 7 and 8 of the policy read as follows:

b (7) Claims (Action by the Insured)

c The insured or his legal personal representatives shall give notice in writing to the Company as soon as possible after any event which may give rise to liability under this Policy with full particulars of such event. Every claim notice letter or writ or process or other document served on the Insured shall be forwarded to the Company immediately on receipt. Notice in writing shall also be given immediately to the Company by the Insured of any impending prosecution inquest or fatal inquiry in connection with any such event.

d (8) Claims (Conduct and Control)

No admission offer promise payment or indemnity shall be made or given by or on behalf of the Insured without the written consent of the Company.

e The Company shall be entitled if it so desires to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim for indemnity or damages or otherwise. The Company shall have full discretion in the conduct of any proceedings and in the settlement of any claim against the Insured and the Insured shall give all such information and assistance as the Company may require."

[4] Section 1 of the business policy is entitled "Employers' Liability". The cover is stated in these terms:

f "In the event of Bodily Injury [which is the subject of a definition] caused to an Employee within the Territorial Limits arising out and in the course of employment by the Insured the Company would indemnify the Insured in respect of Compensation for such Bodily Injury arising out of such event."

Then, under the heading "Exception", this is provided:

g "The Company shall not provide indemnity against liability in respect of which compulsory insurance or security is required under the Road Traffic Act 1998 ..." (and I need not read the following words).

Then, under the heading "Section Extensions", this is provided:

h "These Extensions are subject otherwise to the Terms Exceptions and Conditions of this Policy.

(1) Work Overseas.

The indemnity provided by this Section shall extend to apply in respect of liability for Bodily Injury caused to an Employee whilst temporarily engaged in work outside the Territorial Limits."

j Then there are certain provisos to that and certain other paragraphs in this section.

[5] Section 2 is entitled "Public Liability". The cover there provided is:

"In the event of accidental (1) Bodily Injury to any person (2) Damage to Property (3) obstruction trespass nuisance or interference with any right of way air light or water or other easement (4) wrongful arrest wrongful detention false imprisonment or malicious prosecution occurring within the

Territorial Limits the Company will indemnify the Insured in respect of Compensation arising out of such event.” a

There are then set out various provisions relating to limit of liability and section exceptions. One of the section exceptions is in respect of bodily injury to any employee arising out of and in the course of employment by the insured in the business. That, of course, is the subject of cover in s 1 of the policy. Another section exception relates to matters caused by or arising from any product supplied. That is the subject of cover contained in s 3 of the policy. b

[6] Section 3 indeed is entitled “Products Liability”. The cover there provided is:

“In the event of accidental (1) Bodily Injury to any person (2) Damage to Property caused anywhere in the world by any Product Supplied the Company will indemnify the Insured in respect of Compensation arising out of such event.” c

[7] After those sections, there is then a series of “General Policy Extensions”, so called. Paragraphs 1 and 2 of the general policy extensions provide as follows: d

“(1) Claimants’ Costs and Expenses

The Company will provide indemnity against legal liability for all costs and expenses recoverable by any claimant in connection with any claim to which the indemnity expressed in Sections 1, 2 or 3 applies.

(2) Defence Costs and Expenses e

The Company will provide indemnity in respect of all (a) costs incurred with the Company’s written consent of legal representation at any (i) coroner’s inquest or other inquiry in respect of any death (ii) proceedings in any court in respect of any act or omission causing or relating to any occurrence (b) other costs and expenses incurred with the Company’s written consent in relation to any matter which may be the subject of indemnity under Sections 1, 2 or 3.” f

It is not necessary to recite any other of the general policy extensions.

[8] The claim brought by Mr Froggatt was defended by the claimant, DAC acting on its behalf. As was contemplated by the general policy conditions and as is the invariable practice in such cases, the defence in substance was conducted by the solicitors in close liaison with Independent, albeit of course DAC was acting on behalf of the claimant. It is accepted, on the facts of this particular case and on the wording of this particular business policy, that the claimant had a liability to pay DAC’s legal costs and that such liability fell within the ambit of this particular policy. g h

[9] In due course, liability to Mr Froggatt was admitted. Quantum, however, was not. There was a trial at the Manchester County Court and in the event judgment was given in favour of Mr Froggatt on 7 February 2001 for damages in the sum of £110,650.87, including interest, with costs. It would appear that that award was very much higher than had been anticipated. The claimant accordingly appealed. Independent quite soon thereafter was placed in provisional liquidation, as I have mentioned. The appeal thereafter was pursued with the consent of Independent, by its provisional liquidators. In the event, the appeal was dismissed with costs by judgment of the Court of Appeal given on 17 April 2002 ([2002] EWCA Civ 600, [2002] All ER (D) 108 (Apr)). j

a [10] The costs of DAC in acting in the proceedings up until 17 June 2001—that is, the date of the provisional liquidation—are put at £15,710.55. The costs of DAC in acting after that date amounted, so I was told, to £8,984.81. I was told that the provisional liquidators have discharged the latter costs. As to DAC's costs of the pre-liquidation period, the claimant itself has, I was told, discharged those costs.

b [11] The claimant considered that those costs for which it was liable fell within the ambit of the policy. That, as I have said, is not disputed in this particular case. The claimant further considered that, Independent having been placed in insolvent liquidation, the claimant was entitled to recover these costs from the Financial Services Compensation Scheme (the Scheme) under the provisions of the Policyholders Protection Act 1975, as amended.

c The claimant requested payment from the Scheme accordingly, and correspondence ensued. By a reasoned decision letter of 25 July 2002, the Scheme denied that it had any legal obligation to pay such legal costs incurred by the claimant through DAC in its unsuccessful conduct of the defence of the proceedings prior to 17 June 2001. The claimant was aggrieved by such decision and commenced these proceedings, by way of claim form for judicial review issued on 22 August 2002. By its claim form the claimant seeks declaratory relief as to its claimed entitlement to be paid such costs by the Scheme and also seeks an order for payment.

d

e [12] Three points should be mentioned at this stage. (1) First, the Scheme accepts, and has never disputed, that it is liable to pay the amount of damages awarded to Mr Froggatt, together with the awarded interest, and, further, that it is liable to pay Mr Froggatt's costs of the litigation. Those it has paid. (2) Second, the present claim is for, and only is for, the asserted amount of legal costs incurred by the claimant in the period up to the date of the liquidation on 17 June 2001. Mr Edelman QC (who, with Mr Wynter, appeared for the claimant) told me that there may be questions as to whether the provisional liquidators are entitled to recover from the Scheme the legal costs thus far paid in respect of the conduct of the litigation on behalf of the claimant after 17 June 2001. But that matter forms no part of the proceedings before me and, accordingly, I confine myself to the question of the liability for the pre-liquidation legal costs of the claimant in defending, unsuccessfully, the proceedings brought by Mr Froggatt. (3) Third, this case may have wider implications with regard to costs incurred by others who had taken out insurance of similar kind with Independent, who have unsuccessfully defended other proceedings brought by other claimants using the services of DAC or Berryman's Lace Mawer or Davies Lavery (or some other firm). Indeed, it may be that this case has implications in the context of a future liquidation of some other insurance company.

f

g

h

Statutory background

j [13] I turn then to the statutory background. By virtue of the Employers' Liability (Compulsory Insurance) Act 1969, insurance against liability for employees, broadly speaking, is made mandatory. As the title to that Act states, it is:

"An Act to require employers to insure against their liability for personal injury to their employees; and for purposes connected with the matter aforesaid."

Section 5 of the 1969 Act provides for criminal sanctions in the event of failure to insure in accordance with the Act.

[14] Section 1 of the 1969 Act provides, in the relevant respects, as follows:

"(1) Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain."

I would add that the phrase "approved policy" is given a particular definition, as is the phrase "authorised insurer" given a particular definition by s 1(3). It is not disputed that the business policy in this case was an approved policy and that Independent was an authorised insurer.

[15] It follows, of course, that the claimant was required by statute to insure against liability for bodily injury or disease sustained by its employees in accordance with s 1 of the 1969 Act. It can be seen that the business policy which the claimant in fact took out provided significantly more extensive cover than that required by the 1969 Act itself. Indeed, even in the section of the cover relating to employers' liability, the claimant obtained cover more extensive than that required by s 1 of the 1969 Act; for example, in that the cover provided under the business policy extended to liability for injury caused to an employee whilst temporarily working outside Great Britain.

[16] A few years after the introduction of the 1969 Act, and in the wake of some highly publicised collapses of certain insurance companies, the Policyholders Protection Act 1975 was passed. The long title to that Act reads as follows:

"An Act to make provision for indemnifying (in whole or in part) or otherwise assisting or protecting policyholders and others who have been or may be prejudiced in consequence of the inability of authorised insurance companies carrying on business in the United Kingdom to meet their liabilities under policies issued or securities given by them, and for imposing levies on the insurance industry for the purpose; to authorise the disclosure of certain documents and information to persons appointed by the Secretary of State to advise him on the exercise of his powers under the Insurance Companies Act 1974; and for purposes connected with the matters aforesaid."

That is followed by s 1. Section 1(2) states:

"The functions of the Board [that is to say the Policyholders Protection Board, now the Scheme] shall be—(a) to take the measures provided for by sections 6 to 16 below for the purpose of indemnifying (in whole or in part) or otherwise assisting or protecting policyholders and others who have been or may be prejudiced in consequence of the inability of insurance companies carrying on business in the United Kingdom to meet their liabilities under policies issued or securities given by them."

It is not necessary to read more of that section.

[17] It is in my judgment clear from those provisions, including the long title, what the policy behind the 1975 Act essentially was. It was to provide a degree of financial protection to those policyholders exposed by the collapse of insurance companies (which are, after all, meant to be authorised and regulated).

[18] Mr Edelman and Mr Rory Phillips QC (who, with Mr Fordham, appeared for the Scheme) were content that I should look, for the purposes

a of assessing the purpose behind the 1975 Act, at extracts from Hansard with regard to the parliamentary debate on the Bill. I am inclined to agree with Mr Phillips that these extracts add little, if anything, to matters for present purposes. At all events, the statements of Lord Beswick, the Minister of State, Department of Industry, in the House of Lords, and of Mr Peter Shore MP, President of the Board of Trade, in the House of Commons, in effect simply confirm what is evident from the Act itself as to its purpose.

b [19] Of central relevance to the present claim are subsequent sections of the 1975 Act (as amended) and in particular s 6. Section 5(4) of the 1975 Act had provided, amongst other things, a definition by reference to the phrase "a company in liquidation" which unquestionably extends to Independent in the light of its provisional liquidation. There then follow ss 6, 7 and 8:

c "*6 Compulsory insurance policies and securities*

d (1) This section applies to any policy which satisfies the requirements of any of the following, that is to say—(a) section 1(4A)(d) of the Riding Establishments Act 1964 or any corresponding enactment for the time being in force in Northern Ireland; (b) section 1 of the Employers' Liability (Compulsory Insurance) Act 1969 or Article 5 of the Employers' Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972; or (c) [Part VI of the Road Traffic Act 1988] or (Part VIII of the Road Traffic (Northern Ireland) Order 1981]; and to any policy evidencing a contract of insurance effected for the purposes of section 19 of the Nuclear Installations Act 1965.

e (2) This section applies to any security in respect of third-party risks given by an authorised insurance company which satisfies the requirements of [Part VI of the Road Traffic Act 1988] or [Part VIII of the Road Traffic (Northern Ireland) Order 1981].

f (3) In this section 'a liability subject to compulsory insurance' means any liability required under any of the enactments mentioned in subsection (1) above to be covered by insurance or (as the case may be) by insurance or by some other provision for securing its discharge.

g (4) Subject to sections 9, 13 and 14 below and the following provisions of this section, it shall be the duty of the Board to secure that a sum equal to the full amount of any liability of a company in liquidation towards any policyholder or security holder under the terms of any policy or security to which this section applies is paid to the policyholder or security holder as soon as reasonably practicable after the beginning of the liquidation.

h (5) Subsection (4) above does not apply by reference to any liability of a company in liquidation under the terms of a policy to which this section applies arising otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance.

j (6) Subject to sections 9, 13 and 14 and subsection (8) below, it shall be the duty of the Board to secure that a sum equal to ninety per cent of the amount of any liability of a company in liquidation towards a private policyholder under the terms of any policy to which this section applies, being a liability arising otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance, is paid to the policyholder as soon as reasonably practicable after the beginning of the liquidation.

(7) In subsection (6) above 'private policyholder' means a policyholder who is either—(a) an individual; or (b) a partnership or other unincorporated body of persons all of whom are individuals.

(8) The duty of the Board under subsection (4) or (6) above shall not apply—(a) in the case of any policy, unless it was a United Kingdom policy at the beginning of the liquidation; or (b) in the case of any security in respect of third-party risks, unless it would have been a United Kingdom policy at the beginning of the liquidation if it had been an insurance policy and the contract governing the security had been a contract of insurance.

(9) References hereafter in this Act to policies which were United Kingdom policies at any time and to policyholders in respect of such policies shall be construed as including references to—(a) securities to which this section applies which would have been United Kingdom policies at the time in question if they had been insurance policies and the contracts governing the securities had been contracts of insurance; or (b) security holders in respect of such securities.

“7 Third-party rights against insurance companies in road traffic cases

Without prejudice to section 6 above, but subject to sections 9, 13 and 14 below, it shall be the duty of the Board to secure that a sum equal to the full amount of any liability of a company in liquidation in respect of a sum payable to a person entitled to a benefit of a judgment under—(a) section 149 of the Road Traffic Act 1972 [or section 151 of the Road Traffic Act 1988] (duty of insurers to satisfy judgment against persons insured or secured against third-party risks); or (b) [Article 98 of the Road Traffic (Northern Ireland) Order 1981] (court orders for recovery from insurers of sums due under unsatisfied judgments against persons insured or secured by them); is paid to that person as soon as reasonably practicable after the beginning of the liquidation.

8 General policies other than compulsory insurance policies

(1) This section applies to any general policy other than a policy to which section 6 above applies.

(2) Subject to sections 9, 13 and 14 below, it shall be the duty of the Board to secure that a sum equal to ninety per cent of the amount of any liability of a company in liquidation towards a private policyholder under the terms of any policy to which this section applies which was a United Kingdom policy at the beginning of the liquidation is paid to the policyholder as soon as reasonably practicable after the beginning of the liquidation.

(3) In subsection (2) above “private policyholder” has the same meaning as in section 6(6) above.

(4) In this Act ‘general policy’ means any policy evidencing a contract the effecting of which constituted the carrying on of general business of any class, [other than class 5, 6, 7, 11 or 12, not being a contract of reinsurance].”

[20] I should also make reference to s 15 of the 1975 Act:

“15 Interim payments to policyholders of companies in liquidation, etc

(1) An authorised insurance company, not being a company in liquidation, is a company in provisional liquidation for the purposes of this section if a provisional liquidator has been appointed in respect of the company under [section 135 of the Insolvency Act 1986] or [Article 115 of the Insolvency (Northern Ireland) Order 1989], provided that the petition for the winding up of the company which led to his appointment was presented after 29th October 1974.

(2) A policyholder is eligible for assistance under this section—(a) if he is a policyholder in respect of a general policy or a long term policy of a company in liquidation which was a United Kingdom policy at the beginning of the

a liquidation; or (b) if he is a policyholder in respect of a general policy or a long term policy of a company in provisional liquidation which was a United Kingdom policy at the time when the provisional liquidator was appointed.

b (3) In any case where it appears to the Board to be desirable to do so, the Board may—(a) make payments to or on behalf of policyholders who are eligible for assistance under this section, on such terms (including any terms requiring repayment, in whole or in part) and on such conditions as the Board think fit; or (b) secure that payments are made to or on behalf of any such policyholders by the liquidator or the provisional liquidator by giving him an indemnity covering any such payments or any class or description of such payments.”

c It thus appears from s 15 that discretionary powers are available to the Scheme in the prescribed circumstances in the context of insurance companies in provisional liquidation. However, nothing turns on that in the circumstances of the case before me.

d [21] I might add that the word “policyholder” is defined by s 32(2) of the 1975 Act by reference to the definition contained in s 96 of the Insurance Companies Act 1982, with a further refinement added by sub-s 2(z)(a) by amendment taking effect from 15 April 2000.

e [22] One obvious feature of the 1975 Act, as appears from the sections above cited, is the distinction it draws between private policyholders—that is to say, broadly speaking, individuals—and other policyholders. The overall reach of the 1975 Act is, for the most part, directed at individual policyholders, as is illustrated by s 8 itself. That distinction also appears in s 6.

f [23] In s 6(4), a protection is given in wide terms to the generality of policyholders, albeit, as sub-s (4) is careful expressly to state, subject to the provisions there identified. One of those provisions is sub-s (5). That clearly operates to delimit the *prima facie* width of sub-s (4) by providing that it does not apply—

g “by reference to any liability of a company in liquidation under the terms of a policy to which this section applies arising otherwise than in respect of a liability of the policyholder which is a liability subject to compulsory insurance.”

h If that delimitation applies, then sub-s (6) takes effect in the case of a private policyholder. The drafting technique of first setting out a wide provision and then qualifying it by a limiting provision was and is in fact quite a common one and I do not myself think—contrary perhaps to some of the submissions of Mr Edelman—that any very great significance attaches to the use of such technique in this statute.

j [24] My attention was drawn not only to the provisions of the 1969 Act, which of course is one of the statutes expressly referred to in s 6(1) of the 1975 Act, but also to the other statutes there specifically mentioned. Thus, in the relevant respects, the Riding Establishments Act 1964, as amended by the Riding Establishments Act 1970, provides as follows:

“1 *Licensing of riding establishments*

(1) No person shall keep a riding establishment except under the authority of a licence granted in accordance with the provisions of this Act.”

The grant of a licence is made subject to conditions. For present purposes, the particular provision of relevance is that contained in sub-s (4A)(d)—

"the licence holder shall hold a current insurance policy which insures him against liability for any injury sustained by those who hire a horse from him for riding and those who use a horse in the course of receiving from him, in return for payment, instruction in riding and arising out of the hire or use of a horse as aforesaid and which also insures such persons in respect of any liability which may be incurred by them in respect of injury to any person caused by, or arising out of, the hire or use of a horse as aforesaid."

It may perhaps be noted that under sub-s (4A) of that particular Act, the use is variously of the words "for" or "in respect of" without any very obvious differentiation.

[25] Then I was referred to the Nuclear Installations Act 1965. That provides for a licence to be obtained in respect of a nuclear site. Section 7 of that Act sets out the duties of the licensee of a licensed site, such duties, amongst other things, requiring the licensee to secure that no occurrence involving nuclear matter, as mentioned in that section, causes injury to any person or damage to any property, and so on. In s 19 of that Act it is provided that where a nuclear site licence has been granted in respect of any site, the licensee must make such provision (either by insurance or by some other means) as the minister, with the consent of the Treasury, may approve.

[26] Then I was referred to the road traffic legislation and in particular to the provisions of s 145 of the Road Traffic Act 1972 (which was itself in the relevant respects replaced by s 145 of the Road Traffic Act 1988, which latter statute was a consolidating statute, albeit with amendments) and to the provisions of s 149 of that Act. These read as follows in the relevant respects:

"145.—(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.

(2) The policy must be issued by an authorised insurer, that is to say, a person or body of persons carrying on motor vehicle insurance business in Great Britain.

(3) Subject to subsection (4) below, the policy—(a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road; and (b) must also insure him or them in respect of any liability which may be incurred by him or them under the provisions of this Part of this Act relating to payment for emergency treatment.

(4) The policy shall not, by virtue of subsection (3)(a) above, be required to cover—(a) liability in respect of the death, arising out of and in the course of his employment, of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (b) any contractual liability ...

149.—(1) If, after a certificate of insurance or certificate of security has been delivered under section 147 of this Act to the person by whom a policy has been effected or to whom a security has been given, judgment in respect of any such liability as is required to be covered by a policy of insurance under section 145 of this Act (being a liability covered by the terms of the policy or security to which the certificate relates) is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he shall, subject to the provisions of this section, pay to the persons

a entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

b (2) No sum shall be payable by an insurer under the foregoing provisions of this section—(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or—(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or—(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy or security was cancelled by mutual consent or by virtue of any provision contained therein, and either—(i) before the happening of the said event the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed, or—(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking of effect of the cancellation of the policy or security, the certificate was surrendered to the insurer, or the person to whom it was delivered made such a statutory declaration as aforesaid; or—(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.”

e One can here see repeated use of the phrase “in respect of”, with the phrase “in connection with” also used without any clear differentiation. Reference should also, in this context, be made to s 151(5) of the 1988 Act, which supersedes, with altered wording, s 149 of the 1972 Act.

f [27] It is plain, I think, from each of these four statutes that the underlying policy of Parliament was to provide a degree of protection to third-party victims. That is the purpose of that legislation in those respects.’

Re Rodencroft Ltd
Re WG Birch Developments Ltd
Re H-M Birch Ltd
[2004] EWHC 862 (Ch)

CHANCERY DIVISION (COMPANIES COURT)

EVANS-LOMBE J

19 MARCH, 23 APRIL 2004

Company – Compulsory winding-up – Petition by Secretary of State – Secretary of State taking view that it is expedient in the public interest that company be wound up – Whether contributory entitled to oppose petition – Insolvency Act 1986, s 124A.

At all material times the appellant was disqualified from acting as a director of companies. The boards of directors of the companies, R Ltd, B Ltd and H-M Ltd consisted of associates or nominees of the appellant. The appellant was the controlling shareholder of R Ltd and R Ltd was the beneficial owner of the issued shares in B Ltd. The Secretary of State presented petitions under s 124A^a of the Insolvency Act 1986 on the ground that it was expedient in the public interest seeking winding-up orders in respect of the three companies. The burden of the allegations in the petitions was that the companies were used by the appellant as vehicles for fraud. The appellant opposed the petitions claiming to do so through his interest in the companies by way of his controlling shareholding in R Ltd and sought leave to put in evidence. The Secretary of State submitted that the appellant had no locus standi, in that being disqualified as a director he could not procure any of the companies to oppose the petitions, that he was not a shareholder of B Ltd or H-M Ltd, and that R Ltd was valueless so that the appellant's controlling shareholding conferred on him no interest justifying the costs to be incurred in fighting a defended petition. The registrar accepted the Secretary of State's submissions and made the orders sought. On his appeal, the appellant contended, inter alia, that the registrar ought to have permitted the petitions to continue to a full hearing so giving him the opportunity to file evidence to traverse the Secretary of State's case. The issue before the court was whether, in the absence of opposition from the company itself, a contributory was entitled to oppose a petition under s 124A of the 1986 Act on his own and if so, whether he could do so notwithstanding that he was unable to demonstrate by evidence that his shares were, in fact, of any value.

Held – A contributory, having an interest to oppose a Secretary of State's petition under s 124A of the 1986 Act, could appear on the petition and file evidence in opposition. That right was not confined to circumstances where the company also appeared to oppose the petition. However, where the company did not also appear the court would be astute to inquire why that was the case. The rule that a contributory, when petitioning for the winding up of a company, had to plead in his petition and prove by evidence that, if a winding-up order was made, there

^a Section 124A provides, so far as material: 'Where it appears to the Secretary of State that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so ...'

- a was a contingent surplus of assets in the winding up which would be available for distribution to him extended to contributories seeking to appear on Secretary of State's petitions under s 124A and on creditors' petitions. Thus the petitioner in either of those two classes of petitions should not be put to the cost of a contested petition when the only opposition was from a contributory who could not demonstrate that the company was solvent. In the instant case the appellant had
- b had no locus standi to appear to oppose the petitions against B Ltd and H-M Ltd before the registrar and had no locus standi to appeal against the winding-up orders made in respect of those companies. In relation to R Ltd, the appellant as a contributory had had a prima facie right to appear on the petition and file evidence in opposition provided that he could demonstrate that R Ltd was solvent. Accordingly, the appeals against the winding-up orders in respect of
- c B Ltd and H-M Ltd would be dismissed and the appeal against the winding-up order against R Ltd would be allowed. The petition against R Ltd would not be dismissed but should proceed to a hearing (see [19]–[23], below).

Rica Gold Washing Co, Re [1874–80] All ER Rep Ext 1570 and *Camburn Petroleum Products Ltd, Re* [1979] 3 All ER 297 considered.

d Notes

For grounds for winding up by the court, and for wishes of creditors and contributories, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) paras 2202, 2240.

For the Insolvency Act 1986, s 124A, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 820.

e Cases referred to in judgment

Bowes v Hope Life Insurance and Guarantee Co (1865) 11 HL Cas 389, 11 ER 1383, HL.

Brighton Hotel Co, Re (1868) LR 6 Eq 339.

- f *Camburn Petroleum Products Ltd, Re* [1979] 3 All ER 297, [1980] 1 WLR 86.

Jacob (Walter L) & Co Ltd, Re [1989] BCLC 345, CA.

Rica Gold Washing Co, Re (1879) 11 Ch D 36, [1874–80] All ER Rep Ext 1570, CA.

Xyllyx plc (No 1), Re [1992] BCLC 376.

g Appeal

- Simon Allso appealed from the orders of Mrs Registrar Derrett on 17 December 2003 whereby she made winding-up orders against Rodencroft Ltd, WG Birch Developments Ltd and H-M Birch Ltd on petitions presented by the Secretary of State for Trade and Industry under s 124A of the Insolvency Act 1986 on the ground that it was expedient in the public interest that those companies should
- h be wound up. The facts are set out in the judgment.

David Lord (instructed by *Tarlo Lyons*) for Mr Allso.

Michael Green (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

- j 23 April 2004. The following judgment was delivered.

EVANS-LOMBE J.

[1] These are appeals from the orders of Mrs Registrar Derrett made on 17 December 2003 whereby she made winding-up orders against Rodencroft Ltd, W G Birch Developments Ltd and H-M Birch Ltd on petitions presented by the

Secretary of State for Trade and Industry under s 124A of the Insolvency Act 1986 on the ground that it was expedient in the public interest that they should be wound up. I will refer to the companies against whom those orders were made together as 'the Companies'. On 3 November, on the application of the Secretary of State, provisional liquidators were appointed over each of the Companies. a

[2] On 3 November 2003 petitions under s 124A against the Companies were presented to the court and subsequently served. Winding-up orders were sought on the public interest and just and equitable grounds. The burden of the allegations contained in the petitions is that the Companies were used by a Mr Simon Allso as vehicles for fraud, namely, the extraction of assets from companies in financial distress before they entered formal insolvent administration. Thus it is alleged that, having discovered an appropriate target company, Mr Allso would procure the acquisition of a controlling interest in its shares by one of the Companies. Having obtained control, the trading of the target company would be continued for a brief period during which assets would be abstracted, typically, as substantial 'management fees', after which the target company would be left to be wound up by its creditors. The petitions make serious allegations about the conduct of Mr Allso. It is accepted that on 2 November 1995 he was sentenced to a total of four years imprisonment for two offences of fraud and two offences under s 11 of the Company Directors Disqualification Act 1986. He was also disqualified from acting as a director under s 2 of that Act for ten years. On 22 October 2003 a maximum period disqualification of 15 years was imposed on Mr Allso as a result of his operations with relation to another failed company, In-A-Flap Envelope Co Ltd. b
c
d

[3] For the purposes of this appeal it is not necessary to set out a detailed description of the transactions entered into by the Companies. Suffice it to say that, at the time the matter came before the registrar, of the five target companies 'acquired' by the Companies two were in liquidation and two in administration, all with substantial deficiencies against ordinary creditors. The fifth company, H-M Shopfitting Ltd, was continuing to trade and was apparently solvent although substantial sums had been abstracted from it. The Secretary of State's petitions against the Companies do not allege insolvency as an alternative ground for winding up. e
f

[4] At all material times Mr Allso has been disqualified from acting as a director of companies. The board of directors of the Companies have consisted of associates or nominees of Mr Allso. Mr Allso is the controlling shareholder of Rodencroft. The issued shares in Birch Developments have at all material times been held by two associates of Mr Allso. The only issued share of H-M Birch is held by company formation agents. It is Mr Allso's case, not challenged, that Rodencroft is the beneficial owner of the issued shares in Birch Developments and H-M Birch. g
h

[5] It is accepted that the holdings of shares in the target companies are the Companies' only assets. Since the winding-up orders it has emerged that the fifth target company, H-M Shopfitting, has also passed into administration showing a deficiency of £908,406.

[6] When the petitions came before the registrar none of the Companies appeared to oppose them. Mr Allso appeared by solicitors and counsel to oppose the petitions claiming to do so through his interest in the Companies by way of his controlling shareholding in Rodencroft. At the hearing he sought leave to put in evidence to traverse the allegations contained in the petitions and in the evidence in support of those petitions adduced by the Secretary of State. After a very short hearing of which Mr Allso's solicitors' notes were before the court, the j

a registrar made winding-up orders in respect of all three Companies. She did so accepting the Secretary of State's submission that Mr Allso had no locus standi to oppose them.

b [7] The case for the Secretary of State presented to the registrar was that Mr Allso was disqualified from being a director of any of the Companies and so could not procure them to oppose the petitions. Whereas he was a shareholder of Rodencroft he was not a shareholder of Birch Developments or of H-M Birch. In those circumstances it was unarguable that he had locus standi to oppose the petitions against those two companies. As to Rodencroft, although Mr Allso was the controlling shareholder of it, that company was valueless and his shareholding conferred on him no interest justifying the costs to be incurred in fighting a defended petition. It seems that when the possibility was adumbrated c that winding-up orders be made against Birch Developments and H-M Birch leaving the petition against Rodencroft to continue to a hearing, counsel for Mr Allso submitted that the Companies should stand or fall together. In the result the registrar made winding-up orders against all three Companies without admitting evidence sought to be adduced by Mr Allso.

d [8] Before me Mr Lord, who appeared for Mr Allso, accepted at the outset that the petitions were not demurrable. Mr Lord submitted, and I accept, that the registrar was only entitled to make winding-up orders without hearing Mr Allso's evidence, if her conclusion that he had no locus standi to oppose the petitions was correct.

e [9] Although Mr Lord initially submitted that anyone having any interest in a company, the subject matter of a petition under s 124A, was entitled to appear on the petition to oppose it and file evidence, he did not persevere with that broad submission and the point for decision on the appeal was confined to whether, in the absence of opposition from the company itself, a shareholder—a contributory—is entitled to oppose such a petition on his own and if so, whether he can do so f notwithstanding that he is unable to demonstrate by evidence that his shares are, in fact, of any value.

[10] It was Mr Lord's submission that Mr Allso's shareholding in Rodencroft entitled him to appear to oppose the petition against that company and, because Rodencroft was beneficially entitled to the whole of the issued shares of Birch Developments and H-M Birch, that entitled him to appear to oppose the petitions g against those two companies. He pointed out that the petitions contained no allegations of insolvency against any of the Companies and that the Secretary of State's own evidence before the registrar established that H-M Birch, through its shareholding in H-M Shopfitters, a company then apparently solvent and trading, had value. Accordingly he submitted that the registrar ought to have permitted h the petitions to continue to a full hearing so giving Mr Allso an opportunity to file evidence to traverse the Secretary of State's case. The continued existence of the Companies, without winding-up orders having been made against them, constituted no threat to the public because they would remain under the control of the provisional liquidator pending the hearing of the petitions on their merits.

j [11] Counsel for the parties were unable to point to any reported case where a contributory had been permitted by the court to appear to oppose a petition under s 124A, let alone to oppose such a petition where the company itself was not opposing it. In *Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297, [1980] 1 WLR 86 Slade J was hearing a creditor's petition in respect of a company each whose two issued shares were held by each of its two directors. Those directors had fallen out with the result that a contributory's petition for winding up the

company alleging deadlock in the management had been presented in the Manchester District Registry and was proceeding, albeit slowly. In his judgment Slade J described the events leading up to the application before him in this way ([1979] 3 All ER 297 at 300, [1980] 1 WLR 86 at 90):

'On 13 April 1979 Chevron's [the petitioner in the creditor's petition] petition came before me for first hearing. I was then told of the petition pending in the Manchester District Registry, but was told that, for practical purposes, proceedings under that petition were frozen ... Counsel for Chevron asked for an order under s 231 of the Companies Act 1948 giving leave to Chevron, so far as leave might be necessary to proceed with its petition, and also for an appropriate adjournment for the purpose of dealing with evidence. Counsel for Mr Cooper [one of the director shareholders] asked for leave to be added to the list of persons who had given notice of their intention to appear on the petition, out of time on the usual undertaking and oppose the making of any order under s 231. After hearing argument I decided, contrary to the submissions made on behalf of Mr Cooper, that there was a sufficient allegation of insolvency in the petition, and that in all the circumstances it was right that Chevron's petition should be allowed to continue. I therefore made the order sought under s 231, and gave certain further directions to which I need not refer.'

[12] The judge then set out the evidence and submissions as to the assets and liabilities of the company, some of it emanating from Mr Cooper. He concluded that discussion where he says ([1979] 3 All ER 297 at 302, [1980] 1 WLR 86 at 92):

'In my judgment, on the facts which I have summarised, the company was, at the date of presentation of Chevron's petition, and is at the present date, manifestly unable to pay its debts within the meaning of ss 222(e) and 223(d) [of the 1948 Act], in as much as it did not and does not have assets available for the discharge of all its current liabilities. Counsel for Chevron, and counsel for Mr Kreike [the other director shareholder] who supports Chevron's petition, thus affirm and rely on the present inability of the company to pay its debts. Counsel, who opposes the petition on behalf of Mr Cooper does not dispute such inability ...'

[13] It was thus submitted for the petitioning creditors that they were entitled to a winding-up order. Counsel for the company, supported by Mr Cooper in his capacity as a contributory, sought an adjournment of the petition over the hearing of the contributory's petition in Manchester. He referred to the provisions of s 346(1) of the 1948 Act containing the following terms:

'The court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence ...'

[14] Those words have been re-enacted in s 195(1)(a) of the 1986 Act.

[15] Slade J, having referred to earlier authority continued ([1979] 3 All ER 297 at 303, [1980] 1 WLR 86 at 93):

'Thus I think that *Re Brighton Hotel Co* ((1868) LR 6 Eq 339) throws little light on the attitude which the court should generally adopt if faced with a request to make a winding-up order in respect of a company shown to be unable to pay its debts, when that request is made by an undisputed unpaid

a creditor, but opposing contributories seek an adjournment. Though there are a number of authorities which give guidance as to the attitude of the court where some creditors support the making of an immediate winding-up order and other creditors oppose it, counsel have been unable to find any other authority which gives guidance as to such attitude, where the contest is^{also} between a petitioning creditor on the one hand and contributories on the other hand. I do not, however, feel much doubt in principle as to what that attitude should be. In the case of a creditor's petition not opposed by other creditors, the general approach of the court was expressed by Lord Cranworth in *Bowes v Hope Life Insurance and Guarantee Co* ((1865) 11 HL Cas 389 at 402, 11 ER 1383 at 1389) as follows: "... I agree with what has been said, that it is not a discretionary matter with the court when a debt is established, and not satisfied, to say whether the company should be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case would occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding up." In other words a creditor in the circumstances mentioned is prima facie entitled to his order, and is prima facie not bound to give time to enable the debtor to pay. In my judgment, subject to the discretion given to it by ss 225 and 346 of the 1948 Act, to which I have already referred, the attitude of the court should be, and is, essentially unchanged today. While I recognise that it would have the right under those two sections to pay regard to the wishes of contributories, in deciding whether or not to make a winding-up order on a creditor's petition, or to adjourn the hearing, in my judgment it can, and should, ordinarily attach little weight to the wishes of contributories, in comparison with the weight it attaches to the wishes of any creditor, who proves both that he is unpaid and that the company is "unable to pay its debts" ... For these reasons while I accept that the court would have jurisdiction to adjourn Chevron's petition, as asked for by counsel for Mr Cooper, I think it should only do so if it were satisfied that there were exceptional circumstances that justified this course.'

[16] Apart from s 195(1)(a) of the 1986 Act, to the provisions of which I have already referred, that Act is silent about those who are entitled to appear upon a petition to wind up a company once presented. Chapter 3 of Pt 4 of the Insolvency Rules 1986, SI 1986/1925, by reason of the heading to the chapter, must be taken as applying to petitions under s 124A.

[17] Rule 4.13 under the heading 'Persons entitled to copy of petition' provides:

'Every director, contributory or creditor of the company is entitled to be furnished by the solicitor for the petitioner (or by the petitioner himself, if acting in person) with a copy of the petition within 2 days after requiring it, on payment of the appropriate fee.'

Rules 4.16, dealing with notice of appearance, and 4.17, dealing with list of appearances, do not appear to be drafted with the idea that a contributory might seek to appear on either a creditor's or a Secretary of State's petition in mind. A contributory would be unable to provide particulars of 'the amount and nature of his debt' as required by rr 4.16(2)(c) and 4.17(4). Rule 4.18 provides for service of evidence in opposition to the petition by the company but there are no

separate provisions for the service of evidence by contributories or by opposing creditors for that matter. However, it is not possible to say that the rules are so inconsistent with the appearance of a contributory as to rule out that happening. Indeed in *Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297, [1980] 1 WLR 86 Slade J found no difficulty in giving leave to a contributory to appear on a creditor's petition and be added to the list of those opposing the making of a winding-up order pursuant to what is now r 4.16(5). Indeed statutory Form 4.9 giving notice of intention to appear on a petition under r 4.16 or Form 4.10, the list of those intending to appear, make provision for the inclusion of contributories.

[18] It must be accepted that petitions of the Secretary of State under s 124A are in a special category in that they can only be presented by one entity, an organ of government. An ordinary individual or company cannot be substituted as petitioner on a Secretary of State's petition see *Re Xyllyx plc (No 1)* [1992] BCLC 376. It is of note, however, that Harman J, who decided that case, did not give as a reason for refusing substitution that a contributory was excluded from appearing on a Secretary of State's petition. The application in that case was that two contributories be added to the list for the purpose of obtaining a seven-day adjournment of the hearing of the petition so as to give them time to consider whether they wished to ask for substitution.

[19] The function of the court on a petition under s 124A is summarised in the judgment of Nicholls LJ in *Re Walter L Jacob Ltd* [1989] BCLC 345 at 353 in this way:

'The court's task, in the case of so called "public interest" petitions, as in the case of all other petitions invoking the courts winding-up jurisdiction under s 122(1)(g), is to carry out the balancing exercise described above, having regard to all the circumstances as disclosed by the totality of the evidence before the court. In respect of all such petitions, whoever may be the petitioner, the court has to weigh the factors which point to the conclusion that it would be just and equitable to wind up the company against those which point to the opposite conclusion. It is to the court that Parliament has entrusted this task, in all cases. Thus, where the reasons put forward by the petitioner are founded on considerations of public interest, the court, if it is to discharge its obligation to carry out the balancing exercise, must itself evaluate those reasons to the extent necessary for it to form a view on whether they do afford sufficient reason for making a winding-up order in the particular case. In the case of "public interest" petitions, the court will, of course, carry out that evaluation with the assistance of evidence and submissions from the Secretary of State and from other parties. When doing so the court will take note that the source of the submissions that the company should be wound up is a government department charged by Parliament with wide-ranging responsibilities in relation to the affairs of companies. The department has considerable expertise in these matters and can be expected to act with a proper sense of responsibility when seeking a winding-up order. But the cogency of the submissions made on behalf of the Secretary of State will fall to be considered and tested in the same way as any other submissions. His submissions are not ipso facto endowed with such weight that those resisting a winding-up petition presented by him will find the scales loaded against them.'

a [20] That being the function of the court on a Secretary of State's petition there does not, in my judgment, appear to be any reason why a contributory, having an interest to oppose the petition, should not be permitted by the court to appear on the petition and file evidence in opposition, as Mr Cooper did as a contributory to the company in *Re Camburn Petroleum Products Ltd* in respect of a creditor's petition. There does not seem to me to be any logical reason why that
b right to appear as a contributory on a Secretary of State's petition should be confined to circumstances where the company also appears to oppose the petition. Where the company does not appear to oppose, the court will be astute to inquire why that is the case. One can, however, imagine circumstances where a company, having a perfectly genuine defence to a Secretary of State's petition, might not be put in motion by its board of directors to oppose such petition.
c There might be division and disagreement amongst the board members, insoluble at least in the short term, which results in such inaction. Such a board disagreement was present in *Re Camburn Petroleum Products Ltd* and there are some indications that there are board disagreements in the present case.

d [21] In *Rica Gold Washing Co, Re* (1879) 11 Ch D 36, [1874-80] All ER Rep Ext 1570 it was decided that a contributory, when petitioning for the winding up of a company, must plead in his petition and prove by evidence that, if a winding up order is made, there is a contingent surplus of assets in the winding up which will be available for distribution to him. It is not a surprise that there are few examples of cases where contributories have sought to appear on creditors' petitions. They will generally have no interest to do so where they accept that
e their company is insolvent. Where the company is solvent but a creditor has presented a petition, the company will either pay the debt or contest the petition on the ground that there is a bona fide dispute as to the existence of the petitioning debt. In *Re Camburn Petroleum Products Ltd* it was Mr Cooper's contention that the company was solvent. A contributory's petition to wind up
f the company presupposes that the company is solvent since the petition could not have been brought without that being established. There seems to me no reason why the rule in *Re Rica Gold Washing Co* should not extend to contributories seeking to appear on Secretary of State's petitions under s 124A and also on creditors' petitions. Thus the petitioner in either of those two classes
g of petitions should not be put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent.

[22] Applying those conclusions to the facts of the present appeal it seems to me that the appeals against the winding-up orders in respect of Birch
h Developments and H-M Birch fall to be dismissed. Mr Allso is not a contributory of either of those companies nor is he a creditor of them. His majority shareholding in Rodencroft would enable him to reorganise the board of that company with new directors who might be prepared, through Rodencroft's control of the boards of those two companies, to put those companies in motion
j to defend the Secretary of State's petition. To date Mr Allso has not done so and there is no sign that those companies' boards are themselves going to defend the petitions. In any event that cannot affect the present position which is that, in my judgment, Mr Allso had no locus standi to appear to oppose the petitions against Birch Developments and H-M Birch before the registrar and has no locus standi to appeal to this court against the winding-up orders that she made in respect of those companies.

[23] The position in relation to Rodencroft seems to me to be different. Mr Allso, as a contributory, had a prima facie right to appear on the petition and file evidence in opposition provided that he could demonstrate that Rodencroft was solvent. The registrar made a winding-up order without giving Mr Allso an opportunity to file any evidence, including evidence of the solvency of Rodencroft. I have reluctantly come to the conclusion that the registrar was wrong to do so and that the appeal against the winding-up order against Rodencroft must be allowed. However, the petition should not be dismissed but should now proceed to a hearing. Those appearing for the Secretary of State should give consideration to whether they should ask permission for the petition to be amended to allege the insolvency of Rodencroft as an alternative ground for a winding-up order.

[24] I will give directions for the filing of evidence. In the event that the Secretary of State takes the view that the evidence filed by Mr Allso does not show that Rodencroft is solvent, steps will no doubt be taken to return the matter before the registrar to consider whether a winding-up order should be re-made. In the event, which on the evidence presently available seems unlikely, that Mr Allso succeeds in his opposition to the Secretary of State's petition, it will be open to him then to procure Rodencroft to apply to stay the winding up of Birch Developments or H-M Birch if either of those companies can be demonstrated to be solvent.

[25] I will invite submissions as to the costs of the appeal and of the hearing before the registrar but, as at present advised, I would order those costs to be in the case of the Rodencroft petition.

Appeal allowed in part.

Celia Fox Barrister.

a **R (on the application of Mullen) v Secretary
of State for the Home Department**

[2004] UKHL 18

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD SCOTT OF FOSCOTE, LORD RODGER
OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

19, 23, 24 FEBRUARY, 29 APRIL 2004

c *Compensation – Crime – Scheme – Statutory scheme compensating persons whose convictions quashed on grounds of ‘miscarriage of justice’ – Ex gratia scheme compensating persons for period in custody following wrongful conviction resulting from serious default of public authority – Claimant’s conviction quashed on grounds of abuse of process preceding trial – Whether compensation payable under statutory or ex gratia schemes – Criminal Justice Act 1988, s 133.*

d The claimant had left the United Kingdom for Zimbabwe shortly before a shooting incident took place which led to the discovery of a ‘bomb factory’ in London. The claimant was deported from Zimbabwe, brought back to the United Kingdom and charged with conspiracy to cause explosions. At his trial
e the intelligence services and the police were aware that the claimant had been unlawfully deported from Zimbabwe but they did not tell prosecuting counsel how the claimant’s presence in court was to be explained. The claimant was convicted and sentenced to 30 years’ imprisonment. His solicitors later sought and obtained disclosure of background information concerning the claimant’s removal from Zimbabwe. The claimant appealed, out of time, and the Court
f of Appeal quashed his conviction on the ground that his deportation had been contrary to the law of Zimbabwe and international law, involving an abuse of process which rendered the conviction unsafe. The claimant had spent almost ten years in prison. It was no part of the claimant’s case on appeal that he was innocent of the offence of which he had been convicted or that, apart from the abuse of process, his trial had been in any way flawed. Section 133^a of the
g Criminal Justice Act 1988 was enacted to fulfil the United Kingdom’s international obligations under the International Covenant on Civil and Political Rights 1966 to compensate a person convicted of a criminal offence when his conviction was subsequently reversed or he was pardoned on the ground that a new or newly discovered fact showed conclusively that there had
h been a miscarriage of justice. Prior to the enactment of s 133, the United Kingdom had had in effect an ex gratia scheme of compensation, and under a ministerial policy statement the Secretary of State continued to pay ex gratia compensation to persons who did not fall within s 133 of the 1988 Act but who had spent a period in custody following a wrongful conviction or charge where
j he was satisfied that it had resulted from serious default on the part of a member of a police force or of some other public authority, or where there were other exceptional circumstances, in particular the emergence of facts which completely exonerated the accused person. The claimant applied to the Secretary of State for compensation on grounds of miscarriage of justice under

a Section 133, so far as material, is set out at [28], below

s 133 of the 1988 Act, and, in the alternative for compensation under the ex gratia scheme. The Secretary of State refused the applications. In relation to the ex gratia scheme, the Secretary of State: (i) stated that he did not consider that the claimant had been 'completely exonerated' or that there were any 'other exceptional circumstances; and (ii) explained that he had departed from his usual policy, which would have led to the payment of compensation following wrongful conviction, because it would be an affront to justice if someone who conceded that he was rightly convicted were compensated financially for an abuse of process. The Divisional Court dismissed an application for judicial review under both heads. The Court of Appeal allowed the claimant's appeal, holding that he was entitled to compensation under s 133. The Secretary of State appealed.

Held – (1) Per Lord Bingham of Cornhill, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe. In the instant case, where an abuse of executive power had led to the claimant's apprehension and abduction prior to the commencement of the trial process and there had been no failure in that trial process, the claimant was not entitled to compensation under s 133 of the 1988 Act (see [8], [65], [69], [70], below).

(2) Per Lord Bingham of Cornhill, Lord Steyn, Lord Scott of Foscote and Lord Rodger of Earlsferry. The Secretary of State's decision not to make an award under the ex gratia scheme had not been unlawful. The Secretary of State had been entitled to treat as exceptional a case in which there appeared to him to be no reason to doubt the claimant's guilt. In the exercise of his discretion he had acted fairly, rationally, consistently and in a manner that that did not defeat substantive legitimate expectations. The appeal would, accordingly, be allowed (see [12], [13], [60]–[63], [67]–[69], below).

Decision of the Court of Appeal [2003] 1 All ER 613 reversed.

Notes

For compensation for miscarriages of justice, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1521.

For the Criminal Justice Act 1988, s 133, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1004.

Cases referred to in opinions

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, [1993] 3 WLR 90, HL.

Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 3 All ER 1048, [1978] AC 141, [1977] 3 WLR 907, HL.

Effort Shipping Co Ltd v Linden Management SA, The Giannis NK [1998] 1 All ER 495, [1998] AC 605, [1998] 2 WLR 206, HL.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

Hammern v Norway [2003] ECHR 30287/96, ECt HR.

Irving v Australia Comm No 880/1999 (1 April 2002, unreported), UN Human Rights Committee.

Lamanna v Austria [2001] ECHR 28923/95, ECt HR.

Leutscher v Netherlands (1997) 24 EHRR 181, [1996] ECHR 17314/90, ECt HR and E Com HR.

- Maaouia v France* (2000) 9 BHRC 205, ECt HR.
- a** *McCann v UK* (1996) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR.
McFarland, Re [2004] UKHL 17, [2004] 1 WLR 1289.
McKerr v UK (2002) 34 EHRR 553, [2001] ECHR 28883/95, ECt HR.
Muhonen v Finland Comm No 89/1981 (8 April 1985, unreported), UN Human Rights Committee.
- b** *O v Norway* [2003] ECHR 29327/95, ECt HR.
People (DPP) v Pringle (No 2) [1997] 2 IR 225, NI SC.
R v Fergus (Ivan) (1994) 98 Cr App R 313, CA.
R v Latif, R v Shahzad [1996] 1 All ER 353, [1996] 1 WLR 104, HL.
R v Looseley, A-G's Ref (No 3 of 2000) [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060.
- c** *R v Mullen* [2000] QB 520, [1999] 3 WLR 777, CA.
R v North and East Devon Heath Authority, ex p Coughlan (Secretary of State for Health intervening) [2000] 3 All ER 850, [2001] QB 213, [2000] 2 WLR 622, CA.
R v Secretary of State for the Home Dept, ex p Adan, R v Secretary of State for the Home Dept, ex p Aitseguer [2001] 1 All ER 593, [2001] 2 AC 477, [2001] 2 WLR 143, HL.
- d** *R v Wilson* (1913) 138 P 971, Cal Ct of Apps (2nd Dist).
Robins v National Trust Co [1927] AC 515, [1927] All ER Rep 73, PC.
Rushiti v Austria (2001) 33 EHRR 1331, [2000] ECHR 28389/95, ECt HR.
Sekanina v Austria (1994) 17 EHRR 221, [1993] ECHR 13126/87, ECt HR.
Weixelbraun v Austria (2001) 36 EHRR 799, [2001] ECHR 33730/96, ECt HR.
WJH v Netherlands Comm No 408/1990 (31 July 1992, unreported), UN Human Rights Committee.
- e** *Weixelbraun v Austria* (2002) 36 EHRR 799, [2001] ECHR 33730/96, ECt HR.

Cases referred to in list of authorities

- A-G's Reference (No 1 of 1990)* [1992] 3 All ER 169, [1992] QB 630, [1992] 3 WLR 9, CA.
- f** *Appleby v UK* (2003) 37 EHRR 38, [2003] ECHR 44306/98, ECt HR.
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, Aust HC.
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.
- g** *Benham v UK* (1996) 22 EHRR 293, [1996] ECHR 19380/92, ECt HR.
Botta v Italy (1998) 4 BHRC 81, ECt HR.
British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165, [1971] AC 610, [1970] 3 WLR 488, HL.
Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, [1987] 2 WLR 606, HL.
- h** *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.
Denimark Ltd v Germany (2000) 30 EHRR CD 144, ECt HR.
El-Ali v Secretary of State for the Home Dept [2002] EWCA Civ 1103, [2003] 1 WLR 95.
- j** *Fisheries Jurisdiction Case: UK v Iceland* (1973) ICJ Rep 3, ICJ.
H (minors) (abduction: acquiescence), Re [1997] 2 All ER 225, [1998] AC 72, [1997] 2 WLR 563, HL.
Hartnett, Re, Re Hudson (1973) 1 OR (2d) 206, Ont HC.
Johnston v Ireland (1986) 9 EHRR 203, ECt HR.
Ker v Illinois (1886) 119 US 436, US SC.

- König v Germany* (1978) 2 EHRR 170, [1978] ECHR 6232/73, ECt HR. a
- Libya v Chad* [1994] ICJ Rep 4, ICJ.
- McFarland's Application for Judicial Review, Re* [2002] NI 337, NI CA.
- Minelli v Switzerland* (1983) 5 EHRR 554, [1983] ECHR 8660/79, ECt HR
- Moenvao v Dept of Labour* [1980] 1 NZLR 464, NZ CA.
- Mox Plant case, The (Ireland v UK)* (3 December 2001, unreported), ITLOS.
- Osman v UK* (1998) 5 BHRC 293, ECt HR. b
- Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
- Pringle v Ireland* [1999] IEHC 185, [1999] 4 IR 10, Ir HC.
- Quazi v Quazi* [1979] 3 All ER 897, [1980] AC 744, [1979] 3 WLR 833, HL.
- R v A(D)* 14 March 2000, unreported.
- R v Bow Street Magistrates' Court, ex p Mackeson* (1981) 75 Cr App R 24, DC. c
- R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 1 All ER 129, [1999] 2 AC 418, [1998] 3 WLR 1260, HL.
- R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498, DC.
- R v Criminal Injuries Compensation Board, ex p P* [1995] 1 All ER 870, [1995] 1 WLR 845, CA. d
- R v McNamee (Gilbert Thomas Patrick)* (17 December 1998, unreported), CA.
- R v Heston-Francois* [1984] 1 All ER 785, [1984] QB 278, [1984] 2 WLR 309, CA.
- R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
- R v Ministry of Defence, ex p Walker* [2000] 2 All ER 917, [2000] 1 WLR 806, HL.
- R v Pendleton* [2001] UKHL 66, [2002] 1 All ER 524, [2002] 1 WLR 72. e
- R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.
- R v Secretary of State for the Home Dept, ex p Atlantic Commercial (UK) Ltd* [1997] BCC 692.
- R v Secretary of State for the Home Dept, ex p Bateman* (1995) 7 Admin LR 175, CA. f
- R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
- R v Secretary of State for the Home Dept, ex p Garner* (1999) 11 Admin LR 595, DC.
- R v Secretary of State for the Home Dept, ex p Launder* [1997] 3 All ER 961, [1997] 1 WLR 839, HL.
- R v Secretary of State for the Home Dept, ex p Sheffield* (7 Oct 1997, unreported), QBD. g
- R v Sunila* [1985] NSJ No 332, NS CA.
- R v Walton* (1905) 10 CCC 269, Can CA.
- R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389. h
- R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
- R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.
- R (the association of British Civilian Internees—Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, [2003] 3 WLR 80. j
- Robins v National Trust Co* [1927] AC 515, [1927] All ER Rep 73, PC.
- Salomon v Customs and Excise Comrs* [1966] 3 All ER 871, [1967] 2 QB 116, [1966] 3 WLR 1223, CA.
- Sentges v Netherlands App No 27677/02* (8 July 2003, unreported), ECt HR.
- South Somerset DC v David Wilson Homes (Southern) Ltd* (1993) 66 P&CR 83.

State v Ebharim (1991) 2 SA 553, SA SC.

Steele Ford & Newton (a firm) v CPS [1993] 2 All ER 769, [1994] 1 AC 22, [1993] 2 WLR 934, HL.

Telfner v Austria (2002) 34 EHRR 7, [2001] ECHR 33501/96, ECt HR.

Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All ER 636, [1995] 1 WLR 759, HL.

US v Alvarez-Machain (1992) 504 US 655, US SC.

US v Toscanino (1974) 500 F 2d 267, US Ct of Apps (2nd Cir).

Van der Leer v Netherlands (1990) 12 EHRR 567, [1990] ECHR 11509/85, ECt HR.

Vogt v Germany (1995) 21 EHRR 205, [1995] ECHR 17851/91, ECt HR.

Appeal

The Secretary of State for the Home Department appealed with permission of the Court of Appeal (Schiemann, Rix LJ and Pumfrey J) from the court's decision on 20 December 2002 ([2002] EWCA Civ 1882, [2003] 1 All ER 613, [2003] QB 993) allowing the appeal of the claimant, Nicholas Mullen, from the decision of the Divisional Court (Simon Brown LJ and Scott Baker J) on 21 February 2002 ([2002] EWHC 230 (Admin), [2002] 3 All ER 293, [2002] 1 WLR 1857) dismissing his application for judicial review of the decision of the Secretary of State on 6 March 2000, confirmed on 15 March 2001, refusing the claimant's applications for compensation under s 133 of the Criminal Justice Act 1988 and for ex gratia compensation. The facts are set out in the opinion of Lord Steyn.

Philip Sales and *Hugo Keith* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Nigel Fleming QC, *Philippe Sands QC* and *Campaspe Lloyd-Jacob* (instructed by *Christian Khan*) for Mr Mullen.

Their Lordships took time for consideration.

29 April 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, on 20 December 2002 the Court of Appeal (Schiemann and Rix LJ and Pumfrey J) ([2002] EWCA Civ 1882, [2003] 1 All ER 613, [2003] QB 993) held, reversing a decision of the Queen's Bench Divisional Court (Simon Brown LJ and Scott Baker J) ([2002] EWHC 230 (Admin), [2002] 3 All ER 293, [2002] 1 WLR 1857), that the Secretary of State was legally bound to pay compensation to Mr Mullen. The Secretary of State now challenges the Court of Appeal's ruling and seeks to reinstate the Divisional Court's ruling in his favour.

[2] In agreement with all members of the committee I would allow the Secretary of State's appeal. But I would do so on a narrow ground, less far-reaching than the main submission made on behalf of the Secretary of State. In explaining the reasons for my decision, I will adopt, without repeating, the account of the facts given by my noble and learned friend Lord Steyn.

[3] In [7] and [8] of my opinion in *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289, I drew attention to the difficulty and sensitivity of questions affecting the payment of compensation to acquitted criminal defendants. I there made reference to the statement by Mr Roy Jenkins as Secretary of State

in July 1976 and quoted in full the statement of Mr Douglas Hurd as Secretary of State in November 1985. I would refer to those passages and need not repeat them^b.

[4] It is apparent from their statements that Mr Jenkins and Mr Hurd were addressing the subject of wrongful convictions and charges. For present purposes, wrongful charges need not be considered. The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

[5] In the course of his statement Mr Hurd recited the terms, and undertook to observe, art 14(6) of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (ICCPR), an instrument which the United Kingdom and many other states have signed and ratified. It is common ground that s 133 of the Criminal Justice Act 1988 was enacted to give effect to this obligation in domestic law, so that the right to be compensated should more obviously be 'according to law'. The only change was to replace the word 'conclusively' in art 14(6) by the expression 'beyond reasonable doubt', familiar in domestic criminal law, in s 133. The task of the House in this appeal is to interpret s 133. But both parties are rightly agreed that the key to interpretation of s 133 is a correct understanding of art 14(6).

[6] Article 14(6) of the ICCPR is the provision of that instrument which is directed to ensuring that defendants shall be fairly tried. Despite differences of wording and substance, it matches art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the European Convention). It also matches, for example, s 11 of the Canadian Charter of Rights and Freedoms, ss 24 and 25 of the New Zealand Bill of Rights and s 35(3) of the Bill of Rights incorporated in the Constitution of the Republic of South Africa. All of these provisions lay down certain familiar principles (the presumption of innocence, the right to be told of the charge against one, and so on). They address different aspects of the core right, which is to a fair trial. They have no bearing on abuses of executive power which do not result in an unfair trial.

[7] The judgment of the Court of Appeal (Criminal Division) (Rose LJ, Colman and Maurice Kay JJ) ([2000] QB 520, [1999] 3 WLR 777) makes it clear that Mr Mullen was the victim of a gross abuse of executive power. The court ([2000] QB 520 at 535, [1999] 3 WLR 777 at 789) found that the British authorities

^b Editor's note: paras [7] and [8] of *Re McFarland* are reproduced in the Appendix, below.

a had acted in breach of international law and had been guilty of 'a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts'. For this conduct, as it seems to me, Mr Mullen had strong grounds for a claim in conspiracy or misfeasance in public office. He could have challenged the legality of his detention, perhaps praying in aid the provisions of art 5(5) of the European Convention (reflected in art 9(5) of the ICCPR):

'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

c But Mr Mullen claims compensation under, in effect, art 14(6), the fair trial guarantee, and he cannot show any defect in his trial or the investigation leading up to it. After conviction he applied for leave to appeal against sentence only. He may, it seems, have wished to appeal against conviction, but did not do so. On his appeal out of time in January 1999, no challenge was made to the conduct of the trial itself. He had, it is true, a legitimate complaint of non-disclosure, but the material which should have been and was not disclosed related to the circumstances of his apprehension and abduction, not to the facts of his offence.

d [8] The jurisdiction exercised by the Court of Appeal (Criminal Division) when quashing the conviction of Mr Mullen was based on the reasoning of the House in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42. That case concerned a stay of proceedings. There had been no trial. But there had been unlawful conduct by the authorities which resulted in the applicant's return to this country where he was arrested and charged. The ground upon which the House held it right to intervene was explained by Lord Griffiths, who gave the leading opinion:

f 'In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.' (See [1993] 3 All ER 138 at 150, [1994] 1 AC 42 at 61–62.)

g He concluded:

h 'The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.' (See [1993] 3 All ER 138 at 152, [1994] 1 AC 42 at 64.)

j Lord Hoffmann correctly characterised this salutary jurisdiction, in my respectful opinion, when he said in *R v Looseley* [2001] UKHL 53 at [40], [2001] 4 All ER 897 at [40], [2001] 1 WLR 2060:

'The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths described the jurisdiction more

broadly and, I respectfully think, more accurately, as a jurisdiction to prevent abuse of executive power.’

In quashing Mr Mullen’s conviction the Court of Appeal (Criminal Division) condemned the abuse of executive power which had led to his apprehension and abduction in the only way it effectively could. But it identified no failure in the trial process. It is for failures of the trial process that the Secretary of State is bound, by s 133 of the 1988 Act and art 14(6) of the ICCPR, to pay compensation. On that limited ground I would hold that he is not bound to pay compensation under s 133.

[9] The central submission of the Secretary of State was that s 133, reflecting art 14(6), obliges him to pay compensation only when a defendant, finally acquitted in circumstances satisfying the statutory conditions, is shown beyond reasonable doubt to be innocent of the crime of which he had been convicted. Having reached the conclusion already expressed, in favour of the Secretary of State, I need form no concluded opinion on this submission, which is strongly challenged by Mr Mullen. But in deference to the very detailed arguments advanced by Mr Sales and Mr Pleming I should very briefly indicate why, on the materials now before the House, I would hesitate to accept it.

(1) The expression ‘miscarriage of justice’ in s 133 is drawn directly from the English-language text of art 14(6). In the article the expression describes a concept which is autonomous, in the sense that its content should be the same in all states party to the ICCPR, irrespective of the language in which the text appears. None the less, ‘miscarriage of justice’ is an expression which, although very familiar, is not a legal term of art and has no settled meaning. Like ‘wrongful conviction’ it can be used to describe the conviction of the demonstrably innocent (see *People (DPP) v Pringle (No 2)* [1997] 2 IR 225 at 230, 236, 246). But, again like ‘wrongful conviction’, it can be and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted: see, for example, *R v Wilson* (1913) 138 P 971 at 975, *Robins v National Trust Co* [1927] AC 515 at 518, [1927] All ER Rep 73 at 75, Sir John May *Return to an Address of the Honourable the House of Commons dated 30 June 1994 for a Report of the Inquiry into the Circumstances surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974* (1994) (HC 449) pp 298–299 (paras 21.3–21.4). When s 133 (as it was to become) was debated in the House of Lords, the minister was pressed to say whether a miscarriage of justice connoted the innocence of a defendant or the raising of a doubt about his guilt, but the minister said nothing to suggest that compensation would be payable only to the innocent (see Hansard, 499 HL Official Report (5th series) cols 1631–1634).

(2) The House was referred to the travaux préparatoires of the negotiations which culminated in adoption of the ICCPR. It is plain that some delegates contended that compensation should not be paid save to those who were shown to be innocent, and such delegates found no difficulty in expressing this very simple principle. But it is equally plain, as Mr Pleming submitted, that every proposal to that effect was voted down. The travaux disclose no consensus of opinion on the meaning to be given to this expression. It may be that the expression commended itself because of the latitude in interpretation which it offered.

(3) Little assistance is in my opinion gained from the jurisprudence of the United Nations Human Rights Committee. In *Muhonen v Finland* Comm

a No 89/1981 (8 April 1985, unreported) the Committee found no violation of art 14(6) where an applicant had been pardoned on grounds of equity and not miscarriage of justice. But it did not attempt to define the latter expression. Nor did it in *Irving v Australia* Comm No 880/1999 (1 April 2002, unreported), where the decision of the majority, rejecting the applicant's claim, turned on the absence of a new or newly discovered fact.

b (4) Article 3 of the Seventh Protocol to the European Convention is in much the same terms as art 14(6) of the ICCPR and was adopted to bring the terms of the European Convention into line with those of the ICCPR. As Lord Steyn has explained, a Committee of Experts on Human Rights drafted and issued an explanatory report. Paragraph 25 contains a passage on which the Secretary of State understandably placed heavy reliance:

c 'The intention is that states would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person was clearly innocent.'

d This passage plainly assists the Secretary of State. But: (i) the United Kingdom has neither signed nor ratified the Seventh Protocol; (ii) many more states are parties to the ICCPR than to the European Convention or the Seventh Protocol, and they cannot be bound by a later commentary on a different instrument; (iii) the report is prefaced by a statement that it does not constitute an instrument providing an authoritative interpretation of the text of the Protocol; (iv) para 25 does not appear to be altogether consistent with para 23, which suggests that a miscarriage of justice occurs where there is 'some serious failure in the judicial process involving grave prejudice to the convicted person'; (v) the simple and readily intelligible reference to 'innocent' in para 25 is to be contrasted with the absence of any such word in the Seventh Protocol, art 3 (or, of course, art 14(6) of the ICCPR). This last observation is applicable also to art 626 of the French Code de Procédure Pénale, where there is reference to 'un condamné reconnu innocent'. The French version of art 14(6) and art 3 of the Seventh Protocol refers not to innocence but to 'une erreur judiciaire' (in Spanish, 'un error judicial'). These expressions can be understood as equivalent to 'miscarriage of justice' in its broad sense, but are not obviously apt to denote proof of innocence.

g (5) The Secretary of State has not, to my mind, demonstrated a consensus of academic opinion in favour of his interpretation. It is true that Stavros in *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993) p 300, observes that:

h 'It is, therefore, possible for a person whose conviction has been quashed not to receive compensation where, instead of an acknowledgement of his clear innocence, a mere reasonable doubt arises as to his guilt.'

j But the only authority quoted for this observation is the explanatory report discussed above. A different view is taken by van Dijk and van Hoof in *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998) p 689, who write:

'In what follows the explanatory report seems to imply that reversal on the ground that new facts have been discovered which introduce a reasonable doubt as to the guilt of the accused is not enough. In our opinion this interpretation would be too strict, especially in view of the right to be

presumed innocent, laid down in article 6(2) of the Convention, which implies that reasonable doubt and clear innocence should lead to the same result.'

(6) It is, in my opinion, an objection to the Secretary of State's argument that courts of appeal, although well used to deciding whether convictions are safe, or whether reasonable doubts exist about the safety of a conviction, are not called upon to decide whether a defendant is innocent and in practice very rarely do so.

[10] Although it is, again, unnecessary for me to express a concluded opinion on the point, I am not at present inclined to accept Mr Pleming's submission that denial of compensation to a defendant acquitted in circumstances meeting the conditions of s 133 necessarily infringes the presumption of innocence protected by art 14(2) of the ICCPR and art 6(2) of the European Convention. In *WJH v Netherlands* Comm No 408/1990 (31 July 1992, unreported) the Human Rights Committee said, in para 6.2:

'With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in art 14(2), of the ICCPR, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; it accordingly finds that this provision does not apply to the facts as submitted.'

This was the view taken by the Irish Supreme Court, without reference to either the European Convention or the ICCPR, in *People (DPP) v Pringle (No 2)* [1997] 2 IR 225 at 237. But it does not appear to be the approach of the European Court of Human Rights. In *Sekanina v Austria* (1994) 17 EHRR 221 at 235 (para 30), the court, finding a violation of art 6(2) of the European Convention, said:

'The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.'

Later authorities distinguish between cases in which there has been no acquittal on the merits of the accusation (as in *Leutscher v Netherlands* (1997) 24 EHRR 181), when the state is permitted to continue to give effect to its suspicions of the defendant's guilt, and cases (such as *Rushiti v Austria* (2001) 33 EHRR 1331, *Lamanna v Austria* [2001] ECHR 28923/95, *Weixelbraun v Austria* (2001) 36 EHRR 799, *Hammern v Norway* [2003] ECHR 30287/96, and *O v Norway* [2003] ECHR 29327/95, where there has been an acquittal on the merits of the accusation and the state is not permitted to give effect to its suspicions of the defendant's guilt. This latter rule applies even though the defendant has been acquitted because of doubt about his guilt (*Rushiti v Austria* (2001) 33 EHRR 1331 at 1338–1339 (para 31)) and art 6(2) is not confined in its application to criminal proceedings (*Hammern v Norway* [2003] ECHR 30287/96 at para 44). If, as I think, this is the correct analysis of the European jurisprudence, it gives no assistance to Mr Mullen, since his acquittal was based on matters entirely unrelated to the merits of the accusation against him.

[11] In holding that the Secretary of State's appeal should succeed on the limited ground explained above, I have necessarily rejected Mr Mullen's main argument, accepted by the Court of Appeal, that any defendant whose conviction is reversed in circumstances meeting the conditions in s 133 is entitled to

a payment of compensation. But a subsidiary argument was advanced for Mr Mullen, relying on that part of Mr Hurd's statement in November 1985 which allowed for payment of compensation to those—

b 'who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.'

c The Secretary of State accepted in correspondence that Mr Mullen's conviction resulted from a trial which, but for the unlawful conduct of the British authorities, might not have taken place, and that the conviction had thus resulted from a serious default on the part of a public authority. But he did not consider that Mr Mullen had been 'completely exonerated', and Mr Mullen was notified:

d 'However, given the very unusual circumstances of this case, as noted above, in which the Court of Appeal quashed Mr Mullen's conviction for a very serious offence, even though he conceded that he had been "properly convicted", the Home Secretary is minded to conclude that it would be right to depart from his usual policy, and *not* to pay ex-gratia compensation in this case on the ground that it would be an affront to justice if someone who concedes that he was rightly convicted was compensated financially for an abuse of process.'

e Mr Mullen was invited to make representations why the Secretary of State should not depart from his usual policy, and did so, but the provisional decision was affirmed. The Divisional Court rejected Mr Mullen's challenge to the lawfulness of the Secretary of State's decision. The Court of Appeal did not address this argument.

f [12] In my opinion, the Divisional Court was right to reject this argument. First, serious though the default in this case certainly was, and right though the Court of Appeal (Criminal Division) was to quash the conviction, the default did not affect the fairness of the trial or throw doubt on the verdict which the jury, by a majority, returned. Secondly, the Secretary of State was in my view entitled to treat as exceptional a case in which there appeared to him to be no reason to doubt Mr Mullen's guilt. Thirdly, Mr Mullen did not lack means of obtaining redress otherwise than through payment of ex gratia compensation. Fourthly, I consider that the Secretary of State must enjoy some latitude in the administration of an ex gratia scheme, so long as he acts fairly, rationally, consistently and in a manner that does not defeat substantive legitimate expectations. His decision has not been shown to offend any of these rules.

h [13] I would allow this appeal and restore the order of the Divisional Court.

LORD STEYN.

1—THE SHAPE OF THE CASE

j [14] My Lords, in 1990 a jury convicted Mr Mullen of conspiracy to cause explosions. The judge sentenced him to 30 years' imprisonment. After he had been in prison for nearly ten years the Court of Appeal (Criminal Division) quashed his conviction on an appeal out of time on the ground that his deportation from Zimbabwe to the United Kingdom involved an abuse of process rendering the conviction unsafe (see [2000] QB 520, [1999] 3 WLR 777). The Court of Appeal concluded that the British Secret Intelligence Service,

assisted by the British police, had initiated and taken part in the deportation of Mr Mullen from Zimbabwe contrary to the law of that country and international law. It was no part of his case as deployed on appeal that he was innocent of the offence of which he was convicted or that, apart from the abuse of process, his trial was in any way flawed. Subsequently, Mr Mullen applied to the Secretary of State for compensation under s 133 of the Criminal Justice Act 1988 or, alternatively, under the *ex gratia* scheme, as set out in ministerial policy statements, on the basis that his conviction had been reversed on the ground that there had been a miscarriage of justice. The Secretary of State refused the application under s 133 and under the *ex gratia* scheme. The Divisional Court dismissed an application for judicial review under both heads (see [2002] EWHC 230 (Admin), [2002] 3 All ER 293, [2002] 1 WLR 1857). The Court of Appeal reversed the decision of the Divisional Court and held that the claimant was entitled to compensation under s 133 (see [2002] EWCA Civ 1882, [2003] 1 All ER 613, [2003] QB 993). The Court of Appeal, therefore, did not have to consider the alternative claim under the *ex gratia* scheme.

[15] In outline the issues before the House are whether, as a matter of law, the claimant is entitled to compensation under s 133 or, alternatively, under the *ex gratia* scheme. It is, however, necessary to set out the background in detail before it will be possible to consider the questions which arise.

II—THE DISCOVERY OF A BOMB FACTORY LINKED TO THE CLAIMANT

[16] In the early hours of 21 December 1988 a shooting incident took place in a street in Battersea. The police searched a flat at 8 Staplehurst Court, London. At the flat was found over 100lbs of Semtex, timing and power units for detonating various types of bombs, a number of ready made car bombs, blasting incendiary devices, mortar bomb equipment, firearms and ammunition. A further search in January 1989 revealed guides to the Diplomatic Service, the Civil Service, the Army and the House of Commons, newspaper cuttings, code words, documents and a coded list of items of terrorist equipment. The flat was, in effect, a bomb factory for an IRA active service unit.

[17] On 20 December 1988, shortly before the incident and the discovery of the bomb factory, the claimant (a man then aged 42 years), his girlfriend and his daughter, had flown to Zimbabwe. On 7 February 1989 the claimant was deported from Zimbabwe. He was brought back to the United Kingdom. At Gatwick Airport British police boarded the plane and arrested the claimant. He was charged with a number of offences, the material one being conspiracy to cause explosions likely to endanger life or cause serious damage to property, contrary to s 3(1)(a) of the Explosive Substances Act 1883 and s 7 of the Criminal Jurisdiction Act 1975.

III—THE TRIAL

[18] In June 1990 the trial against the claimant and a co-accused commenced at the Central Criminal Court before Hidden J and a jury. The co-accused was in due course acquitted and discharged and his position is not material to these proceedings. The prosecution alleged that the claimant was involved in a conspiracy to cause explosions. The prosecution contended that he acted as the quarter master for an active IRA unit. Specifically, the prosecution relied on the fact that he was responsible for renting the flat at 8 Staplehurst Court and other premises, and had assisted the bomb makers by supplying them with false birth certificates and driving licences, cars and banking facilities. The inventory of

- a bomb-making equipment was in his handwriting, and traces of Semtex were found in two of the cars which the claimant had bought. The claimant did not dispute the primary facts. The defence case was that the claimant had arranged the premises, banking facilities and false documentation for two men whom he believed to be involved in a credit card fraud. Giving evidence the claimant said that he had never been a member of the IRA or any other terrorist organisation.
- b He said that he did not know that he had become involved with the IRA until 14 December 1988 when the two men told him, whereupon he tried to withdraw from the scheme. He said that they had, however, fired a gun at him and made threats to his wife and child and thereafter he had acted only under duress. He had not, in interview, told the police about the events which he claimed had occurred on 14 December 1988.
- c [19] After a summing up by Hidden J, the jury retired to consider their verdict. Following their retirement the jury asked whether the claimant had been extradited to the United Kingdom. The intelligence services and police were aware that the claimant had been unlawfully deported. They did not tell prosecuting counsel how the presence of the claimant in the Central Criminal
- d Court was to be explained. The judge's knowledge was restricted to the evidence before him. The judge, quite correctly, on the evidence led could not enlighten the jury. He simply reminded the jury of the evidence. In any event, after two days of deliberations, and by a 10:2 majority the jury convicted the claimant of causing conspiracy to cause explosions as alleged in the main count. The judge sentenced the claimant to 30 years' imprisonment.
- e

IV—THE APPELLATE PROCEEDINGS

- [20] The claimant applied for leave to appeal against sentence but not conviction. On 4 November 1990 a single judge of the Court of Appeal (Criminal Division) refused the application. By letter dated 7 November 1990 the Criminal
- f Appeal Office reminded him that, although out of time, he could still apply for leave to appeal against conviction. He did not do so. On 21 March 1991 the Court of Appeal (Criminal Division) refused a renewed application for leave to appeal against sentence (see (1991) 12 Cr App R (S) 754).

- [21] Following the decision on 24 June 1993 of the House of Lords in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42 the
- g claimants' solicitors wrote on 27 January 1994 to the Crown Prosecution Service (CPS) asking for disclosure of all material relating to how the claimant came to be brought into the jurisdiction. The CPS refused to consider the request on the ground that no leave had been obtained.

- [22] On 21 July 1997 the claimant lodged an application for an extension of
- h time (approximately seven years) in which to apply for leave to appeal against conviction. Initially he had raised an issue about the correctness of the judge's directions on the issue of duress. He did not pursue this aspect. His case was confined to the argument that he was brought to trial in England as a result of the illegal collusion of the British and Zimbabwean authorities. On 30 September
- j 1997, leave was refused by a single judge of the Court of Appeal (Criminal Division). On 29 January 1998, the full court granted an extension of time in which to appeal, and leave to appeal against conviction on the grounds relating solely to the circumstances of the claimant's deportation from Zimbabwe. In November 1998, the Crown sought, and was granted, an ex parte hearing before the Court of Appeal in order to seek directions concerning public interest immunity. The Court of Appeal ordered the disclosure of a summary of

background information concerning the claimant's removal from Zimbabwe. This material was disclosed to the claimant's solicitors on 3 November 1998 and formed the basis of his subsequent appeal. On 13 and 14 January 1999, the claimant's appeal was heard by Rose LJ, Colman and Kay JJ. The claimant pursued one argument only, namely that the events which led to him being brought before the court in 1990 were such as to render his prosecution an abuse of the process of the court, and thus unsafe.

V—THE JUDGMENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)

[23] Rose LJ gave the judgment of the Court of Appeal. He described in detail the unlawful deportation of the claimant from Zimbabwe as a result of the collusion of British intelligence services and police with the Zimbabwean intelligence services and police. He stated:

'This court is firmly of the view that it must have been appreciated by the S.I.S., and probably by the police in Britain, that the vital element in the operation, the insulation of the defendant from any legal advice following his detention, was in breach of specific provisions of the law of Zimbabwe, or, at the least, was contrary to the defendant's entitlement as a matter of human rights. In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law. Finally, the events leading to the deportation as now revealed in the summary for disclosure were concealed from the defendant until last year. In all these circumstances, can it now be said that the conduct of the British authorities is causing the defendant to be deported in the manner in which he was, and in prosecuting him to conviction was, to use the words of Lord Steyn in *[R v Latif]* [1996] 1 All ER 353 at 361, [1996] 1 WLR 104 at 113, "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed?" This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from *[Bennett's case]* and *R v Latif*, very considerable weight must be attached.' (See [2000] QB 520 at 535–536, [1999] 3 WLR 777 at 789; my emphasis.)

He concluded:

'In these circumstances, the discretion has to be exercised on the basis that, but for the unlawful manner of his deportation, he would not have been in this country to be prosecuted when he was, and there was a real prospect that he would never have been brought to this country at all. Additionally,

a the need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure clearly is a matter to be taken into account, on the exercise of this court's discretion following a conviction. In these circumstances, we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was preceded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceedings then being stayed. Inasmuch as that discretionary exercise now falls to be carried out by this court, we conclude that, by reason of this abuse of process, the prosecution and therefore the conviction of the defendant were unlawful.' (See [2000] QB 520 at 536, [1999] 3 WLR 777 at 790; my emphasis.)

b It is therefore clear that the Court of Appeal relied on a combination of the abuse of executive power and the flawed trial process involving in the words of Rose LJ the concealment of the events leading to the deportation. The Court of Appeal held that the conviction was unlawful, and unsafe within the meaning of s 2 of the Criminal Appeal Act 1968 (as substituted by s 2 of the Criminal Appeal Act 1995). The claimant was released after almost ten years in custody.

VI—THE CLAIM FOR COMPENSATION

e [24] On 25 February 1999 the solicitors for the claimant applied to the Secretary of State for compensation. On 6 March 2000 the Secretary of State rejected the application.

VII—COMPENSATION FOR MISCARRIAGES OF JUSTICE

f [25] The procedure adopted in respect of ex gratia payments in the case of miscarriages of justice was described by the Home Secretary (Mr Roy Jenkins) in an written answer on 29 July 1976 (Hansard, 916(2) HC Official Report (5th series) cols 328–330). He stated:

g 'A decision to make an ex gratia payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.'

h Under this policy the Secretary of State exercised a broad discretionary power.

j [26] Gradually a fundamental human right to compensation for miscarriages of justice evolved. The Universal Declaration of Human Rights (Paris, 10 December 1948; UNTS 2 (1949); Cmd 7226) made no provision for such a fundamental right. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the ECHR) in its original form also did not contain such a provision. The American Convention on Human Rights 1969, contained in art 10 a weak provision which left it to states to make suitable provision for compensation in accordance with law. The breakthrough came with the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmdnd 6702) (ICCPR).

[27] On 19 December 1966 the ICCPR was adopted by the General Assembly of the United Nations and opened for signature at New York. On 20 May 1976 the United Kingdom ratified the ICCPR. On 20 August 1976—three weeks after Mr Jenkins' statement—the required number of ratifications was attained and the ICCPR entered into force. Article 14 contained two relevant provisions, namely:

'2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law ...

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned *on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice*, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.' (My emphasis.)

From 1976 to 1985 the United Kingdom purported to fulfil its international obligations under art 14(6) under the extant *ex gratia* scheme.

[28] On 29 November 1985 the Home Secretary (Mr Douglas Hurd) formalised the position by a policy statement in the House of Commons. He stated (Hansard, 87 HC Official Report (6th series) cols 691–692):

'There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application *ex gratia* payments from public funds to persons who have been detained in custody as a result of a wrongful conviction. In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following a reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The International Covenant on Civil and Political Rights [art 14(6)] provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is provided that the non-disclosure of the unknown fact in time is wholly or partly attributable to him". I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority. There may be exceptional

a circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was
b unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought ...'

There was international pressure on the United Kingdom to put its obligations under art 14(6) on a statutory footing: see McGoldrick *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) p 412. The result was s 133 of the 1988 Act. It provides as follows:

(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows *beyond reasonable doubt* that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

(4A) In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to—(a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction; (b) the conduct of the investigation and prosecution of the offence; and (c) any other convictions of the person and any punishment resulting from them.

(5) In this section "reversed" shall be construed as referring to a conviction having been quashed—(a) on an appeal out of time ...' (My emphasis.)

It will be noted that the language closely follows art 14(6). But for the word 'conclusively' in art 14(6) s 133 substituted the words 'beyond reasonable doubt'. As a matter of law this enactment replaced pro tanto the policy statement of Mr Hurd, viz to the extent that it set out art 14(6). Section 133 was amended in 1995 (s 28 of the Criminal Appeal Act 1995) and 2000 (Terrorism Act 2000) in respects not material to this appeal.

[29] On 17 June 1997 the Home Secretary (Mr Jack Straw) made a policy announcement in which he stated that he would continue to be bound by the terms of Mr Hurd's policy statement of 29 November 1985 (Hansard, 87 HC Official Report (6th series) cols 691–692. This statement has, however, to be read

subject to the qualification already mentioned, viz that s 133 of the 1988 Act has replaced the reference to art 14(6) in the earlier statement.

VIII—THE REASONS FOR THE DECISION

[30] By a letter dated 6 March 2000 the Home Office responded to the claimant's claim for compensation. The letter stated:

'The Home Secretary has personally considered this case very carefully. In his view, there is no "miscarriage of justice" for the purpose of section 133(1) where, as here, a defendant has conceded that he was "properly convicted" of a very serious offence, notwithstanding that, as the Court of Appeal found, the circumstances in which he was brought to the UK were unlawful. Accordingly, the Home Secretary has decided that Mr Mullen is not eligible for compensation under the statutory scheme.'

The letter added:

'I turn now to the ex-gratia arrangements. In accordance with the terms of the 1985 statement, there are, broadly, two categories where the Home Secretary is prepared to pay ex-gratia compensation to a person who has spent time in custody following a wrongful conviction or charge. These are (1) where he is satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority (the first limb of the statement); or (2) where there are other exceptional circumstances, in particular the emergence, at trial or on appeal within time, of facts which completely exonerate the accused person (the second limb). The Home Secretary accepts that Mr Mullen's conviction resulted from a trial which, but for the involvement of the British authorities in securing his unlawful deportation from Zimbabwe, might not have taken place; and that this, in principle, brings him within the first limb of the 1985 statement. (He does not consider that Mr Mullen has been "completely exonerated" or that there are any "other exceptional circumstances" for the purpose of the second limb.) However, given the very unusual circumstances of this case, as noted above, in which the Court of Appeal quashed Mr Mullen's conviction for a very serious offence, even though he conceded that he had been "properly convicted", the Home Secretary is minded to conclude that it would be right to depart from his usual policy, and *not* to pay ex-gratia compensation in this case on the ground that it would be an affront to justice if someone who concedes that he was rightly convicted was compensated financially for an abuse of process. Before making a final decision on Mr Mullen's eligibility for compensation under the ex-gratia scheme, however, the Home Secretary is prepared to consider any representations you may wish to make as to why there should be no departure from his stated policy in this case. I would be grateful if any such representations could be sent to this office by 6 April.'

On 4 May 2000 the claimant's solicitors disputed the correctness of the Home Secretary's position. On 15 March 2001 the Home Office stated in the decision letter that the Home Secretary took the view that the claimant was not the victim of a miscarriage of justice within the meaning of s 133. The letter added that, having taken into account the letter of 4 May 2000, the Home Secretary remains of the view 'that he should depart from his usual policy in this case and should not make an ex gratia payment of compensation to Mr Mullen'.

IX—THE DECISION OF THE DIVISIONAL COURT

a [31] The claimants' application for judicial review came before the Divisional Court (Simon Brown LJ and Scott Baker J) ([2002] 3 All ER 293, [2002] 1 WLR 1857). The court held that under s 133 of the 1988 Act a miscarriage of justice was the wrongful conviction of an innocent defendant. The claimant did not come within this category. The court further held that the Secretary of State was b entitled to depart from his stated policy with regard to the payment of ex gratia compensation. His decision was neither unfair nor irrational. The application for judicial review was dismissed.

X—THE DECISION OF THE COURT OF APPEAL

c [32] The claimant appealed to the Court of Appeal ([2003] 1 All ER 613, [2003] QB 993). Schiemann LJ (with whom Rix LJ and Pumfrey J agreed) gave the only reasoned judgment. He helpfully summarised his conclusions as follows:

d '[42] In summary therefore I consider that: (i) the ICCPR provides for compensation in a case like the present as the travaux préparatoires indicate; (ii) even if that is wrong, the ordinary use of English indicates that the phrase "miscarriage of justice" is wide enough to embrace circumstances such as the present; (iii) there is nothing to prevent Parliament when giving effect to the United Kingdom's international obligations from giving the citizen more rights than those obligations require that he be given; (iv) in a case where this court has quashed a conviction the presumption of innocence requires that Acts of Parliament e are to be interpreted on the basis that it is not intended that the state should proceed on the basis that a wrongly convicted man is guilty. Had Parliament intended that compensation should only be available to those who could prove themselves innocent it would have said so clearly. In the present case there is not even such an implication.

f [43] I therefore respectfully differ from the Divisional Court. Our criminal law system, like that of most other states, does not provide for proof of innocence. I do not consider that Parliament intended proof of innocence to be a prerequisite of entitlement to compensation.

g [44] I would therefore allow the appeal on the basis that Mr Mullen is entitled to compensation under s 133. In those circumstances it is unnecessary to consider his arguments on discretionary compensation.'

XI—THE ISSUES

h [33] The agreed statement of facts and issues defines the issues as follows: (a) the true meaning of the phrase 'miscarriage of justice' in s 133(1) of the 1988 Act; (b) whether an unsafe conviction resulting from an abuse of process preceding an otherwise fair and properly conducted trial amounts to a 'miscarriage of justice' within the meaning of s 133(1) of the 1988 Act; (c) whether i it was irrational, or otherwise unlawful, of the Secretary of State to depart from his own ex gratia policy in this case. j

XII—THE CLAIM UNDER SECTION 133

The principal contentions

[34] The contentions of the parties can be stated shortly. For the Home Secretary Mr Sales submitted that the concept of 'a miscarriage of justice' in s 133

extends only to cases where a person who was convicted of an offence is later shown beyond reasonable doubt, by virtue of some new or newly discovered fact, to have been innocent of those offence of which he was convicted. For Mr Mullen, Mr Pleming submitted that in all cases where a conviction has been quashed as unsafe, the presumption of innocence requires the defendant to be treated as innocent and therefore it follows that for the purposes of s 133 he was the victim of a miscarriage of justice.

Two preliminary points

[35] It is now necessary to examine the central issue in some detail. Two preliminary points must be explained. Firstly, it is clear that in enacting s 133 Parliament intended to give effect to the international obligations of the United Kingdom under the ICCPR in domestic law. International pressure prompted the legislation. The language of s 133 closely tracks the provisions of art 14(6). The observation of Schiemann LJ in the Court of Appeal that there is nothing to prevent Parliament when giving effect to the United Kingdom's international obligations from giving the citizen more rights than those obligations require that he be given is, of course, correct. But it is not in point in the present case. There is no foundation whatever in the language of art 14(6) and s 133, or by reference to any relevant external aids to construction, for the suggestion that Parliament intended to use the words 'miscarriage of justice' in a wider sense than it bears in art 14(6). Parliament intended to give effect, by using the words 'miscarriage of justice' in s 133, to the international obligations under art 14(6) and no more. That is hardly surprising: there was in the United Kingdom in place an ex gratia scheme, duly announced in Parliament, which was apt to cover cases outside the scope of s 133.

[36] The second preliminary point is common ground. The concept 'miscarriage of justice' in art 14(6) is an autonomous convention concept. It must be construed 'unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptance' (see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048 at 1052, [1978] AC 141 at 152 per Lord Wilberforce). The court 'must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning' (see *R v Secretary of State for the Home Dept, ex p Adan* [2001] 1 All ER 593 at 605, [2001] 2 AC 477 at 517). In my view Schiemann LJ erred in relying on what he described as 'the ordinary use of English' and in saying that the 'phrase "miscarriage of justice" is wide enough to embrace circumstances such as the present', ie where the guilt of the claimant is not in doubt but he should not have been unlawfully deported to stand trial in England. The Court of Appeal ought to have concentrated on the autonomous meaning of the concept in art 14(6). For the same reason the observations of Sir John May in his *Return to an address of the honourable the House of Commons dated 30 June 1994 for a Report on the Inquiry into the Circumstances surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974* (1994) (HC 449) pp 298–299 (paras 21.3–21.4) are concerned with the use of the concept in a different domestic context and certainly do not merit the weight counsel for Mr Mullen put on them in the relevant international context. On a broader basis I would add that generally in law the inquiry into what words mean is of no interest. The response of a court to such a generalised and unhelpful question must always be: 'In what particular context?' And here the only

a relevant context is the international meaning of the words in art 14(6) upon which s 133 is based.

The impact of art 14(2) on art 14(6)

b [37] The Court of Appeal found support for its conclusion in the presumption of innocence provided for in art 14(2). It led the Court of Appeal to conclude in effect that a consideration of art 14(2) by itself rules out an interpretation of s 14(6) giving a right to compensation to only those who are innocent of the offence. Counsel for Mr Mullen made this a main plank of his argument before the House. He argued in effect that art 14(2) necessarily impresses a meaning on art 14(6) which recognises that anybody whose conviction was quashed as being 'unsafe' (a technical concept under s 2(1)(a) of the Criminal Appeal Act 1968) was a victim of a miscarriage of justice under art 14(6) and therefore under s 133. Before I consider the arguments on art 14(6) and s 133 it will be convenient to examine this point.

d [38] It is, of course, right that provisions of the ICCPR, in this case art 14(2) and (6), must be read together as part and parcel of the scheme of the covenant (see *Maaouia v France* (2000) 9 BHRC 205). The primary role of art 14(2) is to protect the defendant in the trial process. It has, however, also a role in protecting a defendant from assertions of guilt by the state or its agencies after his acquittal. All this is the obvious field of application of the presumption of innocence. It does not follow that it can influence the scope of the specific duty of the state to compensate victims of miscarriages of justice. On the contrary, the obvious and sensible construction is that art 14(6) is a *lex specialis* and that the general wording of art 14(2) does not warrant either an expansive or a restrictive reading of art 14(6). The latter provision creates an independent fundamental right governed by its own express limits. This is the view upheld by the international tribunal charged with the implementation of the ICCPR. In *WJH v Netherlands* Comm No 408/1990 (31 July 1992, unreported) the Human Rights Committee said in para 6.2:

g 'With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in art 14(2) of the ICCPR, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; it accordingly finds that this provision does not apply to the facts as submitted.'

h [39] Counsel for Mr Mullen relied, however, on decisions of the European Court of Human Rights (the European Court) in support of his submission to the contrary. The ECHR contains in art 6(2) a presumption of innocence provision in the same terms as art 14(2) of the ICCPR. By art 3 of the Seventh Protocol dated 22 November 1984 a fundamental right in respect of compensation for wrongful conviction was introduced. Article 3 reads as follows:

j 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved

that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.' (My emphasis.)

Subject to the addition of the underlined words to the text of art 14(6) of the ICCPR the wording of art 3 follows verbatim the language of art 14(6).

[40] The United Kingdom has not so far signed or ratified the Seventh Protocol. It is, however, relevant to an understanding of the European jurisprudence.

[41] *Sekanina v Austria* (1994) 17 EHRR 221 is the first in a line of Austrian cases concerning the same compensation scheme. The applicant was detained on remand for about a year on suspicion of murdering his wife. He was acquitted by a jury. He applied for compensation for costs incurred in his defence and pecuniary damage sustained during his detention under the relevant Austrian legislation. Section 2(1)(b) of the Compensation in Criminal Cases Act 1969 provides for a right to compensation—

'where the injured party has been remanded in custody or placed in detention by a domestic court on suspicion of having committed an offence which is liable to criminal prosecution in Austria ... and is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence is dispelled or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested ...'

On the ground that suspicion remained concerning the applicant's involvement in his wife's death the Austrian authorities rejected the claim. The European Court (at 235 (para 30)) found this to be a breach of art 6(2) on the basis that—

'the voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to reply on such suspicions once an acquittal has become final.'

The applicant's case did not involve a claim arising from art 3 of the Seventh Protocol. Indeed the court (at 233 (para 25)) was careful to emphasise that—

'In addition, despite certain similarities, the situation in the present case is not comparable to that governed by Article 3 of Protocol No 7, which applies solely to a person who has suffered punishment as a result of a conviction stemming from a miscarriage of justice.'

Rushiti v Austria (2001) 33 EHRR 1331 concerns the same Austrian provisions. The European Court (at 1337 (para 27)) noted that—

'Austrian legislation and practice link the two questions—the criminal responsibility of the accused and the right to compensation—to such a degree that the decisions on the latter issue can be regarded as a consequence and, to some extent, the concomitant of the decision on the former.'

Again the case concerned compensation for time spent on remand, prior to an acquittal by a jury. Article 3 of the Seventh Protocol was not relied upon. A violation of art 6(2) was found (at 1338–1339 (para 31)) on the basis that—

'the general aim of the presumption of innocence ... is to protect the accused against any judicial decision or other statements by State officials

a amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law.'

b It was held that once an acquittal has become final, albeit an acquittal giving the accused the benefit of the doubt in accordance with art 6(2), the voicing of any suspicions of guilt, including those expressed in the reason for the acquittal, is incompatible with art 6(2). *Lamanna v Austria* [2001] ECHR 28923/95 and *Weixelbraun v Austria* (2001) 36 EHRR 799 both concern similar Austrian legislation and similar factual circumstances as *Sekanina v Austria* and *Rushiti v Austria*. On the basis of the latter decisions a breach of art 6(2) was found in both cases. The decisions are not relevant to the issue presently under consideration. The interaction between art 6(2) and art 3 of the Seventh Protocol was not under consideration. The reason was that in Austrian legislation there was a wider right to compensation than provided by art 3 of the Seventh Protocol.

c [42] The applicant in *Hammern v Norway* [2003] ECHR 30287/96, was acquitted by a jury at trial and he then sought compensation for the period of his detention on remand. The test applied was whether 'it is shown to be probable that he did not perform the act that formed the basis for the charge' (art 444 of the Code of Criminal Procedure, Norway). The application was refused. The applicant appealed to the European Court alleging that Norway was in breach of art 6(2) of the ECHR. The European Court held that there were no grounds for distinguishing Mr Hammern's case from those of *Sekanina v Austria* and *Rushiti v Austria*. Accordingly art 6(2) was applicable and there was a violation of it. Again, the court was not called on to consider the interaction between art 6(2) and art 3 of the Seventh Protocol.

d [43] Much was made by Mr Sales of *Leutscher v Netherlands* (1997) 24 EHRR 181. In that case the European Court rejected an application under art 6(2) of the ECHR and Dutch law on the ground that a suspicion still attached to the applicant despite his acquittal on appeal. Again, however, the link between art 6(2) and art 3 of the Seventh Protocol was not considered.

e [44] In my view the European jurisprudence cited throws no light on the question whether art 6(2) of the convention justifies an expansive interpretation of art 3 of the Seventh Protocol, or the corresponding question in respect of art 14(2) and (6) of the ICCPR. In my view the principled analysis already set out must prevail. Article 14(6) of the ICCPR (and therefore s 133 of the 1988 Act), are in the category of *lex specialis* and the general provision for a presumption of innocence does not have any impact on it.

f Textual analysis

j [45] It is now possible to examine the interpretation of art 14(6) on its own terms. The starting point must, of course, be the language and structure of art 14(6) as enacted in United Kingdom law by s 133. It is to be noted that a case where a defendant was wrongly convicted (eg on the ground that the circumstantial evidence did not exclude the reasonable possibility of innocence) and then had his conviction quashed on an appeal lodged within ordinary time limits does not qualify for compensation. There was no intention to create a right to compensation in favour of victims in this category. All cases in this category are excluded whatever the grounds on which the appeal is allowed and whatever the cause of the wrongful conviction. It follows that there was no overarching purpose of compensating all who are wrongly convicted. In cases of a wrongful

conviction quashed on an appeal out of time an indispensable pre-condition is that '(1) a new or newly discovered fact (2) shows conclusively that there has been a miscarriage of justice' (numbering added). If there is no new or newly discovered fact, but simply, for example, a recognition that an earlier dismissal of an appeal was wrong, the case falls outside art 14(6). That is so, however palpable the error in the first appellate decision may have been, and however severe the punishment that the victim suffered unjustly. These considerations demonstrate that the fundamental right under art 14(6) was unquestionably narrowly circumscribed.

[46] The requirement that the new or newly discovered fact must show conclusively (or beyond reasonable doubt in the language of s 133) 'that there has been a miscarriage of justice' is important. It filters out cases where it is only established that there *may* have been a wrongful conviction. Similarly excluded are cases where it is only probable that there has been a wrongful conviction. These two categories would include the vast majority of cases where an appeal is allowed out of time. In agreement with Simon Brown LJ in the Divisional Court ([2002] 3 All ER 293 at [24]) I regard these considerations as militating against the expansive interpretation of 'miscarriage of justice' put forward on behalf of Mr Mullen. They also demonstrate the implausibility of the extensive interpretation of Schiemann LJ: it entirely erodes the effect of evidence showing 'conclusively that there has been a miscarriage of justice'. While accepting that in other contexts 'a miscarriage of justice' is capable of bearing a narrower or wider meanings, the only relevant context points to a narrow interpretation, viz the case where innocence is demonstrated.

[47] The French text of the ICCPR is also relevant. It reads as follows:

'Lorsqu'une condamnation pénale définitive est ultérieurement annulée ou lorsque la grâce est accordée parce qu'un fait nouveau ou nouvellement révélé prouve qu'il s'est produit une erreur judiciaire, la personne qui a subi une peine en raison de cette condamnation sera indemnisée, conformément à la loi, à moins qu'il ne soit prouvé que la non-révélation en temps utile du fait inconnu lui est imputable en tout ou partie.'

For 'shows conclusively' the French text uses the word 'prouve'. For 'a miscarriage of justice' the French text uses the word 'une erreur judiciaire'. The latter is a technical expression indicating a miscarriage of justice in the sense of the conviction of the innocent. France acceded to the ICCPR in 1981. France has given effect to its international obligations under art 14(6) by art 626 of the Code de Procédure Pénale which provides as follows:

'Sans préjudice des dispositions des deuxième et troisième alinéas de l'article L. 781-1 du code de l'organisation judiciaire, un condamné reconnu innocent en application du présent titre a droit à réparation intégrale du préjudice matériel et moral que lui a causé la condamnation. Toutefois, aucune réparation n'est due lorsque la personne a été condamnée pour des faits dont elle s'est librement et volontairement accusée ou laissé accuser à tort en vue de faire échapper l'auteur des faits aux poursuites.'

From the words 'reconnu innocent' in art 626, it is clear that in France the obligation in art 14(6) was narrowly construed by the legislature, viz as extending only to a miscarriage of justice in the sense of the conviction of an innocent person. If Schiemann LJ's extensive interpretation of 'miscarriage of justice' is

a right, art 626 is too narrow to fulfil the international obligations of France under art 14(6). That I regard as quite implausible. This factor tends to reinforce the view at which I have arrived. In any event, the French dimension establishes state practice, which is relevant to treaty construction: art 31(3)(b) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964).

b [48] This is the view which I would expect to prevail if the European Court is called upon to interpret art 3 of the Seventh Protocol. When that happens the European Court will have before it the explanatory report prepared by the 21-member Steering Committee for Human Rights appointed by the Council of Europe. It accompanied the Seventh Protocol when it was published. The Committee of Ministers emphasised in September 1984 'the importance of the explanatory report for the purpose of interpreting the protocol'. In para 25 the Steering Committee observed about art 3:

d 'The intention is that states would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge.'

e It is true that the introduction to the explanatory report (para 4) states:

f 'It was understood that participation of member states in this Protocol would in no way affect the interpretation or application of provisions containing obligations, among themselves, or between them and other States, under any other international instrument.'

g Such cautionary language is understandable. But the explanatory report has great persuasive value in the process of interpretation. For example, it is a basis on which states sign and ratify the Protocol. Inevitably, state practice will be based on the explanatory report, and in this way it becomes directly relevant to the interpretation of art 14(6): see art 31(3)(b) of the Vienna Convention. Bearing in mind that one is considering an autonomous concept, which must apply in the legal systems of many states, this interpretation is in no way surprising. It is likely to prevail in European jurisprudence. If this is right I regard it as implausible that one can assign to the much earlier 1966 text of the ICCPR a more expansive meaning.

h [49] I would add one further perspective. The explanatory report was available from 1984. It was available to the British authorities, draftsmen and Parliament before s 133 was enacted. It was relevant to the treaty background of s 133. The relevant comment in para 25 would, however, have come as no surprise.

j *Travaux préparatoires*

[50] That brings me to the reliance of the Court of Appeal on the travaux préparatoires of the ICCPR in respect of art 14(6). The principle that a court may in appropriate cases have regard to travaux préparatoires in construing a treaty is clear. But it is also settled that such an aid is only helpful if the materials clearly and indisputably point to a definite treaty intention: see

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696 at 703, [1981] AC 251 at 278 per Lord Wilberforce). In *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] 1 All ER 495 at 509, [1998] AC 605 at 623, I cited the judgment of Lord Wilberforce and added: 'Only a bull's eye counts. Nothing less will do'.

[51] In the present case Schiemann LJ made the following observations about the travaux préparatoires:

[14] ... The ICCPR was many years in preparation, drafting having started in 1947. For present purposes it suffices to pick the trail up at the 14th session of the Third Committee in 1959. Then, the words which now appear in art 14(6) were attacked by the United Kingdom as being objectionable on the ground that they allowed compensation to persons who were "clearly guilty but whose conviction had been annulled for reasons of form of procedure" (see p 313).

[15] Other representatives accepted that this was implicit in the words but felt that this was not objectionable. An Argentinian amendment to suggest that "the judicial recognition of the innocence of a convicted person shall confer on him the right to request an award of compensation" was rejected and the present wording was adopted (see p 314).

[16] All that seems to indicate that all were agreed that the concept of miscarriage of justice was used in its wider rather than in its narrower sense. There is absolutely no suggestion that the parties understood that there was a requirement that innocence be proved.

[17] I would thus reject the conclusion of the Divisional Court that art 14(6) of the ICCPR uses the words "miscarriage of justice" in such a narrow sense.'

It is necessary to examine these conclusions with the aid of Bossuyt's *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (1987), published by Martinus Nijhoff, as well as the materials produced by counsel. I start with general matters. What became art 14(6) was discussed at four sessions of the Human Rights Committee, viz in 1949 (the 5th session), 1950 (the 6th session), 1952 (the 8th session) and 1959 (the 14th session). At such an international conference it is common experience that many contradictory views are expressed. The positions of representatives on issues of substance and drafting changes are initially often widely divergent. And views change in the course of discussions and then eventually converge in the adoption of a final text. This is, however, rarely an orderly and harmonious process. Back stage deals are of the order of the day. In any event rejection of a proposal may be accounted for by a number of different reasons, eg disagreement on the substance of it, disagreement with the drafting technique, the view that the matter is already satisfactorily dealt with in the existing text, and so forth. Similarly, approval of a proposal may be inspired by different views as to what it means, or even the belief that pragmatically it should be adopted in order to move on, leaving arguments about its meaning to be settled later. An insight into the flavour of proceedings at an international conference is given in *Fothergill's case* [1980] 2 All ER 696 at 707-708, [1981] AC 251 at 283 by Lord Diplock as follows:

'With some personal experience of international conferences of this kind, I should not attach any great significance to the fact that two delegates in withdrawing an amendment to art 26 which would have included in the article an express reference to partial loss as well as to damage said, without

a contradiction by any other delegates who happened to be present at that time, that they did so on the understanding that partial loss was included in the expression damage. Machiavellism is not extinct at international conferences.'

b It is, therefore, often extraordinarily difficult to infer the will of a composite body, such as an international conference, except from the language actually adopted. That is certainly the case here.

[52] What I have described as a typical process of the evolution of a provision at an international conference neatly fits the present case. The discussions were often unstructured. Much of the discussions centred not on the issue of the desirability of a fundamental right to compensation but on the technical problems associated with finding a solution which could be accommodated across the spectrum of national systems. Divergent views were certainly expressed in favour of a wider and narrow right to compensation. The views were, however, not as polarised as at first appears. That is demonstrated by the fact that some countries supported views in both categories. A realistic reading of the discussions does not warrant a conclusion that there was a consensus, or even a majority view, in favour of any view other than the eventual view that art 14(6) should be adopted. Schiemann LJ ([2003] 1 All ER 613 at [15], [2003] QB 993 at [15]) relied on what he described as an Argentinian amendment (it was in fact an Israeli/ Afghan amendment), which was rejected. It is impossible to infer why the amendment was rejected. It may have been because some thought that art 14(6) already made clear that compensation would only be payable where innocence was established or because the wording of the amendment was regarded as unsatisfactory. Schiemann LJ's observed that 'all were agreed that the concept of miscarriage of justice was used in its wider than in its narrower sense'. He does not explain what the wider sense is: he appears to conclude that 'miscarriage of justice' covers every case where wrongful conviction is quashed, eg even a case where a conviction is quashed on purely technical grounds, subject to retrial. In my view this interpretation of the travaux is certainly not borne out by a careful study of the discussions. If Schiemann LJ thought that there was a via media to be found in the travaux he does not identify and explain it. And counsel did not suggest it.

g [53] Schiemann LJ may have been led astray by the importance he attached to an observation by the United Kingdom delegate in the 1959 session which he mentioned. The views of the delegate as to the meaning of what became art 14(6) are irrelevant. And there is nothing to warrant the conclusion that there was a consensus, or a majority view, along the lines of the statement of the United Kingdom delegate. Mr Fleming made a similar point. He cited in full the statement of Mr Hoare, representing the United Kingdom, who during the earlier 1952 session said:

j 'Under the existing paragraph persons would be entitled to compensation not only if it was found that they had been unjustly convicted, but even if the conviction was discovered to be invalid because of a technicality; and it was surely going too far to compensate a man, who might have been guilty in the first place, simply because the proceedings against him had not been properly conducted. It was because paragraph 3 [later art 14(6)] was a wholly inadequate statement of the circumstances in which compensation should be granted that he wished to see it deleted.'

Mr Hoare's individual views are irrelevant. In any event, Mr Hoare's concerns were not directly addressed by delegates. Only very much later was the United Kingdom proposal to delete what became art 14(6) defeated in a vote. What the reasons of those who voted for the rejection of the proposal were we do not know. It is probable that there were different reasons but we shall never know for certain. It is impossible to infer any consensus or majority view for the rejection of Mr Hoare's statement. a

[54] I agree with Lord Bingham of Cornhill (at [9](2)) that the travaux disclose no consensus of opinion on the meaning of the expression 'a miscarriage of justice'. The travaux are neutral and do not assist in any way on the proper construction of art 14(6). b

A workable interpretation c

[55] Schiemann LJ observed that our criminal law system 'does not provide for proof of innocence'. Sometimes compelling new evidence, eg a DNA sample, a forensic test result, fingerprints, a subsequent confession by a third party who was found in possession of the murder weapon, and so forth, may lead to the quashing of a conviction. The circumstances may justify the conclusion beyond reasonable doubt that the defendant had been innocent. Sometimes the Court of Appeal makes it clear (see *R v Fergus (Ivan)* (1994) 98 Cr App R 313 at 325) and sometimes it can be inferred from the circumstances. The interpretation which I have adopted is therefore perfectly workable. That is why France adopted it and why the Committee of Experts felt able to put it forward as the correct interpretation of art 3 of the Seventh Protocol. d

Conclusion on art 14(6)

[56] I conclude that the autonomous meaning of the words 'a miscarriage of justice' extends only to 'clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent' as it is put in the explanatory report. This is the international meaning which Parliament adopted when it enacted s 133 of the 1988 Act. e

[57] Mr Mullen can certainly say that he was a victim of a failure of the trial process in as much as the circumstances in which he was deported from Zimbabwe were deliberately concealed from him before and at his trial. If it had been disclosed the trial would have been stopped. But Mr Mullen was not innocent of the charge. On the contrary, the conclusion is inescapable that he knowingly lent assistance to an active IRA unit. He is therefore not entitled to compensation under s 133. f

XIII—THE CLAIM UNDER THE EX GRATIA SCHEME g

[58] In the alternative counsel for Mr Mullen submitted that the Home Secretary erred in his understanding and application of the ex gratia scheme, and that his decision not to award compensation was irrational. h

[59] The Home Secretary acknowledged in his decision letter that the case falls within the first limb of the 1985 statement. No question of a misconstruction of the policy arises. i

[60] The Home Secretary decided to depart from the policy. He did so in the light of the circumstances set out in the judgment of the Court of Appeal (Criminal Division). Was he entitled to depart from the policy? In the Divisional Court Simon Brown LJ observed ([2002] 3 All ER 293 at [32]):

a "There are, of course, cases in which substantive legitimate expectations have been built up where nowadays public authorities will be required to honour their statements of policy or intention. All this is exhaustively and authoritatively discussed by the Court of Appeal in *R v North and East Devon Heath Authority, ex p Coughlan* (*Secretary of State for Health intervening*) [2000] 3 All ER 850 at 868–880, [2001] QB 213 at 238–251 (paras 51–82 inclusive). As, b however, is there made plain, the question for the court is ultimately one of reasonableness and fairness. Would a departure from policy represent an abuse of power? That is a question to be asked in the circumstances of the particular case. It cannot in my judgment be suggested that the Secretary of State can never in any circumstances depart from his stated policy with regard to the payment of ex gratia compensation. He should, of course, give c the person concerned an opportunity to say why in his particular case the policy should be applied rather than disappplied. But no problem of that sort arises here. The opportunity was given and taken. The Secretary of State was simply not persuaded.'

I am in respectful agreement with these observations.

d [61] On behalf of the Home Secretary counsel pointed out that the European Court has relied upon the fact of the involvement of individuals in a terrorist bombing conspiracy as a good reason for not awarding compensation for established breaches of art 2 of the ECHR (right to life), even though its usual practice would be to award monetary compensation in such case (see *McCann v UK* (1996) 21 EHRR 97 at 177–178 (para 219) (the 'Death on the Rock' case); see e also *McKerr v UK* (2002) 34 EHRR 553 at 616–617 (paras 180–181)). By analogy the Home Secretary cannot be said to have been irrational in deciding to exercise his discretion as he did. I would accept that it was open to the Home Secretary to conclude, in his discretion, that he should not pay public moneys in respect of the quashing of the conviction, where the appeal proceeded on the basis that if it had f been fair to try Mr Mullen, he had been properly convicted. This further reinforces the view that the argument that the Home Secretary acted irrationally must be rejected.

[62] The alternative argument under the ex gratia scheme must be rejected.

g XIV—DISPOSAL

[63] I would allow the appeal of the Home Secretary.

LORD SCOTT OF FOSCOTE.

[64] My Lords, I have had the advantage of reading in advance the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn. h Both have concluded that the appeal of the Home Secretary should be allowed but, in coming to that conclusion, have expressed different views as to the correct scope to be given to the words 'a miscarriage of justice' in s 133(1) of the Criminal Justice Act 1988. Lord Steyn would allow the words to extend only to 'clear cases of miscarriage, in the sense that there would be acknowledgment j that the person concerned was clearly innocent' (see [56], above). Lord Bingham, on the other hand, would give a wider scope to the words and allow them to cover 'failures of the trial process' (see [8], above).

[65] My Lords I, too, would allow this appeal for the reasons given by my noble and learned friends. Even if the wider scope which Lord Bingham would allow to s 133(1) is correct, none the less the respondent is unable to bring his claim for compensation within the section. The reason his conviction was

reversed by the Court of Appeal was not because there had been any failure in the trial process. It was because, prior to the commencement of the trial process, there had been a serious abuse of executive power which had led to the removal of the respondent from Zimbabwe to this country and had thus enabled his trial to take place. I agree with my noble and learned friends that the respondent's conviction was not reversed on the ground that there had been a 'miscarriage of justice' within the meaning of those words in s 133(1) of the 1988 Act. a
b

[66] It is strictly unnecessary for the disposal of this appeal for your Lordships to express a concluded view as to whether s 133(1) does have the wider scope suggested by Lord Bingham and I shall not do so. It should be borne in mind, however, that the failure of a claimant for compensation to bring his claim within s 133(1), and thereby to establish his entitlement to compensation, will not necessarily lead to the failure of the claim. The claimant may, as a second string to his bow, seek to persuade the Home Secretary to make a discretionary payment of compensation pursuant to the ex gratia scheme. In most, if not all, of the miscarriage of justice cases in which Lord Steyn would refuse but Lord Bingham would allow a s 133 claim, the facts would be likely to be such as to attract a discretionary payment of compensation by the Home Secretary. So I doubt whether there would be much practical difference in result between the two rival views. c
d

[67] As Lord Bingham has noted in [11], the Home Secretary accepted in correspondence that the respondent's conviction resulted from serious improprieties on the part of British Secret Intelligence agents and police officers and that the case would, under the terms of the ex gratia scheme as expressed on 29 November 1985 in the House of Commons by the then Home Secretary, have been one in which ex gratia compensation would have been payable. But the Home Secretary took the view that the facts of the present case were exceptional and that it would be 'an affront to justice' (his letter of 6 March 2000) if the respondent were to be the recipient of ex gratia compensation. In my opinion, the Home Secretary was fully entitled in the exercise of his discretion to decline for the reasons he gave to make an ex gratia payment of compensation to the respondent. But it would be a very unusual case in which the 'serious default' on the part of the British authorities that had led to the compensation claim had been part of the trial process and had fallen within the terms of the ex gratia scheme but had none the less been such as to lead the Home Secretary to conclude that he ought not to make an ex gratia payment. e
f
g
h

[68] So far as the present appeal is concerned, however, I would allow the appeal for the reasons given by Lord Bingham and Lord Steyn.

LORD RODGER OF EARLSFERRY.

[69] My Lords, I have had the privilege of reading the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, in draft. I agree that the appeal can be decided on the basis put forward by Lord Bingham, with which I agree. While it is not, therefore, necessary to go further for the decision of the appeal, for my part, I would also accept the arguments advanced by Lord Steyn. I would accordingly allow the appeal. j

LORD WALKER OF GESTINGTHORPE.

- a [70] My Lords, I have had the great advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. Lord Steyn has set out powerful reasons for his conclusion as to the autonomous meaning of the expression 'miscarriage of justice' in art 14(6) of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702). But for my part I would go no further than the limited
- b ground for allowing the appeal identified by Lord Bingham. On that limited ground I too would allow this appeal.

Appeal allowed.

c

Dilys Tausz Barrister.

APPENDIX

d

*Extract from the judgment of Lord Bingham of Cornhill in Re McFarland [2004]
UKHL 17, [2004] 1 WLR 1289*

- e [7] This is a difficult and sensitive question, for two main reasons. The first is that ministers, being accountable for the expenditure of public money, are rightly circumspect about making gratuitous payments to members of the public; and the need for circumspection is particularly great where the recipient may be a wholly innocent victim of mistake or misidentification or may be a serious criminal who is very fortunate to have escaped his just deserts. While the public might approve sympathetic treatment of the former, they would be understandably critical if significant sums of public money were paid to the
- f latter. The second source of difficulty and sensitivity derives from the interaction, in this field, of judicial and executive activity. Just as the courts must apply Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or not, so Parliament and the executive must respect judicial decisions, whether they
- g approve of them or not, unless or until they are set aside. This is reflected in s 14(1)(a) of the Criminal Appeal (Northern Ireland) Act 1980 and is currently reflected in s 10 of the Criminal Appeal Act 1995, providing for suspect convictions to be referred to the Court of Appeal for a final decision. Only very rarely could it be appropriate for the executive to act in a way which threw doubt on a judicial decision.

h

- j [8] The payment of compensation to some acquitted defendants is by no means novel. Adolf Beck was compensated in 1904. But the practice has in recent years been put on a more systematic footing. On 29 July 1976 Mr Roy Jenkins, as Home Secretary, in a written answer (HC Debates 29 July 1976, cols 328–330), outlined the procedure to be followed when ex gratia payments were to be made to persons wrongly convicted or charged. Claimants were to be informed:

'A decision to make an ex gratia payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or

charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.’ a

The Home Secretary (para 4) made clear that the assessor would take into account any expenses incurred by the claimant ‘in establishing his innocence or pursuing the claim for compensation’. He continued:

‘5. In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person’s own conduct ...’ b

On 29 November 1985, Mr Douglas Hurd, as Home Secretary, was asked to make a statement with regard to the payment of compensation to persons who had been wrongly convicted of criminal offences. His written answer was (HC Debates, 29 November 1985 (cols 691–692)): c

‘There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application *ex gratia* payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.’ d

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The international covenant on civil and political rights [article 14.6] provides that: e

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.” f

I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority. g

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am h

j

- a* prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.
- b* It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a question in the House of Commons on 29 July 1976 at columns 328–330.
- c* Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr Michael Ogden QC as the assessor for England and Wales. He will also assess any case that arises in Northern Ireland, where my right hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice.'
- d*

This statement was adopted without modification or addition by the Home Secretary (Mr Straw) and the Secretary of State for Northern Ireland on 17 June 1997.'

Wright v Redrow Homes (Yorkshire) Ltd Roberts and others v Redrow Homes (North West) Ltd

[2004] EWCA Civ 469

COURT OF APPEAL, CIVIL DIVISION

PILL, LATHAM LJ AND HOLMAN J

2 MARCH, 23 APRIL 2004

Employment – ‘Worker’ – Contract to perform work or services personally – Whether bricklayers working under standard contract for building company ‘workers’ – Working Time Regulations 1998, reg 2(1).

The applicant bricklayers worked for the respondent companies. Their written contracts consisted of an ‘official order’ containing the works to be done and accompanied by ‘conditions and acceptance of order’. Condition 1 provided that the contractor agreed to be bound by the conditions of contract ‘insofar as they are applicable to his subcontract’. Under Condition 6 the contractor was to ‘at all times provide sufficient labour to maintain the rate of progress laid down from time to time by the Company’. The applicants worked in gangs but each was paid individually. Under reg 2^a of the Working Time Regulations 1998 the meaning of ‘worker’ included an individual who worked under a contract whereby the individual ‘undertakes to do or perform personally any work or services for another party to the contract’. In two separate applications to employment tribunals, the issue arose whether the applicants were ‘workers’ within the meaning of the 1998 regulations. In each case the tribunal found that the applicants fell within the definition of ‘worker’. The Employment Appeal Tribunal dismissed the companies’ appeals and they appealed to the Court of Appeal, submitting that there had been no contractual obligation on the applicants to do their work personally, and that condition 6 clearly contemplated that the specified work might be done by other men.

Held – The intention of the parties when the contracts had been made involved, in each case, an obligation on the applications to do the work personally. The scheme for payment pointed strongly in that direction. Had the intention been otherwise, the company would have been likely to make arrangements with one member of each gang alone and arrange for the payments to be made to them. Condition 6 was not intended to be included so as to permit others to do the work; the company’s printed form of contract was plainly intended to cover a wide range of situations. Condition 1 bound each applicant to the conditions ‘insofar as they are applicable to his subcontract’. Accordingly, the appeals would be dismissed (see [23]–[29], below).

^a Regulation 2, so far as material, is set out at [7], below

Notes

- a** For the meaning of 'worker', see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 199.

For the Working Time Regulations 1998, SI 1998/1833, reg 2, see 7 *Halsbury's Statutory Instruments* (2003 issue) 330.

b Cases referred to in judgments

Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96, [2002] ICR 667, EAT.

Carmichael v National Power plc [1999] 4 All ER 897, [1999] ICR 1226, [1999] 1 WLR 2042, HL.

Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkins & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

- c**

Cases referred to in skeleton arguments

- d** *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229, [1985] AC 191, [1984] 3 WLR 592, HL.

Barlow v P E Jones Contractors [2002] All ER (D) 20 (Mar), EAT.

Express and Echo Publications Ltd v Tanton [1999] IRLR 367, [1999] ICR 693, CA.

IRC v Post Office Ltd [2003] IRLR 199, [2003] ICR 546, EAT.

Jany v Staatssecretaris van Justitie Case C-268/00 [2003] All ER (EC) 193, [2001] ECR I-8615, ECJ.

- e** *Lawrie-Blum v Land Baden-Württemberg Case 66/85* [1987] ICR 483, [1985] ECR 2121, ECJ.

Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL.

- f** *Miller (James) & Partners Ltd v Whitworth Street Estates (Management) Ltd* [1970] 1 All ER 796, [1970] AC 583, [1970] 2 WLR 728, HL.

Mirror Group Newspapers v Gunning [1986] 1 All ER 385, [1986] ICR 145, [1986] 1 WLR 546, CA.

Perceval-Price v Dept of Economic Development [2000] IRLR 380, NI CA.

Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

- g** *R (on the application of the Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry Case C-173/99* [2001] All ER (EC) 647, [2001] ICR 1152, [2001] 1 WLR 2313, [2001] ECR I-4881, ECJ.

Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, HL.

- h** *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39, [1974] AC 235, [1973] 2 WLR 683, HL.

Appeals

- j** *Wright v Redrow Homes (Yorkshire) Ltd*

Redrow Homes (Yorkshire) Ltd appealed from the decision of the Employment Appeal Tribunal (Judge Peter Clark presiding) released on 30 May 2003 dismissing its appeal from the decision of the employment tribunal at Leeds on 26 February 2002 that Bernard Harry Wright was a worker within the meaning of the Working Time Regulations 1998. The facts are set out in the judgment of Pill LJ.

Roberts and ors v Redrow Homes (North West) Ltd

Redrow Homes (North West) Ltd appealed from the decision of the Employment Appeal Tribunal (Judge Peter Clark presiding) released on 30 May 2003 dismissing its appeal from the decision of the employment tribunal at Flint released on 24 September 2002 that Keith Roberts, James Antony Mercer, Ronald William Waddell, Scott Alexander Forbes, Stephen John Billington, Roy Franklyn Vaughan-Smith, C Williams and Stephen Anthony Billington (Mr Roberts and others) were workers within the meaning of the Working Time Regulations 1998. The facts are set out in the judgment of Pill LJ.

Andrew Stafford QC and David Reade (instructed by *Ian Mason*, Flintshire) for Redrow.

Jill Brown (instructed by *Rowley Ashworth*) for Mr Wright.

Andrew Stafford QC and Sam Neaman (instructed by *Ian Mason*, Flintshire) for Redrow.

Andrew Hogarth QC (instructed by *OH Parsons*) for Mr Roberts and others.

Cur adv vult

23 April 2004. The following judgments were delivered.

PILL LJ.

[1] These are appeals against decisions of the Employment Appeal Tribunal (EAT) ([2003] All ER (D) 258 (May)), Judge Peter Clark presiding, whereby they dismissed appeals from Redrow Homes (Yorkshire) Ltd and Redrow Homes (North West) Ltd (Redrow) against decisions of employment tribunals. There are two employment tribunal decisions, the first given by a tribunal held at Leeds (26 February 2002, unreported) and the second by a tribunal held at Flint (24 September 2002, unreported). In each case, the tribunal had been asked to decide whether applicants were 'workers' within the meaning of the Working Time Regulations 1998, SI 1998/1833. The Leeds tribunal heard an application by Mr B Wright and the Flint tribunal by Mr K Roberts and others that they were workers within the meaning of the regulations. In each case, the unanimous decision of the tribunal was that the applicants were workers and, as such, were entitled to the compensation relating to entitlement to leave in reg 14. In Wright's case, calculation of the amount due was adjourned. In Roberts's case, Redrow was ordered to pay £658 to each of the eight applicants.

[2] Mr Wright is a bricklayer by trade and worked for Redrow between 9 October 2000 and 23 April 2001 on two of its sites in West Yorkshire. He worked with another bricklayer, Mr R Milner. The tribunal found that they were offered work by Redrow's Mr Hall at remuneration rates he stipulated and Mr Wright received Redrow's pre-printed form, to which I will refer, which named him alone. In the event, Mr Wright and Mr Milner performed their services as bricklayers personally throughout the whole period.

[3] Mr Milner was largely responsible for making claims for payment of sums due. The claims indicated the proportions in which the payment should be divided between him and Mr Wright. Payments were made weekly into each man's bank account. The form showed the gross amount, the amount of retention against defective workmanship and the amount of tax deducted.

a Mr Wright had what is known as a CIS4 certificate which obliged Redrow to deduct tax at the rate of 18% from each payment. Mr Wright earned a total of about £9,600.

b [4] Redrow provided the bricks, pre-mixed mortar, a fork-lift truck and driver, scaffolding and normally one labourer per site. Mr Wright and Mr Milner provided their own hand tools. They were given a set of drawings and were subject to a building programme. Subject to their obligation to conform to the building programme, and to daily outside limits of time, they could regulate their hours and work to suit themselves.

c [5] The tribunal found similar facts in the case of Roberts. There were eight originating applications, including that of Mr Roberts, and each of the men worked for Redrow from July/August 2000 to January/February 2001. There were two gangs of workers each comprising four men. Mr Roberts's gang of four included one, Mr Forbes, who worked only as a labourer. Redrow employed a site manager on each of their many residential house-building sites, together with a fork-lift truck driver and a labourer. By way of payment, each bricklayer received a valuation sheet and was paid weekly.

d [6] The tribunal found that the applicants accepted the offer of work in accordance with typed conditions which, we were told, were slightly different from those in Wright's case but not materially so. The other bricklayers did not receive a copy of the document containing the conditions.

e [7] The 1998 regulations amongst other things implement Council Directive (EC) 93/104 concerning certain aspects of the organisation of working time (OJ 1993 L307 p 18). Regulation 2(1) provides a number of definitions. It provided:

f "“worker” means an individual who has entered into or works under (or, where the employment has ceased, worked under)—(a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ...’

g [8] It is not suggested that the applicants worked under a contract of employment. Nor is it suggested save, possibly, as an aid to construction, that the closing words of sub-para (b) dealing with ‘profession or business undertaking’ have any relevance. Redrow do not claim the status of client or customer. The applicants' case is that they entered into or worked under a contract whereby each of them undertook to do or perform personally work for Redrow. The case turns upon whether the individual applicants had undertaken to do the work specified in the contract personally.

j [9] The written contract consisted of a form entitled ‘official order’ accompanied by ‘conditions and acceptance of order’. In Wright's case, Mr Wright was named on the official order, site details were provided and it was stated:

‘Please undertake, execute, carry out and complete the undermentioned works subject to: a) the undermentioned conditions and b) the terms and

conditions of business of Redrow Group plc. Acceptance of this order will be deemed to be acceptance to all the said conditions.’ a

[10] The works are specified as ‘brickwork’ and ‘items and costs’ are specified in considerable detail. Provision is made for payment to be made weekly. The official order includes the following provision:

‘The Contractor is to ensure that a copy of their current Health & Safety Policy together with a Method Statement for the works is forwarded to our offices prior to commencement on site.’ b

[11] In the document ‘conditions and acceptance of order’ 23 conditions are set out. Argument has centred mainly on conditions 1 and 6: c

‘1. That the Contractor having had an opportunity of inspecting our Conditions of Contract shall be deemed to have noted its provisions, and hereby agrees to be bound by them insofar as they are applicable to his subcontract ...

6. LABOUR d

In respect of all operatives employed by the Contractor, the Contractor is responsible for and shall keep the Company indemnified against any claim or liability for National Insurance, Graduated Pension Contributions, Pay-As-You-Earn, Holiday Pay, Construction Industry Training Board levy, Travelling Expenses and other emoluments payable, all other payments required by Law or otherwise which may be necessary for the proper execution of the contract work whether current or introduced during the period of the contract. The Contractor must at all times provide sufficient labour to maintain the rate of progress laid down from time to time by the Company, and shall supply such labour with all necessary tools and equipment. On each site where the work is in progress the Contractor must maintain a competent foreman or chargehand who has complete control of all labour engaged on the work. Any instruction given to such foreman or chargehand shall be deemed to have been given to the Contractor.’ e

Condition 20, which Redrow submit is readily reconcilable with condition 6, provides: f

‘20. SUBLETTING g

No order, nor any part order issued by the Company shall be assigned, sublet or transferred without the prior consent in writing of the Company. In the event of any such assignment, subletting or transfer, the Contractor shall be responsible for securing compliance with these conditions in every respect.’ h

[12] Reference was made to other conditions:

‘16. PROGRAMME OF WORK j

Programmes of work issued by the Company from time to time must be adhered to rigidly, in regard to both rate of progress and the sequence in which work is to be completed.

17. HOURS OF WORK

No Contractor or employee of the Contractor shall be permitted to work on site outside normal working hours of 8.00 am to 5.30 pm Monday to

- a Friday, Saturday 8.00 am to 12.00 noon inclusive, unless prior to consent has been given by the Company in writing and only then when the Company's appointed supervisor is on site.'

b Condition 18, having dealt with payment, states that the company 'requires Contractors to provide their VAT registration number or statement that they are not VAT registered'.

c [13] For Redrow, Mr Stafford QC submits that the men are not workers within the meaning of the 1998 regulations because there is no contractual obligation on Mr Wright or Mr Roberts, or any of the others, to do the work 'personally'. Moreover, it is submitted that condition 6 was a term of the contract and the condition plainly contemplates that work may be done by other men. It provides that the contractor must supply sufficient labour to maintain the rate of progress laid down and all necessary tools and equipment for such labour. The clause also requires the contractor to maintain a competent foreman or chargehand on site. These are requirements inconsistent with a personal obligation. It is submitted that a personal obligation cannot be inferred from the presence of the sub-letting clause. A party to the contract can employ other bricklayers without sub-letting the contract. The status of additional labour taken on by the contractor is the contractor's problem and does not affect the position as between the contractor and Redrow. Each contractor is under an obligation to complete the specified works, it is submitted, and may employ other men to do it.

e [14] Mr Stafford submits that in finding that Mr Wright, Mr Roberts and the others were workers within the meaning of the 1998 regulations, the tribunals have erred, in particular by having regard to the way in which the contracts were performed by the individuals concerned. In Wright's case, the tribunal stated:

f 'Furthermore, in construing the contract, we are entitled to have regard to all the circumstances. They include the fact that the contract was performed personally throughout the period of engagement. We find that that reflected the parties' expectation that it would be so performed.'

g [15] It was further stated:

h 'Looking at the above factors, we are left with the clearest impression that the applicant was in a subordinate and dependent position vis-à-vis the respondent, similar to that of an employee. We find accordingly that the respondent's status was not by virtue of the contract with the applicant that of a customer of a business undertaking carried on by the applicant. The applicant and Mr Milner were not a firm. They were two individual workers who worked together and personally provided their service as bricklayers to the respondent.'

j [16] In Roberts's case, the tribunal held that it was 'the common intention and understanding of the parties that all the applicants would undertake to work personally', and that 'there was mutuality of obligation for the purposes of whether the applicants were workers because of the factual matrix in this case'. The tribunal cited fully, and, as did the tribunal in Wright's case, relied on a judgment of the EAT, Mr Recorder Underhill QC presiding, in *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96, [2002] ICR 667.

[17] Considering sub-para (b) of the definition of worker in reg 2(1) of the 1998 regulations, Mr Recorder Underhill stated ([2002] IRLR 96 at 101 (para 17), [2002] ICR 667 at 677–678 (para 17)):

‘(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu*—workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm’s-length and independent position to be treated as being able to look after themselves in the relevant respects. (5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker’s favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers. (6) What we are concerned with is the rights and obligations of the parties under the contract—not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see (*Carmichael v National Power plc* [1999] 4 All ER 897, [1999] ICR 1226), esp. ([1999] 4 All ER 897 at 904–905, [1999] ICR 1226 at 1234–1235) per Lord Hoffmann.’

[18] Mr Recorder Underhill added ([2002] IRLR 96 at 101 (para 18), [2002] ICR 667 at 678 (para 18)):

‘Self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the “intermediate category” created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment ... Cases which “could have gone either way” under the old test ought now generally to be caught under

a the new test in “limb (b)”. The fact that such a subcontractor may be regarded by the Inland Revenue as self-employed, and hold certificates to prove it, is relevant but not decisive.’

b [19], In the judgment of the EAT ([2003] All ER (D) 258 (May)), reference was made to the ‘intermediate category’ described in the *Byrne Brothers (Formwork) Ltd* case. However, the EAT relied, in dismissing the appeals, on the presence of condition 1:

c ‘It is plain that the conditions are drafted on the basis that “one size fits all”. It is specifically envisaged that not all the terms will be appropriate to all contracts entered into by Redrow ... Looking at the factual background it is clear to us, as it was to the tribunals below, that it was the common intention of the parties that under the contract the applicants would provide their personal services ... the personal service requirement was made out.’

d [20] Mr Stafford submits that, in concluding that condition 6 did not apply to these applicants, the EAT has made the same mistake as the tribunals; they have relied on what happened subsequently and how the contracts were performed instead of considering what had been agreed. An expectation that the work would be done personally, which Mr Stafford accepts was present, is not an obligation to do the work personally.

e [21] In my judgment there is force in the submission that tribunals should not be deflected from a consideration of the definition of ‘worker’ and from a consideration of terms of the contract in that context by general policy considerations as to the nature of employment and self-employment. The reasoning of the tribunal in Roberts’s case, with its long citation from the *Byrne Brothers (Formwork) Ltd* case, appears to come close to saying that, because the applicants ought to come within definition of worker, it follows that they do. f The 1998 regulations leave parties free to enter contracts and, whether or not the contract includes an obligation to do the work personally, is a matter of construction. The tribunal in Wright’s case appears to have regarded the ‘subordinate and dependent position ... similar to that of an employee’ of the applicants as justifying a conclusion that they came within the definition. g Moreover, it does not necessarily follow from the fact that the work was done personally that there was a contractual obligation to do it personally.

h [22] Mr Recorder Underhill rightly stated ([2002] IRLR 96 at 101 (para 17(6)), [2002] ICR 667 at 678 (para 17(6)) that the tribunal is concerned with the rights and obligations of the parties under the contract. However, the general distinction he attempts to draw (at para 17(4)) must not deflect tribunals, nor, I think, was it intended to deflect them, from considering whether the necessary personal obligation has arisen. Expressions such as ‘degree of dependence’ and ‘lower the pass-mark’ assist little in that task. The guidance in the *Byrne Brothers (Formwork) Ltd* case, cited in the present cases, was given under the heading j ‘Business undertaking’, the expression which appears later in reg 2(1)(b). As such, it does not arise for consideration in this case and it is not necessary to consider it or the guidance given upon it.

[23] The tribunals were entitled to construe the contracts in the light of the circumstances in which they were made. An important issue is whether, in those circumstances, condition 6 was a term of these particular contracts. Light may be thrown on that issue by considering, for example, the agreement as to how the

contract was to be performed, the method of payment. It is not a question of looking at prior negotiations but 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' (see *Investors' Compensation Scheme Ltd v West Bromwich Building Society*, *Investors' Compensation Scheme Ltd v Hopkins & Sons (a firm)*, *Alford v West Bromwich Building Society*, *Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 913 per Lord Hoffman). While respecting the tribunals' findings of fact, and admitted facts, this court is in as good a position as the tribunals to consider that question. a
b

[24] Relevant considerations are: (a) Redrow's printed form of contract was plainly intended to cover a wide range of situations, from contracts with substantial contractors to contracts with applicants such as the present applicants. (b) Arrangements between house-builders such as Redrow and small gangs of workers, such as the bricklayers in these cases, are common in the house-building industry. Both Redrow and the present applicants were accustomed to them. (c) Condition 1 binds the applicants to the conditions 'insofar as they are applicable to his subcontract'. Having regard to the wide range of contracting parties by whom the conditions were intended to be used, that provision is totally unsurprising. (d) There is no evidence that Redrow sought to enforce, or intended to enforce against these parties the conditions relating to depositing a current health and safety policy and relevant VAT registration. It can be inferred, as an illustration of the flexibility permitted by condition 1, that these provisions were not considered appropriate to the contracts with these applicants, as distinct from bigger contractors. (e) The items of work specified were not beyond the capacity of the men to do it themselves. (f) The agreed method of payment was not payment to the named contractor, Mr Wright, but to each individual doing the work. The suggestion that, by agreeing to pay Mr Milner, Redrow was acting as agent for Mr Wright, produces an unnecessary and unlikely complexity. While Mr Milner is not an applicant, it is difficult to discern an intention that his position be different from that of Mr Wright. (g) In Roberts's case, it was not suggested by Redrow that the other members of the gang were in a position different from that of Mr Roberts. (h) The requirement in condition 6 for a 'competent foreman or chargehand' is foreign to arrangements made, and customarily made, with members of a small gang of bricklayers and it is difficult to conclude that the parties intended it to be included in these contracts. c
d
e
f
g

[25] Against that background, each of the tribunals was in my judgment entitled to find that there was 'a mutuality of obligation' (Roberts's case), or 'a personal provision of services' (Wright's case). Criticism can be made of the reasoning in each case but, in context, the conclusion was correct and should be upheld in this court upon a consideration of the evidence. In these contracts, condition 6 was not intended to be included so as to permit others to do the work. (When the tribunal in Wright's case used the word 'expectation' (see [14], above), I believe they meant to convey the state of mind of intention but that finding is not essential to my general conclusion upon condition 6.) h

[26] In my judgment, the intention of the parties when the contracts were made involved, in each case, an obligation on the applicants to do the work personally. That makes sense of Redrow's decision to contract with bricklayers individually. The scheme for payment points strongly in the direction of contracts with individual bricklayers to do the work personally. Had the intention been otherwise, Redrow would have been likely to make arrangements with Mr Wright and with Mr Roberts alone and arrange for the payments to be made j

a to them. On the evidence, the finding that the obligation to Redrow of each of the men was personal was justified. An analysis has not been attempted by the parties as to what the position would, on my conclusion, be as between members of the gang, or as between one of them and Redrow, if a member failed to do his share of specified work, and that does not need to be determined in this case.

b [27] I agree with the EAT that it was the intention of the parties that personal services be provided and I would dismiss these appeals.

LATHAM LJ.

[28] I agree.

c HOLMAN J.

[29] I agree that these appeals should be dismissed for the reasons given by Pill LJ. I only summarise my own reasoning very briefly out of deference to the sustained argument of Mr Stafford QC to which I pay tribute.

d [30] So far as is material to these appeals, the definition of 'worker' in reg 2(1) of the Working Time Regulations 1998, SI 1998/1833 may be reduced to:

"worker" means an individual who ... worked under ... a contract ... whereby the individual undertakes to do ... personally any work ... for another party to the contract ...

e The applicants are individuals. There were contracts between them and Redrow to do work. The only question is whether *by the contracts* ('whereby') the applicants *undertook* to do the work 'personally'. I agree with Mr Stafford that it is irrelevant that later the applicants did in fact do the work personally. The question is whether the contracts themselves bound or required the applicants to do the work personally.

f

CONDITION 6

g [31] I also agree with Mr Stafford that the language of, and duties under, condition 6 of Redrow's standard 'conditions and acceptance of order' are inconsistent with an obligation to do the work personally. The first and third sentences of condition 6 contemplate operatives employed by the contractor and the need to maintain a foreman or chargehand in control of them. The second sentence contemplates the provision of sufficient labour to maintain the rate of progress laid down by the company, and there is an absolute obligation under condition 16 rigidly to adhere to that rate of progress. So if condition 6 forms part of the actual contracts between the applicants and Redrow, the applicants could h not have 'undertaken' or been required to do the work personally and they might well have required to engage the assistance of others.

j [32] However, the whole of the conditions are governed by and subject to condition 1: the contractor agrees to be bound by the conditions 'insofar as they are applicable to his subcontract'. The words 'insofar as they are applicable to his subcontract' are quite neutral in their effect or onus. There is neither a presumption that any particular condition applies unless in some way expressly disappplied, nor a presumption that a condition does not apply unless expressly applied. The conditions were described by the tribunal in Wright's case (26 Febuary 2002, unreported) as 'all-embracing' and by the Employment Appeal Tribunal (EAT) ([2003] All ER (D) 258 (May)) in the conjoined appeals as 'one size fits all'.

[33] In short, the effect of condition 1 is to make the remaining clauses of the printed conditions a 'menu' and it is necessary to determine which particular clauses or conditions were applicable to the actual sub-contracts under consideration. This is a different exercise or task from that of construing the meaning of the words used. Rather, it requires the tribunal or court to determine which clauses the parties themselves intended to select, and did select, as applying to their contract. In that task the 'matrix of fact' is, in these cases, predominant and, indeed, the only guide as to which clauses or conditions were applicable. Nothing was said or written expressly to apply or not apply any particular clause. The subjective intent of the parties is not admissible, nor do we know it. The question has to be: would reasonable people, in the position of these parties and having all the background knowledge which would reasonably have been available to them in the situation in which they were at the time of the contract, intend to apply or not apply condition 6? a
b
c

[34] The EAT gave their reasons for concluding that condition 6 did not apply to the contracts with these applicants. In my view their reasoning is permissible and their reasons are cogent and we should not interfere with their conclusion that it did not. d

UNDERTAKING TO DO THE WORK PERSONALLY

[35] However, that is not the end of the case or the appeals. The non-application of condition 6 merely eliminates from the contracts and the case a provision that would be necessarily inconsistent with an obligation to do the work personally. The question remains: did the contracts in fact positively require the applicants to do the work personally? Again, this must be determined in the context of the matrix of fact. I agree with the submission of Mr Stafford (although he expressed it more politely) that, with respect to them, the reasoning of both tribunals is weak and confused and takes into account inadmissible or irrelevant considerations—in particular by placing weight on the irrelevant consideration that the applicants did later in fact do the work personally. I agree, too, with his submission that in Wright's case the tribunal wrongly referred to 'the parties' expectation that it would be' personally performed. The correct consideration is not 'expectation' but intention. e
f
g

[36] But I consider that on a fair overall reading of their respective extended reasons both tribunals clearly found as a fact that the parties did intend that the applicants must do the work personally. The tribunals are specialist tribunals and the finding was based upon their specialist understanding of the realities of the case. The finding is summarised in the last sentence of the extended reasons in Wright's case as: 'They were two individual workers who worked together and personally provided their service as bricklayers to the respondent.' In Roberts's case (24 September 2002, unreported) there is a finding of fact: 'We find that it was the common intention and understanding of the parties that all the applicants would undertake to work personally.' Although that finding is followed by some inadmissible reasoning (by reference to what later actually happened) the tribunal continued: 'it accords with the understanding and common sense of the circumstances ...' h
j

[37] In the conjoined appeals the EAT said:

a 'Looking at the factual background it is clear to us, as it was to the tribunals below, that it was the common intention of the parties that under the contract the applicants would provide their personal services.'

b [38] Despite the sustained argument of Mr Stafford, these seem to me to be findings and conclusions of specialist tribunals which accord with common sense and with which, despite errors in the reasoning processes, I would not interfere. I would accordingly dismiss both appeals.

Appeals dismissed.

Kate O'Hanlon Barrister.

Bayoumi v Women's Total Abstinence Educational Union Ltd and another

[2003] EWCA Civ 1548

COURT OF APPEAL, CIVIL DIVISION

CHADWICK, BUXTON AND RIX LJJ

9 OCTOBER, 5 NOVEMBER 2003

Charity – Sale of charity estate – Terms of proposed sale – Statutory requirement that charity trustees decide that proposed sale on best terms reasonably obtainable – Whether agreement for sale made before compliance with statutory requirement valid – Charities Act 1993, s 36(1), (3).

Charity – Sale of charity estate – Land held by charity – Disposition – Statutory provision protecting purchasers in respect of 'disposition' of land held by charity – Whether contract for sale constituting 'disposition' for purposes of provision – Charities Act 1993, s 37(4).

The defendant charity contracted to sell certain freehold property to the second defendant. The contract contained the statement required by s 37(1)^a of the Charities Act 1993 that the property was land to which the restrictions on disposition imposed by s 36^b of the 1993 Act applied. Under s 36(1) no land held by or in trust for a charity was to be sold without an order of the court or the Charity Commissioners. Section 36(2) disapplied s 36(1) where, *inter alia*, the requirements of s 36(3) were complied with. That sub-section provided that before entering into an agreement for sale charity trustees had to obtain a surveyor's report, advertise the proposed sale as advised by the surveyor, and decide that they were satisfied, having considered the surveyor's report, that the terms on which the disposition was proposed to be made were the best that could reasonably be obtained for the charity. The contract was silent as to compliance by the charity with the s 36(3) requirements. The second defendant, for consideration, assigned the benefit of the contract to the claimant. The charity refused to complete the sale on the basis that the contract was void for non-compliance with s 36 and the claimant applied for a summary order for specific performance relying on the protection afforded by s 37(4) which provided, *inter alia*, that where any land held by or on trust for a charity was 'sold, leased, or otherwise disposed of by a disposition' to which s 36(1) or (2) applied, but s 36(2) had not been complied with in relation to the disposition, then in favour of a person who in good faith acquired an interest in the land for money or money's worth, the disposition would be valid whether or not the charity trustees had complied with the provisions of s 36. The master dismissed the application and the claimant appealed, amending his claim to add the second defendant. The judge was asked to determine, as a preliminary issue, whether on its true construction, s 37(4) could provide any assistance to a purchaser under an uncompleted contract for sale. He held that the charity had not complied with

a Section 37, so far as material, is set out at [7], below

b Section 36, so far as material, is set out at [6], below

- a the requirements of s 36(3) and that s 37(4) did not apply to the contract, which accordingly was void and of no effect. The second defendant appealed.

Held – Section 36(1) of the 1993 Act did not, itself, have the effect of making void an agreement for the sale of charity land into which charity trustees had entered without first complying with the requirements of s 36(3), although (absent an

- b order of the court or the commissioners) a transfer made in purported performance of such an agreement would be void, unless saved by s 37(4). It followed that in a case such as the instant case, where a purchaser of charity land became aware, before the completion of the contract, of the failure by the charity trustees to comply with the requirements of s 36(3), he could not compel performance of the contract. Section 37(4) had no application to an uncompleted contract for the sale of charity land. No 'disposition' was capable of being made valid by the operation of that section unless it was a disposition to which s 36(1) or (2) applied. An uncompleted contract for the sale of charity land was not, itself, a 'disposition' of that land for the purposes of s 36(1) or (2). Accordingly, the appeal would be allowed to the extent of setting aside the declaration that the contract had been void and of no effect, and substituting a declaration to the effect that s 37(4) had no application in relation to the contract (see [42], [43], [49]–[51], below).

Milner v Staffordshire Congregational Union (Inc) [1956] 1 All ER 494 not followed.

Decision of Simon Berry QC [2003] 1 All ER 864 reversed in part.

e Notes

For supplementary provisions relating to dispositions of charity land, see 5(2) *Halsbury's Laws* (4th edn) (2001 reissue) para 345.

For the Charities Act 1993, ss 36, 37, see 5 *Halsbury's Statutes* (4th edn) (1998 reissue) 993, 996.

f

Cases referred to in judgments

A-G v South Sea Co (1841) 4 Beav 453, 49 ER 414.

Clergy Orphan Corp, Re [1894] 3 Ch 145, [1891–4] All ER Rep Ext 1309, CA.

Haslemere Estates Ltd v Baker [1982] 3 All ER 525, [1982] 1 WLR 1109.

- g *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241.

Milner v Staffordshire Congregational Union (Inc) [1956] 1 All ER 494, [1956] Ch 275, [1956] 2 WLR 556.

Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark

- h [1975] 3 All ER 416.

Appeal

James Edward Perkins appealed, with permission of Simon Berry QC (sitting as a deputy judge of the High Court) from that part of his order made on 21 January

- j 2003, in the trial of a preliminary issue as to the true construction of s 37(4) of the Charities Act 1993, in proceedings brought by the claimant Omar Hugh Bayoumi against the Women's Total Abstinence Educational Union Ltd (the charity) and the appellant for specific performance of a contract made between the charity and the appellant on 16 November 2001 for the sale and purchase of freehold property known as 23 Dawson Place, London, W2 (the contract), declaring that the contract was void and of no effect ([2003] EWHC 212 (Ch), [2003] 1 All ER 684).

Mr Perkins had assigned the benefit of the contract to Mr Bayoumi on 26 November 2001. The charity was the sole respondent named in the appeal.

Andrew Simmonds QC and Tracey Angus (instructed by Howard Kennedy) for Mr Perkins.

Michael Furness QC and Jonathan Evans (instructed by Winward Fearon) for the charity.

Cur adv vult

5 November 2003. The following judgments were delivered.

CHADWICK LJ.

[1] This is an appeal from an order made on 21 January 2003 by Mr Simon Berry QC, sitting as a deputy judge of the High Court in the Chancery Division ([2003] EWHC 212 (Ch), [2003] 1 All ER 864, [2003] Ch 283), in proceedings brought by Mr Omar Bayoumi against the Women's Total Abstinence Educational Union Ltd, a charity, and Mr James Perkins. The appeal raises questions of some general importance in relation to the scope and effect of the restrictions on dispositions of charity land contained in Pt V of the Charities Act 1993.

THE UNDERLYING FACTS

[2] The Women's Total Abstinence Educational Union Ltd (to which I shall refer as 'the charity') is a company limited by guarantee and not having a share capital. It was incorporated in 1951 under the Companies Act 1948 with objects that are exclusively charitable. It is expressly provided, at cl 3 of its memorandum of association, that the charity shall not sell any property subject to the jurisdiction of the Charity Commissioners which it may from time to time hold 'without such authority, approval or consent as may be required by law'. Power to manage the business of the charity is vested in the committee of management. Accordingly, the members of the committee for the time being are the 'charity trustees' for the purposes of Pt V of the 1993 Act (see s 97(1) of that Act).

[3] At all material times the charity has been registered at HM Land Registry as the owner of freehold property known as 23 Dawson Place, London W2. By a contract dated 16 November 2001 the charity agreed to sell that property to Mr Perkins at a price of £3,200,000, of which £200,000 was paid by way of deposit on exchange of contracts and released to the vendor. The date fixed for completion was 18 February 2002. The contract contained the statement, required by s 37(1) of the 1993 Act, that the property was held by the charity, that the charity was not an exempt charity, and that the restrictions on disposition imposed by s 36 of the Act applied to the sale. The contract was silent as to compliance with the requirements in s 36(3) of the Act.

[4] The contract contained no prohibition against assignment. On 26 November 2001 Mr Perkins assigned the benefit of the contract to Mr Bayoumi. The consideration for the assignment, paid by Mr Bayoumi to Mr Perkins on 26 November 2001, was £450,000. In addition, Mr Bayoumi reimbursed to Mr Perkins the £200,000 which Mr Perkins had paid to the charity by way of deposit on exchange of contracts. On 15 January 2002 solicitors acting for Mr Bayoumi gave notice in writing to the solicitor then acting for the charity that the contract had been assigned to him. The charity's solicitor took the point, in a letter of 17 January 2002 to Mr Perkins's solicitors, that the charity could not

a be required to execute a transfer to the property to his assignee. That point, which appears to have been without any foundation, has not been pursued.

[5] By a letter of 8 February 2002 Mr Bayoumi called upon the charity to complete. The charity instructed new solicitors, who took advice from counsel. On 18 February 2002 those solicitors wrote to Mr Perkins's solicitors informing them that they had advised the charity that the contract into which it had entered on 16 November 2001 was void by reason of a failure to comply with the requirements in s 36 of the 1993 Act. A copy of that letter was passed to Mr Bayoumi's solicitors. They rejected the contentions advanced on behalf of the charity. These proceedings were commenced by Mr Bayoumi on 24 April 2002 by the issue of a claim form in which the charity was named as sole defendant.

c SECTIONS 36 AND 37 OF THE 1993 ACT

[6] The material provisions of s 36 of the 1993 Act, in the context of this appeal, are these:

d '(1) Subject to the following provisions of this section ... no land held by or in trust for a charity shall be sold, leased or otherwise disposed of without an order of the court or of the Commissioners.

e (2) Subsection (1) above shall not apply to a disposition of such land if—(a) the disposition is made to a person who is not—(i) a connected person ... or (ii) a trustee for, or a nominee of, a connected person; and (b) the requirements of subsection (3) or (5) below have been complied with in relation to it.

f (3) Except where the proposed disposition is the granting of such a lease as is mentioned in subsection (5) below, the charity trustees must, before entering into an agreement for the sale, or (as the case may be) for a lease or other disposition, of the land—(a) obtain and consider a written report on the proposed disposition from a qualified surveyor instructed by the trustees and acting exclusively for the charity; (b) advertise the proposed disposition for such period and in such manner as the surveyor has advised in his report (unless he has there advised that it would not be in the best interests of the charity to advertise the proposed disposition); and (c) decide that they are satisfied, having considered the surveyor's report, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity ...

h (5) Where the proposed disposition is the granting of a lease for a term ending not more than seven years after it is granted ... the charity trustees must, before entering into an agreement for the lease—(a) obtain and consider ... advice ... and (b) decide that they are satisfied, having considered that ... advice, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.'

j [7] Section 37 of the 1993 Act contains provisions which are supplementary to those in s 36. The following are material in the present context:

'(1) Any of the following instruments, namely—(a) any contract for the sale, or for a lease or other disposition, of land which is held by or in trust for a charity, and (b) any conveyance, transfer, lease or other instrument effecting a disposition of such land, shall state—(i) that the land is held by or in trust for a charity, (ii) ... and (iii) ... that the land is land to which the restrictions on disposition imposed by [s 36] apply.

(2) Where any land held by or in trust for a charity is sold, leased or otherwise disposed of by a disposition to which subsection (1) or (2) of section 36 above applies, the charity trustees shall certify in the instrument by which the disposition is effected—(a) (where subsection (1) of that section applies) that the disposition has been sanctioned by an order of the court or of the Commissioners (as the case may be), or (b) (where subsection (2) of that section applies) that the charity trustees have power under the trusts of the charity to effect the disposition, and that they have complied with the provisions of that section so far as applicable to it. a
b

(3) Where subsection (2) above has been complied with in relation to any disposition of land, then in favour of a person who (whether under the disposition or afterwards) acquires an interest in the land for money or money's worth, it shall be conclusively presumed that the facts were as stated in the certificate. c

(4) Where—(a) any land held by or in trust for a charity is sold, leased or otherwise disposed of by a disposition to which subsection (1) or (2) of section 36 above applies, but (b) subsection (2) above has not been complied with in relation to the disposition, then in favour of a person who (whether under the disposition or afterwards) in good faith acquires an interest in the land for money or money's worth, the disposition shall be valid whether or not—(i) the disposition has been sanctioned by an order of the court or of the Commissioners, or (ii) the charity trustees have power under the trusts of the charity to effect the disposition and have complied with the provisions of that section so far as applicable to it.' d
e

THESE PROCEEDINGS

[8] As I have said, these proceedings were commenced by Mr Bayoumi against the charity as the sole defendant. Mr Bayoumi sued as assignee of the contract of 16 November 2001. The primary relief sought was specific performance of that contract. On 1 July 2002 Mr Bayoumi applied for summary judgment. That application came before Master Moncaster on 23 July 2002. The master refused the claimant's application. But he held that the matter could be dealt with summarily; and he gave judgment in favour of the charity. He did so on the basis: (i) that none of the requirements of s 36(3) of the 1993 Act had been complied with; (ii) that, accordingly, the charity could not execute a transfer in which the members of the committee of management—as the charity trustees for this purpose—gave the certificate required by s 37(2); (iii) that, in those circumstances no transfer would take effect unless the transferee could rely on the provisions of s 37(4) of the Act; and (iv) that those provisions were not enacted for the benefit of a purchaser who had not completed his purchase. As he put it: f
g
h

'The only route by which the claimant might enforce this contract is under s 37(4) and that route is not in my judgment, available to him. It follows that, so far from the claimant being entitled to summary judgment he cannot, in my view, succeed in his claim, and ... it seems to me that in those circumstances what I ought to do is to give summary judgment for the defendant and dismiss the claim.' j

[9] Mr Bayoumi appealed from the master's order of 23 July 2002. Before that appeal was heard, the claim in these proceedings was amended to add Mr Perkins as an additional defendant. In the amended particulars of claim Mr Bayoumi sought damages, or repayment, from Mr Perkins (in the alternative to his claim

a against the charity and in the event that the contract of 16 November 2001 were held to be void) of £650,000—being the £450,000 which he had paid for the assignment and the further £200,000 paid in respect of the deposit. On 28 November 2002 Mr Perkins served a notice under CPR Pt 20 claiming from the charity repayment of the deposit, an indemnity in respect of the claims made against him by Mr Bayoumi and damages in respect of wasted expenditure.

b [10] When the appeal came before the deputy judge he was asked to determine, as a preliminary issue, whether, on the true construction of s 37(4) of the 1993 Act, it could provide any assistance to a purchaser under an uncompleted contract. It is plain on the face of that section that—whether or not that question were answered in the affirmative—a purchaser could obtain no assistance under s 37(4) unless he were ‘a person who ... in good faith acquires an interest in the land for money or money’s worth’. In those circumstances the judge was asked to treat as before him an application by Mr Bayoumi, under CPR Pt 24, for a summary determination that both he and Mr Perkins had acted in good faith. The judge had before him, also, an application by the charity under Pt 24 for summary judgment against Mr Perkins on the basis that there had been no compliance with the requirements of s 36(3) of the Act.

d [11] The judge’s conclusions are summarised at [42] of the written judgment which he handed down on 21 January 2003. He held that there had been no compliance by the charity with the requirements of s 36(3). He went on:

e ‘I also hold that s 37(4) of the Act does not apply to the contract. Accordingly, the contract is void and of no effect. I also find that, if s 37(4) does apply, then there was good faith on the part of Mr Perkins and Mr Bayoumi—but, in the light of my determination in relation to s 37(4), this question does not now arise.’

f The judge gave effect to his findings by an order in which, after recording that the matter before the court was ‘the trial of the preliminary issue as to the true construction of s 37(4) of the Charities Act 1993’, it was declared, in para 1 of the order, that the contract of 16 November 2001 was void and of no effect. He dismissed Mr Bayoumi’s appeal from the master’s order of 23 July 2002; and dismissed Mr Bayoumi’s claim against the charity. He gave Mr Perkins permission to appeal from the declaration in para 1 of the order.

g [12] Mr Bayoumi has not sought permission to appeal from the judge’s order dismissing his appeal from the order made by the master on 23 July 2002. Permission for what would be a second appeal could only be granted by this court. An application for such permission would now be well out of time and, in the circumstances that no application was made before or at the hearing of h Mr Perkins’s appeal, could be seen as abusive. In those circumstances the effect of the judge’s order of 21 January 2003 has been to determine these proceedings as between Mr Bayoumi and the charity. But, following the order of 21 January 2003, there remained issues to be tried in relation to (i) Mr Bayoumi’s claim against Mr Perkins and (ii) Mr Perkins’s Pt 20 claim against the charity.

j [13] Those claims are the subject of a consent order made on 3 June 2003, to which all three parties agreed. Subject to the present appeal being allowed ‘such that the contract [of 16 November 2001] between the claimant and the first defendant is held to be valid’, there is to be judgment for Mr Bayoumi against Mr Perkins for £670,000, and judgment for Mr Perkins against the charity for £200,000, with interest on each judgment. The position, therefore, is that, unless this court holds the contract to be valid (whatever that may mean in this context),

the parties are agreed that the charity will repay to Mr Perkins the amount of the deposit paid on exchange of contracts; and Mr Perkins will pay to Mr Bayoumi an amount equal to the aggregate of the amounts paid for the assignment (£650,000) and an amount (£20,000) in respect of damages for breach of the warranty as to title in the assignment. a

THIS APPEAL b

[14] The appeal before this court is an appeal by Mr Perkins from the declaration in para 1 of the order of 21 January 2003. In his appellant's notice Mr Perkins gave notice of his intention, also, to appeal against para 3 of that order—that is to say, from the order dismissing Mr Bayoumi's claim against the charity. An appeal against that paragraph of the order was not pursued at the oral hearing. I need say no more about it; save to indicate that, in my view, an appeal by Mr Perkins against an order dismissing a claim which Mr Bayoumi was content not to pursue against the charity would have faced substantial difficulties. Mr Perkins appealed, also, against the judge's orders refusing him the costs of the 'good faith' issue and requiring him to pay, jointly with Mr Bayoumi, the other costs of the action incurred after 28 November 2002; but those matters were not addressed in argument before us. c
d

[15] The charity is the sole respondent to this appeal; although a copy of the appellant's notice was served on Mr Bayoumi's solicitors. It is not at all clear—at least, not clear to me—what interest the charity has in resisting the appeal. It is content to return the deposit paid to it in November 2001. If the contract were held to be valid, there would seem to be no-one, as matters now stand, who could enforce it against the charity. Mr Perkins has assigned his rights under the contract to Mr Bayoumi. Mr Bayoumi's claim under the contract has been dismissed and is not the subject of any appeal. But the charity has appeared by leading and junior counsel to uphold the judge's order and, for my part, I have been assisted by their submissions. e
f

[16] Mr Perkins's decision not to name Mr Bayoumi as a co-respondent in his appellant's notice—and, given Mr Bayoumi's decision not, himself, to seek permission to appeal the judge's order, Mr Bayoumi's own decision to take no part in the appeal—have not been explained and are difficult to understand. If Mr Perkins were to succeed in his objective of having the validity of the contract of 16 November 2001 upheld, he would, no doubt, seek to rely on that finding as a defence to Mr Bayoumi's claim on the warranty as to title in the assignment. But, for that purpose, Mr Perkins would need to ensure that Mr Bayoumi was bound by that finding. And, if Mr Bayoumi were at risk of being bound by a finding that, notwithstanding the failure of his own claim against the charity, the contract was valid, he might be thought to have an interest in resisting that finding. Be that as it may, Mr Bayoumi has taken no part in the appeal. g
h

[17] There is no challenge, on this appeal, to the judge's finding that the committee of management, as the charity trustees for this purpose, failed to comply with the requirements in s 36(3) of the 1993 Act. Nor, if s 37(4) were otherwise in point, is there a challenge by the charity to the judge's finding that Mr Perkins and Mr Bayoumi acted in good faith. The issue on this appeal, as it appeared from the appellant's notice, as served, was whether or not s 37(4) of the Act can have any application in circumstances where the purchaser of charity land under a contract within s 36(1) of the Act has not taken a transfer or conveyance of the land. j

a [18] The premise underlying that issue is that the contract of 16 November 2001 is, itself, a sale or other disposition to which s 36(1) of the 1993 Act applies. The judge, following the decision of Dankwerts J in *Milner v Staffordshire Congregational Union (Inc)* [1956] 1 All ER 494, [1956] Ch 275, accepted that premise. After setting out (at [2]) the provisions of s 36(1), he said:

b 'No order of the court or of the commissioners was obtained. Without more, it would be clear that the contract would be void. This is because the approach of Dankwerts J in *Milner v Staffordshire Congregational Union* [1956] 1 All ER 494, [1956] Ch 275 to the true construction of the expression "make any sale" which appeared in s 29 of the Charitable Trusts Amendment Act 1855, and which he held included a contract for sale, is, in my judgment, c equally applicable to the expression "be sold".'

It was on that basis that, having held that s 37(4) of the 1993 Act was not in point, the judge declared the contract to be void.

d [19] In their supplemental skeleton argument, lodged shortly before the hearing of this appeal, counsel for the appellant challenged that premise. They contended, for the first time, that the phrase 'sold, leased or otherwise disposed of' in s 36(1) of the Act refers only to a completed sale, lease or disposition; that the decision in *Milner's* case, on different words and in the context of a different statutory scheme, could be distinguished; alternatively, that the decision in *Milner's* case is not binding on this court and is wrong. Those contentions have e found formal expression in an amended appellant's notice for which, in the absence of opposition by the charity, the court gave permission.

[20] For the reasons which I set out in later paragraphs of this judgment, I am satisfied that the appellant's challenge to the premise upon which the judge decided the question before him is well founded. I am satisfied that the contract f of 16 November 2001 is not, itself, a sale or other disposition to which s 36(1) of the 1993 Act applies. But, as it seems to me, that conclusion does not assist the appellant in the present case. The contract is, plainly, 'an agreement for the sale ... of the land' for the purposes of s 36(3); and, as the judge has found, the charity trustees did not, before entering into that agreement, comply with the requirements of that subsection. As I have said, there is no appeal against that g finding. So the contract was one into which, by virtue of s 36(3) of the Act, it was unlawful for charity trustees to enter; and, *prima facie* at least, it was void for that reason. Further, whatever argument might be advanced on the basis that the word 'disposition' in s 37(4) of the Act included an agreement or contract which was to be treated as a sale or disposition for the purposes of s 36(1), it is plainly h beyond argument that if 'an agreement for the sale ... or other disposition' is not a sale or disposition to which s 36(1) applies, s 37(4) can have no application in respect of it.

STATUTORY RESTRICTIONS ON DISPOSITIONS OF CHARITY LAND

j [21] Statutory restrictions on the sale, lease or other disposition of charity land in England and Wales were introduced by the Charitable Trusts Amendment Act 1855. Before that statutory intervention, the position was that, subject to the terms upon which the land had been conveyed to them, charitable corporations and charity trustees had power to sell, lease or mortgage charity land. But the transaction was liable to be set aside in equity unless it was shown to be beneficial to the charity; and the onus to establish that it was beneficial to the charity was

on the purchaser (see *A-G v South Sea Co* (1841) 4 Beav 453 at 458, 49 ER 414 at 416). Section 29 of the 1855 Act was in these terms, so far as material:

'It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament ... or of a Court or Judge of competent jurisdiction ... or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof ... for any term of years exceeding twenty-one years.'

The 'board', in that context, meant the Charity Commissioners for England and Wales appointed under s 1 of the Charitable Trusts Act 1853 (see s 6 of that Act and s 1 of the 1855 Act).

[22] The prohibition in s 29 of the 1855 Act applied to all land held by a charity, unless the charity itself was wholly or partially exempted from the operation of the 1853 Act (see s 62 of the 1853 Act and s 48 of the 1855 Act). The effect was to limit the prohibition to land which formed part of the endowment of the charity (see *Re Clergy Orphan Corp* [1894] 3 Ch 145, [1891-4] All ER Rep Ext 1309). That prohibition was relaxed on the enactment of the Charities Act 1960. Section 29(1) of the 1960 Act provided that—with exceptions which are not material in this context—no land in England and Wales forming part of the permanent endowment of a charity should be sold, leased or otherwise disposed of without an order of the court or of the Charity Commissioners. 'Permanent endowment' was given a meaning, by ss 45(3) and 46 of the 1960 Act, which was more restrictive than that given to 'endowment' by this court in *Re Clergy Orphan Corp* for the purposes of s 62 of the 1853 Act. Section 29(2) of the 1960 Act applied that prohibition to land ('functional land') held by or in trust for a charity which was or had at any time been occupied for the purposes of the charity. But it was provided, in s 29(2), that a transaction for which the sanction of an order under s 29(1) was required by virtue only of s 29(2) should 'notwithstanding that it is entered into without such an order, be valid in favour of a person who (then or afterwards) in good faith acquires an interest in or charge on the land for money or money's worth.'

[23] The reason why it was thought necessary to give the protection to a purchaser in good faith of functional land for which s 29(2) of the 1960 Act provided is explained by the editors of *Tudor on Charities* (7th edn, 1984) p 559 in a note to the subsection:

'Protection is given to a purchaser who unwittingly acquires an interest in or charge on land within this subsection. The reason for this is that in the case of sales of land coming within this subsection the purchaser has to rely virtually entirely upon what he is told as to the function of the land, particularly in the past; and the fact that it is functional land of a charity—which mere inspection of the documents will not necessarily reveal—may be concealed from him. On the other hand, in the case of a sale under subsection (1) of land which is permanent endowment, the purchaser will be able to look at the deed under which the trustees hold the land, which will indicate this (see the Settled Land Act 1925, s.29(1)), and accordingly special protection for the purchaser is not needed: *Hansard* (Commons, Standing Committee A) June 28, 1960, col 324, Solicitor-General (Sir Jocelyn Simon).'

a [24] The provisions in s 29(1) and (2) of the 1960 Act were replaced, following the report of a committee chaired by Sir Philip Woodfield, by ss 32 and 33 of the Charities Act 1992. The objective which that change sought to achieve was explained in the introduction to Ch 7 (Consent to Land Transactions) of a command paper, 'Charities: A Framework For The Future' (Cm 694), presented to Parliament in May 1989:

b 'Section 29 of the 1960 Act places an obligation on trustees to obtain the Charity Commission's consent before selling or otherwise disposing of certain charity property. The provision is designed to ensure that it is proper for the transaction to go ahead and that the best price has been obtained. As the Woodfield Report observed, the additional steps which the Commission ask for are mostly things which, in view of their legal obligation to act in the charity's best interests, the trustees should have done automatically. Consistent with the aim of fostering among trustees a greater sense of their own responsibilities the Government propose to replace s 29 with a provision enabling trustees to dispose of charitable property without consent, provided they follow certain statutory procedures.'

d Sections 32 and 33 of the 1992 Act were re-enacted, on consolidation, as ss 36 and 37 of the 1993 Act.

[25] The scheme established by the 1992 Act and adopted in the provisions of the 1993 Act which I have set out earlier in this judgment would—but for the decision in *Milner v Staffordshire Congregational Union (Inc)* [1956] 1 All ER 494, [1956] Ch 275—be clear enough. It may be summarised as follows:

e (1) Where land is held by or in trust for a charity—and whether or not that land forms part of the permanent endowment or is functional land—the charity trustees must, before entering into an agreement for the sale of that land, comply with the requirements of s 36(3) of the 1993 Act. In particular, the charity trustees must satisfy themselves, after consideration of a written report from a qualified surveyor instructed by them and acting exclusively for the charity, that the proposed sale is on terms which are the best that can reasonably be obtained (s 36(3)(a) and (c)).

f (2) It follows that, if the charity trustees have not complied with the requirements of s 36(3) of the 1993 Act, it is unlawful for them to enter into—or, where the charity is a company having charitable objects, for them to cause or permit the charity to enter into—an agreement for the sale of the land. That, as it seems to me, is the clear purpose and effect of s 36(3).

g (3) If the charity trustees have complied with the requirements of s 36(3) of the 1993 Act, then—but for the decision in *Milner's* case—there would be nothing in s 36(1) or (2) which prohibits them (or the charity) from entering into an agreement for the sale of the land. But the effect of that agreement will depend on whether the proposed sale is, or is not, to a connected person (or to a trustee for, or nominee of, a connected person) (s 36(2)(a)). 'Connected person' is given a wide meaning for the purposes of s 36(2) by the definition in Sch 5 to the 1993 Act.

j (4) Where the proposed sale is to a connected person (or to a trustee for, or nominee of, a connected person) the land cannot be sold without an order of the court or of the commissioners (s 36(1)). It follows that, in such a case, the agreement—although lawfully made after proper compliance with the requirements in s 36(3)—cannot lawfully be performed unless such an order is first obtained.

(5) Where the proposed sale is to a person who is not within s 36(2)(a) there is no requirement that an order of the court or of the commissioners be obtained. But it remains necessary, of course, that there has been proper compliance with the requirements of s 36(3) (s 36(2)(b)).

(6) Where land held by or in trust for a charity is to be sold, both the contract for sale (if any) and the transfer must contain a statement that the land is charity land and is land to which the restrictions on disposition imposed by s 36 of the 1993 Act apply (s 37(1)). The purpose and effect of that requirement is that the immediate purchaser—and any subsequent purchaser—is on notice of the matters stated. That requirement goes a long way to meet the need, identified in the note in *Tudor* to which I have referred, which had led Parliament to include the proviso when enacting s 29(2) of the 1960 Act.

(7) A purchaser to whom charity land is transferred—and any subsequent purchaser—is protected by the inclusion in the transfer of a certificate by the charity trustees that (in a case falling within s 36(1) of the 1993 Act) the transfer has been sanctioned by an order of the court or of the Commissioners or (in a case falling within s 36(2)) that the trustees have complied with the requirements of s 36(3) (s 37(2) and (3)).

(8) In a case where the transfer does not include the certificate by the charity trustees for which s 37(2) provides, a purchaser—and any subsequent purchaser—may still be protected if he can rely on the provisions of s 37(4) of the 1993 Act, which re-enact the proviso formerly contained in s 29(2) of the 1960 Act. In such a case, the transfer will have effect notwithstanding s 36(1) and (2). The purchaser will be protected whether or not the sale has been sanctioned by the court or by the commissioners and whether or not the charity trustees are acting within their powers or have complied with the requirements of s 36(3). But, in order to rely on the provisions of s 37(4) of the 1993 Act, the purchaser must show that he is a person who ‘in good faith acquires an interest in the land’ (my emphasis). Where the contract contains a statement that the land is held by or in trust for a charity and that the restrictions on disposition imposed by s 36 apply—as, in such a case, s 37(1) requires—but the transfer contains no certificate under s 37(2), it is difficult to see how a purchaser who makes no inquiry as to the matters which such a certificate should disclose could establish good faith. But there may be cases where there is no s 37(1) statement and the purchaser is unaware that the land is charity land. In such cases the purchaser in good faith will need the protection which the proviso to s 29(2) of the 1960 Act—now re-enacted as s 37(4) of the 1993 Act—was intended to provide.

[26] It is important, in the context of the present appeal, to note that the legislature has had well in mind, when enacting ss 36 and 37 of the 1993 Act, the distinction between a contract (or agreement) for the sale or other disposition of charity land and the transfer, conveyance or other instrument by which the sale or other disposition is effected. The distinction is emphasised in s 37(1). It is recognised, also, in s 36(3)—the requirements of which must be complied with ‘before entering into an agreement for the sale or (as the case may be) for a lease or other disposition’ of charity land; in s 36(5)—‘Where the proposed disposition is the granting of a lease ... before entering into an agreement for the lease’; and in s 37(2)—which requires the charity trustees to include the certificate for which that subsection provides ‘in the instrument by which the disposition is effected’. But, having regard to the decision in *Milner’s* case, it is less clear whether the prohibition in s 36(1) of the Act—‘no land ... shall be sold, leased or otherwise

a disposed of—is intended to extend to the making of a contract for the sale of charity land. It is to that point that I now turn.

DOES S 36(1) OF THE 1993 ACT PROHIBIT THE MAKING OF A CONTRACT FOR THE SALE OF CHARITY LAND?

b [27] But for the decision in *Milner v Staffordshire Congregational Union (Inc)* [1956] 1 All ER 494, [1956] Ch 275 I would have no doubt that the answer to the question whether s 36(1) of the 1993 Act prohibits the making (as distinct from the performance) of a contract for the sale of charity land—in circumstances where s 36(1) applies—is 'No.'

c [28] Section 36(1) must be read in conjunction with the other provisions of s 36. That is emphasised by the opening words, 'Subject to the following provisions of this section'. Section 36(3) makes it unlawful for charity trustees to enter into (or to cause a charitable company under their control to enter into) an agreement for the sale of charity land—or an agreement for a lease other than a lease within s 36(5)—unless the requirements of that subsection have first been satisfied. Section 36(5) makes it unlawful for charity trustees to enter into an agreement for a lease of less than seven years unless the requirements of that subsection have been satisfied. In a case where the requirements of s 36(3) or (5)—as the case may be—are not satisfied, there is no role for s 36(1) at the contract stage. In such a case, as it seems to me, the role of s 36(1) is to make void the transfer or lease executed in pursuance of the unlawful contract—subject, of course, to the saving provisions of s 37(3) and (4).

e [29] If the requirements of s 36(3) or (5) are satisfied, s 36(1) has no application save in a case where the purchaser is (or is trustee or nominee for) a connected person. In such a case, the obvious purpose of s 36(1) is to require that the sale be approved by the court or by the Charity Commissioners. Absent such approval, the transfer to the connected person will be void; unless the transferee can rely on s 37(3) or (4). It is, I think, significant that s 37(2) requires that, where f s 36(1) applies, the certificate to be given by the charity trustees—certifying that the disposition has been sanctioned by the court or by the commissioners—is to be in the transfer or in the lease. And it is only where the certificate is in the transfer that the purchaser (or a subsequent purchaser) obtains the protection afforded by s 37(3). There is no comparable provision for a certificate that sanction has been obtained to be included in the contract, nor anything in s 37(3) g which would protect a purchaser if such a certificate were included in the contract. The reason for that omission is, as it seems to me, obvious. The legislature did not intend that s 36(1) would have any application at the contract stage even in those cases where the requirements of s 36(3) or (5) were satisfied.

h [30] But it is not easy to reconcile that conclusion with the decision in *Milner's* case. It is necessary, therefore, to examine the reasoning which led Danckwerts J to the conclusion which he reached in that case; and to review the later cases in which that decision has been considered and distinguished.

SHOULD THE DECISION IN *MILNER'S* CASE BE FOLLOWED?

j [31] The facts in *Milner's* case may be stated shortly. The plaintiff, Mr Milner, had entered into a written agreement with the trustees of the defendant charity for the purchase of charity land. Notwithstanding that the consent of the Charity Commissioners had not been obtained before the date of the agreement (11 September 1954), the agreement was not made conditional upon such consent. On 24 September 1954 the plaintiff was informed by the charity trustees that the sale was subject to the commissioners' consent being obtained; and, on

12 November 1954, that consent was obtained. But in the interim, on 16 October 1954, the plaintiff had given notice that he did not intend to proceed with the purchase. He sued to recover his deposit. It was held that the contract was unlawful; that the plaintiff was not bound by it; and that he was entitled to repayment. a

[32] The decision turned on the effect of s 29 of the 1855 Act—which I have set out earlier in this judgment—and, in particular, of the words: b

‘It shall not be lawful for the trustees or persons acting in the administration of any charity to make ... otherwise than with the ... approval of the board ... any sale.’

Danckwerts J held that those words made it unlawful for the charity trustees to enter into a contract for the sale of charity land without having first obtained the requisite consent. His reasoning appears in the following passage ([1956] 1 All ER 494 at 497–498, [1956] Ch 275 at 281–282): c

‘I have to decide what that Act means when it says: “make ... any sale”. It does not say “make a conveyance” or “complete any sale” or anything of that sort; it simply says “make ... any sale”, and I think for the purposes of the section, though I am bound to say that the matter is not free from doubt, that a sale is made when a contract is entered into by the owners of the property in question for the sale of the property to some purchaser. It is therefore a breach of the terms of the section if the trustees of a charity enter into a contract to sell the trust property without the authority of the Charity Commissioners. I would observe that there is some support for this view to be found in the documents in the present case. In the alleged contract the phrase is: “The property is sold subject to any reservations ...” and in the solicitors’ letter of Sept. 24, 1954, the expression is: “the sale of this property must be subject to the consent of the Charity Commissioners”. It is perhaps then not unreasonable to think that the word “sale” in the section must be used in a similar manner. I am not saying, of course, that a conveyance in pursuance of the purported contract would be any more lawful than the original contract would be, but it seems to me that “sale” must include the making of a contract of sale at least as well as a conveyance on sale.’ d
e
f
g

[33] It is, I think, clear that, in finding that words used in the contract in the case before him—and in a subsequent letter from the vendors’ solicitors—lent support to the view that, for the purposes of s 29 of the 1855 Act, the phrase ‘make ... any sale’ included the making of a contract for sale, Danckwerts J was doing no more than to make the point that it was not uncommon, in a transaction for the sale and purchase of land, to refer to the land as ‘sold’, or to the ‘sale’ taking place, on exchange of contracts. He could not have intended to suggest that the meaning of words in the 1855 Act could be determined by what the parties may have understood by the word ‘sale’ in an inter partes transaction 100 years later. Be that as it may, it is difficult to find any compelling analysis in the passage which I have set out—or elsewhere in the judgment—to explain why Parliament should have intended, in 1855, to strike down in limine a contract for the sale of land made upon terms which were capable of being approved, and which were in the event approved (albeit between contract and conveyance), by the commissioners. The legislative intention in 1855—to protect the objects of an endowed charity from an improvident disposition of land held by the charity h
j

a trustees—could as well be achieved by prohibiting the conveyance (absent the commissioners' sanction) as by striking down the contract.

[34] In *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 Buckley J was invited to apply the reasoning in *Milner's* case to a comparable provision in a scheme made in 1962 by the Minister of Education under the Endowed Schools Acts 1869 to 1948. The scheme provided that the governing body was entitled to sell land formerly used as a school 'subject in each case to the approval of the purchase price by the Minister of Education'. In rejecting the submission that ministerial approval was necessary before a contract of sale could be made, Buckley J said this ([1969] 3 All ER 1593 at 1598, [1970] 1 WLR 241 at 247):

c 'Reliance is placed on *Milner v Staffordshire Congregational Union (Inc)* where it was held that it was unlawful for charity trustees to enter into a contract of sale under the Charitable Trusts Amendment Act 1855, s 29, without the prior approval of the charity commissioners. In my judgment, that case is clearly distinguishable from the present case. Section 29 of the Act of 1855 expressly makes any sale by charity trustees—ie, any contract for sale—unlawful unless it is made with the approval of the commissioners. The power to contract is conditional on prior approval. The requirement of cl 4 of the 1962 scheme in the present case is quite different. By that clause the governing body is authorised to sell property comprised in the scheme but any sale—ie, any contract for sale—is required to be conditional on ministerial approval of the price being obtained. The power to complete a sale is conditional on prior approval, but not the power to contract. The fact that ministerial approval was not obtained until 18 November 1964 does not, in my judgment, invalidate the contract, if any made on 15 September.'

[35] I find that reasoning difficult to follow. Section 29 of the 1855 Act had not f 'expressly [made] any sale by charity trustees—that is, any contract for sale—unlawful unless it is made with the approval of the commissioners'. The section had made it unlawful for trustees 'to make or grant ... any sale, mortgage or charge of the charity estate, or any lease thereof ... for any term of years exceeding twenty one years' otherwise than with the approval of the commissioners. Clause 4 of the 1962 scheme authorised the governing body—

g 'to sell any of the premises ... subject in each case to the approval of the purchase price by the Minister of Education, or to let the same according to the general law applicable to the letting of property by trustees of charitable foundations.'

h The plain object of the scheme, as it seems to me, was to give effect to s 1(1) of the Education (Miscellaneous Provisions) Act 1948, by transferring to the Minister powers otherwise exercisable by the commissioners under the Charitable Trusts Acts 1853 to 1939—including, in this context, the power to approve a sale conferred by the 1853 Act. If Danckwerts J was correct, in *Milner's* case, to hold that the effect of s 29 of the 1855 Act was to require approval to precede the making of a contract of sale, then it is difficult to see why cl 4 of the scheme did not have the same effect. The better view, I think, is that the basis for Buckley's J decision in the *Manchester Diocesan Council* case cannot be reconciled with Danckwerts J's decision in *Milner's* case.

[36] The decision in *Milner's* case left open the question whether it was lawful for charity trustees to make a contract for the sale of charity land which was

conditional on obtaining sanction from the court or from the commissioners: see the observations of Danckwerts J ([1956] 1 All ER 494 at 498, [1956] Ch 275 at 282):

‘I will not express any opinion as regards the position where the contract entered into between the parties is expressed to be conditional on the obtaining by the vendors of the consent of the Charity Commissioners. It may be that different considerations may arise, and in a case of that kind the purchaser may not be at liberty to withdraw from the transaction if the charitable trustees are duly obtaining the consent of the Charity Commissioners, though it may not have been obtained at some given moment before the time of completion.’

The contract in the *Manchester Diocesan Council* case was, itself, made conditional upon approval of the purchase price by the Secretary of State (upon whom the functions of the Minister of Education had devolved) (see [1969] 3 All ER 1593 at 1595, [1970] 1 WLR 241 at 243). But Buckley J did not distinguish *Milner’s* case on that ground. The question which Danckwerts J had left open came before Goff J in *Michael Richards Properties Ltd v Corp of Wardens of St Saviour’s Parish, Southwark* [1975] 3 All ER 416.

[37] In the *Michael Richards* case the contract had been made on terms that: ‘The person whose Tender is accepted on the 27th day of October 1972 shall be the purchaser, subject to the approval of the Charity Commissioners ...’ The plaintiff’s tender was accepted by letter on 27 October 1972. The Commissioners gave consent by order dated 11 December 1972. The vendors called on the claimant to complete. The claimant refused and sued for return of the deposit which it had paid. It took the point, in reliance on s 29(1) of the 1960 Act and the decision in *Milner’s* case [1956] 1 All ER 494, [1956] Ch 275, that, if the acceptance on 27 October 1972 would otherwise have constituted a contract, that contract was unlawful because it was made at a time when the consent of the Commissioners had not been obtained. Goff J rejected that submission. He said ([1975] 3 All ER 416 at 421):

‘In *Milner v Staffordshire Congregational Union (Incorporated)* Danckwerts J held that an absolute and unqualified contract so made was bad, but he left open the question how it would be if, as here, the contract, though preceding the consent, was conditional on it being obtained. It seems to me, however, that it must be good. Such a condition is precedent and therefore either the consent is not forthcoming when cadit quaestio, or if it be, the contract becomes effective only when the consent is given. It is therefore not made without consent and does not offend against s 29(1) of the Charities Act 1960.’

It may be that, on the facts in the *Michael Richards* case, Goff J was entitled to find that the contract was made subject to a condition precedent. But, as it seems to me, a condition requiring Charity Commissioners’ consent could as well be framed as a condition subsequent—as, for example, where it was provided that the contract would determine if consent had not been obtained by a specified date. The analysis adopted by the judge in that case cannot be regarded as a satisfactory solution to the wider problem which arises in cases where consent is required if the decision in *Milner’s* case is correct.

[38] The point arose, again, in *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109. The agreement in that case was expressed to be subject to

a and conditional upon the grant of consent before 31 March 1982 and if consent was not granted before that date then the contract was to be 'null and void and of no further effect'. The plaintiffs registered an estate contract. The defendants, charity trustees, sought to have the registration vacated. That application, made on motion, was refused by Sir Robert Megarry V-C. He summarised the arguments ([1982] 3 All ER 525 at 532, [1982] 1 WLR 1109 at 1116):

b 'On that footing [that there was no unconditional contract], the question is whether the contract is a conditional contract which is registrable as an estate contract. Counsel ... contended that it was not, for a variety of reasons. First, the contract was void, or at least ineffective, because it had been made without the approval of the Charity Commissioners. Second, even if initially it was valid, it had come to an end because the Charity Commissioners had refused to approve it. Third, even if it continued to exist as a valid conditional contract, such contracts were not registrable as estate contracts.'

d [39] In addressing the first of those submissions, Sir Robert Megarry V-C, reviewed the three decisions to which I have already referred—*Milner's case* [1956] 1 All ER 494, [1956] Ch 275, *Manchester Diocesan Council* [1969] 3 All ER 1593, [1970] 1 WLR 241 and the *Michael Richards case* [1975] 3 All ER 416. He expressed his conclusion ([1982] 3 All ER 525 at 532, [1982] 1 WLR 1109 at 1117):

e 'In the present case, the effect of the exchange of letters in March 1980 was that cl 2.1 of the contract operated to make all the provisions of the contract, apart from the opening words, cl 1, and cl 2.1 itself, "subject to and conditional upon" the Charity Commissioners making an order under s 29 of the Charities Act 1960, authorising the governors to enter into and complete both the contract and the leases. There is a curious element of circularity here: the parties enter into an agreement that nearly all the agreement is subject to an order authorising the governors to do what they have done, namely, enter into the agreement. But looking at the substance, it seems to me plain that it is the *Michael Richards case* that applies rather than the *Milner case*, so I do not think that the contract is invalidated by s 29(1) of the Charities Act 1960.'

g [40] The flaw in that reasoning, if I may say so, is that the decision in the *Michael Richards case* turned on Goff J's finding that the condition, in that case, was a condition precedent (see the passage from his judgment at [1975] 3 All ER 416 at 421, to which I have referred). The condition in the *Haslemere Estates case* was framed as a condition subsequent. The point underlies Sir Robert Megarry V-C's recognition that there was 'a curious element of circularity' in the reasoning which he felt obliged to adopt. It finds expression in the next paragraph of his judgment ([1982] 3 All ER 525 at 532–533, [1982] 1 WLR 1109 at 1117):

j 'That, however, is not the end of the *Michael Richards case*; for there are the words of Goff J saying that if the consent is forthcoming, "the contract becomes effective only when the consent is given". From this flows the contention that where, as here, there has been no consent, the contract, though not struck down by s 29(1), remains nevertheless ineffective until the consent is given. On that footing there is no more than an ineffective contract, and an ineffective contract is not, it is said, registrable as an estate

contract ... The whole basis of the escape from s 29(1) is that there is no contract in existence which offends against the subsection.'

It might have been thought that Sir Robert Megarry V-C's conclusion that the only escape from a finding that the contract was struck down by s 29(1) of the 1960 Act was to hold that there was no contract at all would have led him to conclude that there was no contract to support a c(iv) entry on the Land Charges Register. But he refused to go that far. In a passage which I do not find easy to reconcile with that which I have just set out, he said ([1982] 3 All ER 525 at 534, [1982] 1 WLR 1109 at 1118–1119):

'In this case, there is no doubt about the parties having made an agreement in relation to the site; it is not one of the common cases where the existence of any agreement at all is in dispute. I feel no doubt about holding that no unconditional contract exists, but I am far from having the requisite degree of assurance that the conditional contract is not registrable. Indeed, as at present advised I incline to the view that a conditional contract relating to land is registrable as an estate contract if the condition is one that is to be satisfied not by the parties but by some extraneous person or event. I say nothing about other conditional contracts ... Further, the *Milner* point is certainly not beyond argument, nor is it beyond possibility that the Charity Commissioners will approve the contract before 31 March 1982. Accordingly, I reject the application to vacate the entry of the estate contract.'

[41] It is, I think, not unfair to suggest that the three distinguished Chancery judges—Buckley J, Goff J and Sir Robert Megarry V-C—who, in the cases to which I have referred, have felt obliged to accept the decision in *Milner's* case [1956] 1 All ER 494, [1956] Ch 275 have struggled to avoid the consequences to which that decision might have been thought to give rise; and not unfair to suggest that the reasoning in those subsequent cases betrays the difficulties which they have faced. In my view, the difficulties which that decision has presented in subsequent cases is, of itself, a powerful reason for thinking that the decision was wrong.

[42] For my part, while recognising that it is not, perhaps, now necessary formally to overrule the decision in *Milner's* case, which was a decision on words in a statute no longer in force, I think that the time has come when this court should say that that decision should not be followed. In any event, that decision does not and should not prevent this court from holding that the words in s 36(1) of the 1993 Act, construed in the context of current statutory provisions in ss 36 and 37 of that Act, have no application to an agreement for the sale, or for a lease or other disposition, of charity land.

THE EFFECT OF FAILURE TO COMPLY WITH THE REQUIREMENTS OF S 36(3) OF THE 1993 ACT

[43] Although, as I would hold, s 36(1) of the 1993 Act does not, itself, have the effect of making void an agreement for the sale of charity land into which charity trustees have entered without first complying with the requirements of s 36(3) of the Act, it is plain that (absent an order of the court or of the commissioners) a transfer made in purported performance of such an agreement will be void; unless saved by s 37(4). It follows that, in a case such as the present, where the purchaser becomes aware, before completion of the contract by transfer or conveyance, of the failure by the charity trustees to comply with the

a requirements of s 36(3), he cannot compel performance of the contract. Section 37(4) of the 1993 Act does not assist him in such a case. That section can have no application to an uncompleted contract for the sale of charity land. No 'disposition' is capable of being made valid by the operation of that section unless it is a 'disposition' within para (a)—that is to say, a 'disposition' to which sub-ss (1) or (2) of s 36 applies. An uncompleted contract for the sale of charity land is not, b itself, a 'disposition' of that land for the purposes of s 36(1) or (2) of the Act.

[44] It remains, however, to consider whether the agreement is made void by s 36(3). As I have said, earlier in this judgment, a contract into which, by virtue of s 36(3) of the 1993 Act, it was unlawful for the charity trustees to enter will, prima facie at least, be void for that reason. That, as it seems to me, is, plainly, the position where the charity trustees are, themselves, the purported c vendors—that is to say, in a case where the land is held by them as trustees upon charitable trusts. But the position is, I think, less clear where the land is held by a company with charitable objects. In such a case the charity trustees—who will be the directors, or other persons with powers of management over the affairs, of the company—will not, themselves, be the purported vendors. The vendor will d be the company.

[45] It is plain that directors of a company with charitable objects will be acting outside their powers if they cause the company to enter into an agreement for the sale of charity land in circumstances in which they, as the charity trustees, have not complied with the requirements of s 36(3). It is plain, also, that in the present case—and, I suspect, in most if not all cases where a company has been e incorporated with exclusively charitable objects—it is beyond the capacity of the company (that is to say, ultra vires the company) to enter into such an agreement, by reason of restrictions in the company's memorandum of association. It is pertinent, therefore, to have in mind that the provisions of ss 35 and 35A of the Companies Act 1985—as amended and introduced by s 108(1) of the Companies f Act 1989—do not apply to the acts of a company which is a charity save to the extent for which s 65 of the 1993 Act provides.

[46] Section 35 of the 1985 Act provides that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum. Section 35A provides that, in favour of a person dealing with a company in good faith, the power of the g board of directors to bind the company shall be deemed to be free of any limitation under the company's constitution. Section 65 of the 1993 Act is in these terms, so far as material:

h '(1) Sections 35 and 35A of the Companies Act 1985 (capacity of company not limited by its memorandum; power of directors to bind company) do not apply to the acts of a company which is a charity except in favour of a person who—(a) gives full consideration in money or money's worth in relation to the act in question, and (b) does not know that the act is not permitted by the company's memorandum or, as the case may be, is beyond the powers of the directors, or who does not know at the time the act is done that the company j is a charity [emphasis added] ...

(3) In any proceedings arising out of subsection (1) above the burden of proving—(a) that a person knew that an act was not permitted by the company's memorandum or was beyond the powers of the directors, or (b) that a person knew that the company was a charity, lies on the person making that allegation.'

[47] For my part, I would be prepared to assume, in light of the judge's finding as to good faith in the present case, that the charity has not established, and would not be in a position to establish, that Mr Perkins knew that the agreement of 16 November 2001 was not permitted by the charity's memorandum and was beyond the powers of the Committee of Management. But I would not be prepared to assume that Mr Perkins gave full consideration for the purchase contract. The premium that he was able to obtain from Mr Bayoumi some ten days later is striking. An assertion that full value was given does not sit easily with a claim to damages for loss of bargain. In those circumstances it is impossible to hold, on the material before this court, that the contract is saved by the operation of ss 35 and 35A of the 1985 Act, read in conjunction with s 65 of the 1993 Act. But, equally, it is not possible to say that the contract is void. The point cannot be resolved on this appeal.

[48] In any event, the point as it seems to me, is likely now to be moot. If the contract were saved by the operation of ss 35 and 35A of the 1985 Act, there would seem to be no-one, as matters now stand, who could enforce it against the charity. This court is in no position to hold that the contract is valid, so as to satisfy the condition in para 4 of the consent order of 3 June 2003. Mr Bayoumi was not named as a party to this appeal, has taken no part in it and, *prima facie* at least, will not be bound by any other order which this court might make.

CONCLUSION

[49] I would allow this appeal to the extent that I would set aside the declaration made in para 1 of the order of 21 January 2003. But, having regard to the form in which the preliminary issue was presented to the judge for determination, I would substitute a declaration to the effect that s 37(4) of the 1993 Act has no application in relation to the agreement of 16 November 2001.

BUXTON LJ.

[50] I agree.

RIX LJ.

[51] I also agree.

Appeal allowed in part.

Kate O'Hanlon Barrister.

Omilaju v Waltham Forest London Borough Council

EMPLOYMENT APPEAL TRIBUNAL

JUDGE PROPHET, MR J SHRIGLEY AND MR D WELCH

1 OCTOBER 2003, 31 MARCH 2004

Unfair dismissal – Constructive dismissal – Test to be applied in determining whether employee constructively dismissed – Employee resigning and complaining of series of actions by employer – Whether finding of constructive dismissal precluded where final act of employer precipitating resignation was reasonable conduct by employer.

The employee worked for the local authority as a housing officer. Between February 1998 and August 2000, he lodged five sets of complaints to the employment tribunal against his employer. All his complaints were dismissed. He resigned from his post in September 2001 when he was advised of his employer's decision not to pay him for days spent at the tribunal hearing and lodged a further application which included a complaint of unfair constructive dismissal. He was successful in one matter, but the tribunal dismissed the majority of the complaints, including that for unfair dismissal. He appealed. The issue arose as to whether, in relation to a series of actions by an employer, where it was contended that the final action was 'the last straw' as far as an employee was concerned, the employer's final action had itself to be unreasonable in some way.

Held – Where a series of actions by an employer had to be considered it would be wrong to say that any possibility of a finding of constructive dismissal was negated if the final action of the employer was found to have been reasonable. In a 'last straw' situation matters turned to some extent on the perception of the employee at the time when he felt that he had been treated unreasonably or unfairly by his employer; it was that which caused him to decide to resign, usually bringing into the picture previous actions by the employer. The function of the employment tribunal when faced with a series of actions by an employer was to look at all the matters and assess whether cumulatively there had been a fundamental breach of contract by the employer. In the instant case, the tribunal had failed to answer that question. Accordingly, the matter would be remitted to the same tribunal in order to answer the question whether the previous acts of the employer, together with the final act in refusing to pay the employee's salary, cumulatively constituted a fundamental breach of the employee's contract of employment (see paras 9, 12–14, 16, 17, below).

Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 considered.

Notes

For constructive dismissal, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 478.

Cases referred to in judgment

Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157, CA.

Post Office v Roberts [1980] IRLR 347, EAT.

Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, [1981] ICR 666, EAT;
affd [1982] IRLR 413, [1982] ICR 693, CA. a

Cases referred to in skeleton arguments

Piggott Bros & Co Ltd v Jackson [1991] IRLR 309, [1992] ICR 85, CA. b

Rigby v Ferodo Ltd [1987] IRLR 516, [1988] ICR 29, HL.

Spafax Ltd v Harrison [1980] IRLR 442, CA.

Spring v Guardian Assurance plc [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.

TSB Bank plc v Harris [2000] IRLR 157, EAT.

United Bank Ltd v Akhtar [1989] IRLR 507, EAT. c

Appeal

Folu Omilaju appealed from the decision of the Stratford Employment Tribunal (Chair: Ms Gilbert, Mr Edwards and Mrs Cushing) in March 2003 dismissing his complaint of constructive unfair dismissal against his employer, Waltham Forest London Borough Council. The facts are set out in the judgment of the tribunal. d

Fred Edward Jnr for Mr Omilaju.

Noah Weiniger (instructed by Satish Mistry) for the employer.

Cur adv vult e

31 March 2004. The following judgment of the appeal tribunal was delivered.

JUDGE PROPHET.

1. Mr Omilaju worked as a housing officer for the London Borough of Waltham Forest. Between February 1998 and August 2000, he lodged five sets of complaints to the employment tribunal against his employers, and these were consolidated and heard at Stratford Employment Tribunal in July and August 2001. All his complaints were dismissed on that occasion. However, he then lodged a further application in October 2001, following his resignation from his employment at the end of September 2001. There are a number of heads of complaint in that application, including unfair constructive dismissal. f

2. An employment tribunal with Ms Gilbert as the chairman and Mr Edwards and Mrs Cushing as the lay members, sat for eight days at the Stratford Employment Tribunal in March 2003, to consider those complaints. The outcome was that the majority of them, including unfair dismissal, were dismissed. Mr Omilaju was, however, successful in one complaint which related to victimisation in respect of a reference. g

3. Mr Omilaju appealed the employment tribunal's decision. Initially the registrar of the Employment Appeal Tribunal considered that the appeal raised no point of law, and she directed that no further action be taken on it in accordance with r 3(7) of the Employment Appeal Tribunal Rules 1993, SI 1993/2854. That direction was appealed to Judge Clark, who directed that there should be a preliminary hearing at the Employment Appeal Tribunal before a judge and two lay members. That preliminary hearing took place before Rimer J and two lay members on 15 January 2004. h

a 4. Of the nine grounds of appeal in the notice of appeal, the first seven were all dismissed at that preliminary hearing stage. Two grounds were allowed to proceed to a full hearing, these were ground (viii):

b 'Considering the employment tribunal's own various findings at para 90 (and also paras 83–87, 36–39 and 40) whether the employment tribunal misapplied the law as well as applying the wrong test under the doctrine of "last straw" when they held that there were sufficient breaches of the implied term of trust and confidence in which the appellant was entitled to resign but that his claim failed because "the last straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the appellant's contract and the terms incorporated in it."'

c And the ground (ix):

d 'Whether, on the employment tribunal's own findings of fact, there were sufficient findings entitling the appellant in law to resign apart from the last straw principle.'

It follows that this appeal proceeds only those specific matters, and we are constituted today to deal with them. Mr Omilaju is represented by Mr Edward Jnr, and the employer by Mr Weiniger, of counsel.

e 5. In order to understand the basis of the appeal today, it is necessary to explain that Mr Omilaju alleged that he resigned from his post as housing officer when he was advised of the employer's decision not to pay him for days spent at the employment tribunal. However he also referred to a series of matters preceding that, in respect of which he was also complaining, and that included the matter of the reference. This is confirmed by a reading of his originating application, and the contents of his resignation letter dated 7 September 2001.

f 6. In respect of those earlier matters, Mr Edward, in his skeleton argument, and, indeed, in ground (viii) of his notice of appeal, says that the employment tribunal found that these would have justified Mr Omilaju's resignation, if he had chosen to resign in respect of them. That arises from what is contained in para 90 of the employment tribunal's extended reasons, and it is appropriate for us to set out the contents of para 90 in full.

g 'The applicant has to show that he resigned in circumstances in which he was entitled to resign without notice by reason of his employer's contract. The applicant has to show that there was a serious breach of contract, or a breach which was the last in a series of breaches; that he resigned in response to the breach, and that he resigned within a reasonable time without affirming the contract. The applicant in this case resigned because he was not paid wages for the days in July and August 2001 he was attending the employment tribunal. He was not paid because he was not available for work and his absence was not covered by the contract. There was no breach of contract at all never mind one which would entitle the applicant to resign without notice. The applicant did not resign because of the Kush reference or because of Mrs Chown's [line manager] conduct towards him both of which may have been breaches of the implied term of trust and confidence. He resigned because he was not paid. The applicant also says it was the last in a series of actions such as to amount to a breach of trust and confidence. To this end the applicant relies on the history including his treatment by

Mrs Chown and the reference from Mr Driscoll [Manager of Housing Services]. He may not have resigned in response to these but taken together with non-payment of wages in the employment tribunal he was entitled to resign and claim he was dismissed. The difficulty for the applicant is that looked at objectively the straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract and the terms incorporated in it. The applicant was not dismissed. There was no dismissal and his complaint of unfair dismissal fails and is dismissed.'

7. The difficulty arises in respect of putting the following sentence in context:

'He may not have resigned in response to these but taken together with non-payment of wages in the employment tribunal he was entitled to resign and claim he was dismissed.'

Mr Edward understands that the employment tribunal was thereby making a finding of Mr Omilaju's entitlement to resign and claim a constructive dismissal by virtue of what had happened. Mr Weiniger, on the other hand, says that in the context of para 90, the employment tribunal was thereby indicating what the applicant's position was and the question which he wanted to have determined. It seems to us that there is some ambiguity there, but because of the action we have decided to take in this case, which we will come to in a moment, it will be helpful if the employment tribunal, in due course, can clarify the position on that matter.

8. Returning, therefore, to the issues which the employment tribunal had to decide in respect of unfair dismissal, we find in the extended reasons at para 2, under the heading 'Unfair Dismissal', the following words:

'(viii) Whether the breach of contract referred to in (vii), above [that, indeed, was the deduction of wages] was a fundamental breach of the applicant's contract of employment and if not the last in a series of breaches by the respondent such as to entitle the applicant to resign without notice by reason of the respondent's conduct and if it was, (ix) whether the dismissal was fair.'

Returning then to para 90, the second sentence there says this: 'The applicant has to show that there was a serious breach of contract, or a breach which was the last in a series of breaches ...'

9. Did the employment tribunal misdirect itself as to situations which involve a series of actions by the employer? In such situations, it is necessary for the employment tribunal to look at the earlier matters, plus the final act, in order to decide whether, cumulatively, they constituted a fundamental breach of contract, entitling the employee to resign and claim a constructive dismissal. That is made clear by the judgment in the case of *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, [1981] ICR 666. In particular reference has been made, correctly as we feel, to para 17 in that judgment ([1981] IRLR 347 at 350, [1981] ICR 666 at 670-671), that judgment being by Browne-Wilkinson J, as he then was. At the end of para 17, the following words appear: 'The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts* ([1980] IRLR 347 at 352 (para 50)).'

10. In a situation where the employee is claiming a series of acts culminating in an act alleged to be a final straw, the important case is that of *Lewis v Motorworld*

a *Garages Ltd* [1985] IRLR 465, [1986] ICR 157. As we understand it, the employment tribunal in this case may not have been directed specifically to that case. If they had been, it would have been difficult for them to have said what they did at the beginning of para 90. In *Lewis*' case it was emphasised by the Court of Appeal that if there was a final act by the employer which causes the employee to resign, it is not essential for that final act itself to constitute a breach of contract. As was indicated in *Woods*' case, the employment tribunal had to look at matters cumulatively.

b 11. In its comprehensive judgment in the instant case, the employment tribunal, at para 90, indicate that because the final act, which caused Mr Omilaju to resign, was not a breach of contract, but, indeed, fully in accordance with the terms of his contract there could be no constructive dismissal. They also added
c that the action of the employers was a reasonable one. In general terms, Mr Weiniger submits that the tribunal approached the matters correctly, and reached conclusions which it was entitled to reach on the evidence it received. That, in general terms, is a powerful argument and this tribunal does not seek normally to disturb an employment tribunal decision approached in that way.
d The difficulty arises, however, in the terms of para 90, which we have set out above, and which does indicate some degree of ambiguity and possible confusion on the part of the employment tribunal.

12. However we have also had an interesting argument from Mr Weiniger, in respect of what can or cannot constitute a 'last straw' situation. Mr Weiniger says
e that in order to constitute a 'last straw' the conduct of the employer has to be unreasonable in some way, and, indeed, this tribunal expressly found that the employer's actions in respect of the non-payment of wages was reasonable.

13. The difficulty about that argument, it seems to us, is that in all 'last straw' situations, matters turn to some extent on the perception of the employee at the time when he feels that he has been treated unreasonably or unfairly by his
f employer. It is that which causes him to decide to resign, bringing into the picture, as is usually the case and, indeed, is the case here, previous actions by the employer about which he had complained. It seems to us that it would be wrong to say that any possibility of a finding of constructive dismissal in such a situation is negated if the final action of the employer is subsequently found by the
g employment tribunal to have been reasonable.

14. The case law indicates that the function of the employment tribunal when faced with a series of actions by the employer is to look at *all* the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer. We are unable to find in the judgment of this employment
h tribunal the answer to that question.

15. This was a case where, overall, the employment tribunal tackled its duties commendably, and there were very many matters which had to be resolved. This particular matter, arising as it does having passed through a number of judicial considerations, is one that we feel can be put right in a fairly
j straightforward way.

16. The appeal on the tribunal's decision that Mr Omilaju was not constructively dismissed, is allowed. It would not be appropriate for us to substitute a decision on the matter of whether he was or was not constructively dismissed, as Mr Edward suggests, nor, indeed, do we think it would be proportionate for this matter to have to be remitted to a different employment tribunal.

17. We will therefore direct, and we are very grateful to Mr Weiniger for being so helpful to us in this situation, that the case should be remitted to the same employment tribunal in order for that tribunal to answer the question whether the previous acts of the employer, including the matter of the reference, together with the final act in refusing to pay his salary for days spent at the employment tribunal, *cumulatively* constituted a fundamental breach of Mr Omilaju's contract of employment.

18. If the employment tribunal answers that question in the affirmative, it will follow that they will be likely to find that Mr Omilaju was constructively dismissed, in which case they will then have to deal with an unfair dismissal complaint in the usual way, ie in respect of both liability and, if appropriate, remedy. If, on the other hand, they answer it in the negative, they will in effect be confirming their earlier conclusion that he was not constructively dismissed from his employment, and, consequently, could not have been unfairly dismissed.

19. This appeal has caused us to consider the following question:

'Whether there can be a constructive dismissal in a situation where, whatever may have previously occurred, the final act which precipitated resignation is found by the employment tribunal to be reasonable conduct by the employer.'

We therefore grant Mr Weiniger's request for leave to appeal to the Court of Appeal.

Appeal allowed. Permission to appeal to the Court of Appeal granted.

Dilys Tausz Barrister.

R v Czyzewski and other appeals

[2003] EWCA Crim 2139

COURT OF APPEAL, CRIMINAL DIVISION

ROSE LJ, McCOMBE AND COX JJ

16 JULY 2003

Sentencing – Imprisonment – Length of sentence – Fraudulent evasion of duty chargeable on goods – Aggravating and mitigating factors – Appropriate sentence – Guidelines – Customs and Excise Management Act 1979, s 170.

(1) When assessing the seriousness of an offence of fraudulently evading duty on alcohol or tobacco, contrary to s 170^a of the Customs and Excise Management Act 1979, the principal factors are the level of duty evaded, the complexity and sophistication of the organisation involved, the function of the defendant within the organisation and the amount of personal profit to the particular defendant. The starting points in sentencing defendants with no relevant previous convictions (disregarding any personal mitigation) are: (i) where the duty evaded is less than £1,000 and the level of personal profit is small, a moderate fine; (ii) where the duty evaded by a first time offender is not more than £10,000, or the defendant's offending is at a low level, either within an organisation or persistently as an individual, a community sentence or curfew order enforced by tagging, or a higher level of fine; (iii) where the duty evaded is between £10,000 and £100,000, whether the defendant is operating individually or at a low level within an organisation, up to nine months in custody; and (iv) when the duty evaded is in excess of £100,000 the length of the custodial sentence will be determined principally by the degree of professionalism of the defendant and the presence or absence of other aggravating factors, subject to this the duty evaded will indicate starting points of nine months to three years in custody for evading duty between £100,000 and £500,000; three to five years in custody for evading duty between £500,000 and £1m and between five and seven years in custody for evading duty in excess of £1m. Those passing sentence can be expected to move up from the starting points indicated by reference to aggravating factors, or down, by reference to mitigating factors, particularly a prompt plea of guilty, and co-operation. Sentencers should also bear in mind their powers to order confiscation of assets under the Proceeds of Crime Act 2002; compensation, and deprivation, particularly of vehicles, under the Powers of Criminal Court (Sentencing) Act 2000, deprivation, particularly of vehicles, and disqualification from driving. Where licensed premises have been used for the sale of smuggled goods, the court should notify the licensing authority (see [5], [9]–[13], below).

^a Section 170, so far as material, provides: '(1) ... if any person ... (b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any [goods which are chargeable with a duty which has not been paid and goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force], and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section ...'

(2) An offence will be aggravated if a defendant (i) played an organisational role; (ii) made repeated imports particularly after receiving warnings; (iii) was a professional smuggler; (iv) used a legitimate business as a front; (v) abused a position of privilege; (vi) used children or vulnerable adults; (vii) threatened violence; (viii) dealt in goods with an additional health risk because of possible contamination; or (ix) disposed of goods to under-age purchasers. Evidence of professional smuggling will include a complex operation involving many people, financial accounting or budgets, obtaining goods from several different sources, integration of freight movements with commercial organisations, sophisticated concealment methods, varying of methods and routes, links with illicit overseas organisations, and when the duty evaded is in the order of £75,000. Mitigating factors include: a prompt plea of guilty, co-operation with the authorities, particularly in providing information about an organisation, and, to a limited extent, previous good character. Pressure from others to commit the offence might, depending on the circumstances, afford mitigation (see [6]–[8], below).

R v Dosanjh [1998] 3 All ER 618 not followed.

Notes

For fraudulent evasion of duty, see 12(2) *Halsbury's Laws*, (4th edn reissue) para 1170.

For the Customs and Excise Management Act 1979, s 170, see 13 *Halsbury's Statutes* (4th edn) (2004 reissue) 323.

Cases referred to in judgment

R v Dosanjh [1998] 3 All ER 618, CA.

R v Kefford [2002] EWCA Crim 519, [2002] 2 Cr App R (S) 495.

R v Powell (1984) 6 Cr App R (S) 354, CA.

Appeals against sentence

R v Czyzewski

Josef Eugene Czyzewski appealed with leave of the single judge against two concurrent sentences of four years' imprisonment following his conviction at Birmingham Crown Court before a judge and jury on 22 August 2002 on two counts of being knowingly concerned in fraudulently evading excise duty on cigarettes, contrary to s 170 of the Customs and Excise Management Act 1979. The facts are set out in the judgment of the court.

R v Bryan

Paul Barry Bryan applied for leave to appeal and to appeal against the sentence of two-and-a-half years' imprisonment imposed on him on 5 June 2003 by Judge Balston at the Maidstone Crown Court following his plea of guilty to a charge of being knowingly concerned in the fraudulent evasion of excise duty, contrary to s 170 of the Customs and Excise Management Act 1979. The facts are set out in the judgment of the court.

R v Mitchell

John Mitchell applied for leave to appeal and to appeal against the sentence of four years' imprisonment following his conviction at the Maidstone Crown Court before Judge Balston and a jury of the offence of being knowingly

- a concerned in the fraudulent evasion of excise duty, contrary to s 170 of the Customs and Excise Management Act 1979. The facts are set out in the judgment of the court.

R v Diafi

- b Karim Djamel Diafi applied for leave to appeal and to appeal against four concurrent sentences of nine months' imprisonment imposed on him on 26 June 2003 by Judge Singh QC at the Isleworth Crown Court following his plea of guilty on 29 May 2003 to four offences of being knowingly concerned in the fraudulent evasion of excise duty, contrary to s 170 of the Customs and Excise Management Act 1979. The facts are set out in the judgment of the court.

R v Ward

- d Brian Ward applied for leave to appeal and to appeal against a sentence of nine months' imprisonment imposed on him on 31 March 2003 by Judge Bray at the Leicester Crown Court following his plea of guilty on 26 September 2002 at Warwick Crown Court to the offence of being knowingly concerned in the fraudulent evasion of excise duty, contrary to s 170 of the Customs and Excise Management Act 1979. The facts are set out in the judgment of the court.

- e Fauz Khan (assigned by the Registrar of Criminal Appeals) and Fayyaz Afzal (instructed by Shafiques, Oldham) for Czyzewski.

Paul Tapsell (assigned by the Registrar of Criminal Appeals) for Bryan.

John Femi-Ola (assigned by the Registrar of Criminal Appeals) for Mitchell.

Keiran Galvin (assigned by the Registrar of Criminal Appeals) for Diafi.

Jeremy Wright (assigned by the Registrar of Criminal Appeals) for Ward.

- f Malcolm Morse (instructed by the Solicitor for the Customs and Excise) for the Crown in the cases of Czyzewski, Bryan, Mitchell and Diafi.

John Maxwell (instructed by the Solicitor for the Customs and Excise) for the Crown in the case of Ward.

- g ROSE LJ (delivering the judgment of the court).

- [1] In *R v Dosanjh* [1998] 3 All ER 618, this court gave guidance in relation to the sentencing of defendants for fraudulently evading duty on alcohol or tobacco, contrary to s 170 of the Customs and Excise Management Act 1979. In its recently published advice to the Court of Appeal, the Sentencing Advisory Panel has proposed that sentencing guidelines be issued in relation to these offences modifying *R v Dosanjh* and taking into account several matters since *R v Dosanjh* was reported. First, the *R v Dosanjh* judgment has apparently improved consistency in sentencing in lower-level cross-channel smuggling cases. Secondly, Customs and Excise have revised their prosecution policy so as to focus on high volume seizures and major criminals involved in smuggling. Thirdly, this court's judgment in *R v Kefford* [2002] EWCA Crim 519, [2002] 2 Cr App R (S) 495 emphasised the need for sentencers to take into account the increasing size of the prison population so that only those who need to be sent to prison are sent there, and are sent for no longer than is necessary and '[i]n the case of economic crimes ... prison is not necessarily the only appropriate form of punishment', particularly in the case of those who have no record of previous offending (see [2002] 2 Cr App R (S) 495 at [10]).

[2] It is to be noted that alcohol and tobacco smuggling causes very considerable economic and social harm. In the year 2000 to 2001, loss to the Revenue from alcohol fraud was £800m and, from cigarette smuggling, £2.7bn. Eighty-three smuggling gangs were uncovered, of which 60 were involved in large-scale smuggling and the supply of illicit cigarettes. That being so, we repeat the view expressed in *R v Dosanjh* that deterrence is a relevant consideration when dealing with major fraud of this kind and that, in exceptional cases where very many millions of pounds in duty have been evaded, it may be appropriate to impose consecutive sentences or, alternatively, to charge an offence of cheating the public revenue, for which the maximum sentence is life imprisonment, compared with seven years for an offence contrary to s 170. a
b

[3] It is also to be borne in mind, as was pointed out by Mr Morse, appearing before us on behalf of the Crown, that there is likely to be, in smuggling cases, a loss to the Revenue not just of excise duty but also of value added tax (VAT). c

[4] At the other end of the scale of gravity, we accept the Panel's suggestion that non-custodial sentences, or, somewhat shorter sentences than those suggested in *R v Dosanjh*, may be appropriate. d

[5] Before indicating the revised levels which we think appropriate it is convenient to set out those factors which are relevant when assessing the seriousness of a particular offence, those which aggravate it and those which go in mitigation. With some slight amendments, we adopt as correct the factors identified by the Panel. e

[6] As to seriousness, the principal factors are the level of duty evaded; the complexity and sophistication of the organisation involved; the function of the defendant within the organisation and the amount of personal profit to the particular defendant. An offence will be aggravated if a defendant: (1) played an organisational role; (2) made repeated importations, particularly in the face of a warning from the authorities; (3) was a professional smuggler, to which we shall return; (4) used a legitimate business as a front; (5) abused a position of privilege as a customs or police officer, or as an employee, for example, of a security firm, ferry company or port authority; (6) used children or vulnerable adults; (7) threatened violence to those seeking to enforce the law; (8) dealt in goods with an additional health risk because of possible contamination; or (9) disposed of goods to under-aged purchasers. In addition to these factors there are statutory aggravating features of offending while on bail or having previous convictions. f
g

[7] Evidence of professional smuggling will include: (1) a complex operation with many people involved; (2) financial accounting or budgets; (3) obtaining goods from several different sources; (4) integration of freight movements with commercial organisations; (5) sophisticated concealment methods such as forged documents or specially adapted vehicles; (6) varying of methods and routes; (7) links with illicit overseas organisations; and (8) in recognition of a submission made to us by Mr Morse, when the amount of the goods smuggled is of the order of half a million cigarettes, that is when the duty evaded is some £75,000: that is not, of course, a precise indication, but the value of goods involved is, as it seems to us, a potential indicator of professional smuggling, in addition to those factors identified by the Panel. h
j

[8] As to mitigating factors, these will include: a prompt plea of guilty, co-operation with the authorities, particularly in providing information about the organisation and, to a limited extent, previous good character. Pressure from

a others to commit the offence may, depending on the circumstances, afford mitigation.

[9] We adopt the Panel's suggestions that, following trial, for a defendant with no relevant previous convictions and disregarding any personal mitigation, the following starting points are appropriate: (i) where the duty evaded is less than £1,000, and the level of personal profit is small, a moderate fine, if there is particularly strong mitigation, and provided that there had been no earlier warning, a conditional discharge may be appropriate; (ii) where the duty evaded by a first time offender is not more than £10,000, which approximately equates to 65,000 cigarettes, or the defendant's offending is at a low level, either within an organisation or persistently as an individual, a community sentence or curfew order enforced by tagging, or a higher level of fine; the custody threshold is likely to be passed if any of the aggravating features which we have identified above is present; (iii) where the duty evaded is between £10,000 and £100,000, whether the defendant is operating individually or at a low level within an organisation, up to nine months custody; some of these cases can appropriately be dealt with by magistrates, but others, particularly if marked by any of the aggravating features which we have identified, should be dealt with by the Crown Court; (iv) when the duty evaded is in excess of £100,000, the length of the custodial sentence will be determined, principally, by the degree of professionalism of the defendant and the presence or absence of other aggravating factors; subject to this, the duty evaded will indicate starting points as follows: £100,000–£500,000, nine months to three years; £500,000–£1m, three to five years; in excess of £1m, subject to the comment we have made earlier where many millions of pounds are evaded, five to seven years.

[10] We stress two matters. First, our proposals provide guidelines, not a straitjacket. Secondly, from the starting points indicated, sentencers can be expected to move up by reference to aggravating factors, or down, by reference to mitigating factors, particularly a prompt plea of guilty and co-operation.

[11] Sentencers should also bear in mind their powers to order: confiscation of assets under the Proceeds of Crime Act 2002 (Crown Court only); compensation in a clear case under s 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (Crown Court and, subject to a limit of £5,000, magistrates' court also); deprivation, particularly of vehicles, under s 143 of the 2000 Act (both Crown Court and magistrates' court); and disqualification from driving, where a motor vehicle has been used (Crown Court only).

[12] If any of these additional orders is contemplated, the court should warn the defence, so that argument in relation to them can be heard (see, only by way of example, *R v Powell* (1984) 6 Cr App R (S) 354).

[13] Finally, where licensed premises have been used for the sale of smuggled goods, the court should notify the licensing authority.

[14] Before turning to the specific appeal and applications before this court, we add this: because of the proposals in the Criminal Justice Bill, presently before Parliament, in relation to a new Sentencing Guidelines Council, this may well be the last occasion on which this court, acting directly on advice from the Sentencing Advisory Panel, issues sentencing guidelines. Whether the public will benefit from the new body remains to be seen. In the meantime, it is appropriate for this court to express its gratitude for the efficient and impressive way in which the Panel has discharged its task over the last four years. The breadth of experience of Panel members, the responses which they

have received and analysed from their statutory and other consultees and the research which they have commissioned, have lent great weight to the 12 advices which they have given to this court. In consequence, those advices have, for the most part, been followed and implemented in the judgments of this court. a

[15] In the light of the considerations which we have set out, we turn now to the particular cases before the court. b

[16] Czyzewski was convicted by the jury at Birmingham Crown Court on 22 August 2002 on two counts of being knowingly concerned in fraudulently evading excise duty on cigarettes, contrary to s 170 of the 1979 Act. He was sentenced to four years' imprisonment on each concurrent. He appealed against conviction with leave of the single judge and we have earlier today dismissed that appeal. He appeals against sentence with leave of the single judge. c

[17] Each of the counts on which he was convicted related to a consignment of goods which included approximately 2.5m illicit cigarettes. One consignment entered this country through Immingham on 22 July 2001 and was delivered to an industrial estate in Birmingham on 24 July. The other, destined for the same address, was seized at Felixstowe by Customs and Excise officers on 23 July and held by them. d

[18] The appellant had left the industrial estate before Customs and Excise officers pounced and arrested others. He did not give evidence before the jury. His explanation at interview, when he was arrested on 3 August 2001, which, as it seems to us, the jury obviously rejected, was that he had travelled from Manchester that day to buy a comparatively small quantity of cigarettes because he was a heavy smoker. He had been told to hire a van and put money under the seat but suspected that he was being set up and might be robbed and therefore left without buying. e

[19] Two convicted co-accused, whose role in events was of a manual kind, were each sentenced to two-and-a-half years' imprisonment. The judge passed sentence on the appellant on the basis that, unlike them, he was an organiser. Before us, Mr Khan, on behalf of Czyzewski, challenged that basis of sentencing. We reject that challenge. Following the trial, which lasted a number of weeks, the judge was well able, on the evidence which the jury heard, to form an assessment of the role played by this appellant. There was material which clearly indicated that he had had dealings with his co-accused, Sarzala, before 24 July. There was evidence that the appellant had driven from Manchester to Birmingham in his own private car. If an explanation was to be plausibly advanced, it would necessarily involve him purchasing only a small quantity of cigarettes. We are satisfied, by reference to these and other matters which it is unnecessary to rehearse, that the judge was fully justified in characterising this appellant as an organiser. f
g
h

[20] Mr Khan submits that, in any event, four years was excessive. We do not agree. The excise duty evaded in relation to these two counts was approximately £670,000 and VAT in excess of £150,000 would not have become payable as it ought lawfully to have been paid. It is also pertinent that this appellant, in 1995, was sentenced to three years' imprisonment for supplying a Class A drug. He has other convictions but it is unnecessary to refer to them. j

[21] In our judgment, four years was an unimpeachable sentence and his appeal is accordingly dismissed.

a [22] We turn to Bryan and Mitchell. They were jointly charged at Maidstone Crown Court, on count 1, with conspiracy fraudulently to evade excise duty and, on count 6, with being knowingly concerned in the fraudulent evasion of excise duty. Bryan pleaded guilty to count 6 on 11 October 2002, and count 1 was then ordered to remain on the file on the usual terms. Mitchell was convicted by the jury on count 6 and acquitted on count b 1. There were other allegations against him, in relation to which not guilty verdicts were entered on the relevant counts by the judge under s 17 of the Criminal Justice Act 1967.

[23] Bryan and Mitchell were both sentenced by Judge Balston, on 5 June 2003, Bryan to two-and-a-half years and Mitchell to four years. Their applications c for leave to appeal against sentence have been referred to this court by the Registrar.

[24] There were three co-accused who pleaded guilty to count 6. Each of them played a conspicuously lesser part in the matters to which we now turn than either of these applicants and each of them was sentenced to six months' d imprisonment.

[25] We grant leave to appeal to Bryan and Mitchell.

[26] The circumstances were these. On 10 May 2002, while Bryan, who is a lorry driver, was in France, he was approached and asked at first to bring back a few boxes of cigarettes in return for a payment of £1,000. He agreed, but he e then took delivery of a load of approximately 1.25m cigarettes which he was persuaded to bring to the United Kingdom in return for a promised payment of £3,000. After the lorry came through the Channel Tunnel it was followed by customs officers.

[27] Officers had that morning also observed a Sierra motorcar driven by Mitchell. Shortly before 9.30 am he had only one passenger. Ten minutes f later he had three. The Sierra drove to a service area and stopped, just short of the exit slip road facing the A2. It then pulled onto the A2, heading for London. Very soon afterwards, a van left the HGV park at the service area and travelled in the same direction. At 10.00 pm, customs officers entered a yard in Kent and found Bryan's lorry, Mitchell's Sierra, the van seen leaving g the HGV park and another vehicle. There were about ten men around the lorry, the rear of which was open, and they were in the process of unloading. These two appellants, Bryan and Mitchell, the co-accused and others were arrested and the cigarettes were seized. Excise duty evaded was just over £164,000.

h [28] In interview, Bryan made no comment, Mitchell denied being involved in evading excise duty and denied knowing any of the others in the yard, apart from his son, and he declined to comment when told he had been seen driving the Sierra. At trial, he claimed to have been an innocent dupe, recruited to unload bankrupt goods that were being imported to be sold at shops in Nottingham by j the man he claimed had duped him.

[29] In passing sentence, the learned judge referred to £164,000 as being the figure on the basis of which sentence would be passed. He said that the fact that Mitchell had been acquitted of the conspiracy count did not mean that he was anything other than the organiser and he would be sentenced on that basis. Bryan had played an essential part in carrying out the importation by driving the lorry.

[30] Bryan is 34 years of age and of previous good character. Mitchell is also 34. He has previous convictions for theft and handling, a good many years ago, and he has never previously been sentenced to custody. a

[31] There were a number of reports on Bryan, including a pre-sentence report, referring to his remorse, naivete and failure to consider the consequences. There was a medical report relating to historical matters, to which it is unnecessary to refer, and there were a number of references speaking of Bryan as being a reliable and hard-working man, who was responsible and trustworthy. There is a prison report before this court indicating that he presents no problem there and, indeed, has this week been moved to the enhanced workshop. There was also a pre-sentence report on Mitchell, which indicated that he was still maintaining that he had become involved inadvertently. He was, however, remorseful and appeared to have learnt a lesson. b

[32] The submissions which are made on behalf of these appellants gain force from the guidelines earlier set out in this judgment. No criticism can properly be made of the sentencing judge having regard to the guidelines in *R v Dosanjh* [1998] 3 All ER 618 which applied when he passed sentence. c

[33] However, in the light of the considerations to which we have referred, it seems to us that the sentence of two-and-a-half years passed on Bryan was excessive. He pleaded guilty at an early stage. The amount of duty evaded was that which we have indicated. It is true that he expected a reward of £3,000. But this was a single trip and, taking into account the guidelines which we have now indicated, we quash the sentence of two-and-a-half years' imprisonment and substitute for it a sentence of nine months' imprisonment. d

[34] So far as Mitchell is concerned, he was not of good character although he has not previously been to prison. He was rightly treated by the judge as the organiser of these matters but, having regard to the amount of excise duty evaded, we take the view that four years must today be regarded as an excessive sentence. We quash it. We substitute for it a sentence of two-and-a-half years' imprisonment. To that extent the appeals of Bryan and Mitchell are allowed. e

[35] We turn to the application of Diafi, who on 29 May 2003, at Isleworth Crown Court pleaded guilty to four offences of being knowingly concerned in the fraudulent evasion of duty. On 26 June he was sentenced by Judge Singh QC to nine months' concurrently on each count. The first count was ordered to remain on the file on the usual terms. His application for leave to appeal against sentence has been referred to this court by the Registrar. f

[36] The circumstances are that, on five occasions, he was stopped by customs officers at Heathrow Airport. Each time he was in possession of quantities of cigarettes. On 27 December 2000 he had 25,000 cigarettes. That formed the basis of count 1, which, as we have said, was ordered to remain on the file, he having pleaded not guilty to it. Count 2 related to 4 May 2001, when he had 10,800 cigarettes, count 3, to 15 July 2002, when he had 15,200 cigarettes, count 4, to 17 January 2003, when he had 3,000 cigarettes, count 5, to 2 February 2003, when he had 3,200 cigarettes. The total duty evaded was £5,729. On each of the first four occasions the cigarettes were seized and the applicant was issued with a notice of seizure and he was warned that a record would be kept of the seizure. He was arrested on the fifth occasion. He claimed that the cigarettes were for his own use. g

a [37] The learned judge, in passing sentence, indicated that he did not accept that but that these importations were probably for profit and they were, as was manifest, not one-off importations.

b [38] The appellant is 38 years of age and of previous good character. There was a pre-sentence report before the judge, which indicated that the applicant seemed disposed to deny or diminish the effects of his criminality. He found it difficult to accept that the loss to public funds was a significant matter. He expressed no remorse and the author of the report concluded that there was a significant risk of re-offending. There is before this court a good prison report upon the applicant.

c [39] The submission which is made by Mr Galvin, on behalf of Diafi, is that nine months was perhaps too long. We are unpersuaded of that. The repeated repetition of this conduct, as it seems to us, was a conspicuously aggravating factor which must be taken into account, as well as the comparatively modest amount of duty evaded. In our judgment, it is not arguable that a sentence of nine months was excessive. Accordingly we refuse Diafi's application for leave to appeal.

d [40] We turn, finally, to Ward. He, on 26 September 2002, at Warwick Crown Court, pleaded guilty to being knowingly concerned in the fraudulent evasion of duty and on 31 March 2003, at Leicester Crown Court, he was sentenced by Judge Bray to nine months. He has now been released, since early June, on home detention curfew.

e [41] His application for leave to appeal against sentence has been referred to this court by the Registrar. We grant leave.

[42] There were co-accused, including a man called Peter Gilbey, who pleaded guilty on the day of trial and was sentenced to 20 months' imprisonment.

f [43] The operation which was run by Peter Gilbey was sophisticated and involved the production of what appeared to be genuine hand-rolling tobacco. Between August and November 2001 customs officers mounted a surveillance operation on Gilbey's activities and, in early August, he was seen to meet the applicant at the applicant's home address.

g [44] On 15 September, the applicant was followed to an industrial unit on a farm in Leicester, where he filled a vehicle with black plastic bags. On 22 November he did the same. On 27 November, he borrowed a Transit van and again went to the industrial unit where he collected further bags but, on this occasion, he was stopped before he left. There were in the van 300 kg of tobacco on which £35,000 worth of duty had been evaded.

h [45] In the industrial unit, the officers found a tobacco-producing plant and a large amount of tobacco and tobacco pouches.

j [46] Further investigations showed that Gilbey had ordered the pouches and some re-sealable tabs, some months earlier, and, about a year before, he had tried to set up a tobacco import company and had a number of contacts both in this country and abroad. Pausing there, in the light of the guidelines in this judgment, the sentence passed upon Gilbey may well be regarded as being a lenient one.

[47] When this applicant was interviewed he said it was Gilbey's brother who had introduced him to Peter Gilbey. The applicant admitted collecting tobacco from the unit on three separate occasions. On the first two occasions he picked up 20 bags and on the third, 60 bags. His job was to transport them to a lay-by on a motorway where he would hand over the goods and he was paid £200 a trip. It

was estimated that about £60,000 worth in duty had been evaded by the applicant. a

[48] The submission which is made on behalf of Ward is that the sentence was somewhat too high. We accept that. There is no doubt that this was a planned and professional conspiracy but the role of Ward was a very subsidiary role indeed. We have no doubt that custody was necessary but we quash the sentence of nine months and substitute for it a sentence of six months. To that extent his appeal is allowed. b

Czyzewski's appeal dismissed. Leave to appeal granted to Bryan, Mitchell and Ward; their appeals allowed and sentences varied as indicated. Diafi's application for leave to appeal refused.

Sanchia Pereira Barrister.

a A v Chief Constable of West Yorkshire Police and another

[2004] UKHL 21

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND AND LORD CARSWELL

8, 9 MARCH, 6 MAY 2004

c *Employment – Discrimination – Discrimination against a woman – Male-to-female transsexual applying to become police constable – Requirement that constable carrying out search be of same sex as person searched – Gender of transsexual for purposes of search – Police and Criminal Evidence Act 1984, s 54(9) – Council Directive (EC) 76/207, art 2.*

d The complainant was a male-to-female transsexual who had undergone gender reassignment surgery. Her application to become a police constable was rejected by the chief constable. He considered that as she remained male under English domestic law she would be unable to perform all the duties required of a constable, as under s 54(9)^a of the Police and Criminal Evidence Act 1984, a search of persons who had been arrested or were in custody had to be carried out by a constable of the same sex as the person searched. The complainant applied to the employment tribunal, complaining of sex discrimination. She relied on the prohibition in art 2(1)^b of Council Directive (EC) 76/207 (the Equal Treatment Directive) of any discrimination whatsoever on grounds of sex either directly or indirectly. The tribunal concluded that there had been a denial of the complainant's fundamental right to equal treatment. The Employment Appeal Tribunal allowed the chief constable's appeal. By the time the case reached the Court of Appeal, the European Court of Human Rights had decided that the refusal of English law to recognise a person's gender reassignment was in breach of that person's rights to respect for private and family life and the right to marry under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The Court of Appeal, therefore, allowed the complainant's appeal on the basis that the convention jurisprudence was read into domestic law and that the chief constable was obliged to treat the complainant as a female and that it was not open to him to discriminate against her on the basis that she was a transsexual. The chief constable appealed, **h** submitting that it was wrong to give retrospective effect to the decision of the European Court of Human Rights. The complainant contended that the Equal Treatment Directive as interpreted by the Court of Justice of the European Communities required the chief constable to recognise her sexual identity as female for the purpose of appointment as a constable.

j **Held** – (Per Lord Bingham of Cornhill, Lord Steyn, Baroness Hale of Richmond, and Lord Carswell) Section 54(9) of the 1984 Act was to be interpreted as applying to a transsexual person in his or her reassigned gender. For the purposes of

a Section 54, so far as material is set out at [32], below

b Article 2, so far as material, is set out at [9], below

discrimination between men and women in the fields covered by the Equal Treatment Directive, a transsexual person was to be regarded as having the sexual identity of the gender to which he or she had been reassigned. A transsexual person had a right to be recognised in the reassigned gender both for the purpose of the direct enjoyment of rights under EC law and for the purpose of the preconditions for the enjoyment of a right under EC law. There were no strong public policy reasons for not interpreting s 54(9) in that way. It was the rights of a transsexual person under the Equal Treatment Directive upon which the answer to the instant appeal turned, rather than upon domestic law or upon the impact of the decision of the European Court of Human Rights that the refusal of domestic law to recognise reassigned gender no longer fell within the United Kingdom's margin of appreciation. As to domestic law, there were good policy reasons for distinguishing between the different purposes for which the domestic decision on capacity to marry might be invoked. Marriage could readily be regarded as a special case. The decision of the European Court of Human Rights was intended to operate prospectively rather than retrospectively and did not require the Equal Treatment Directive to be interpreted as if that decision had been the law from the moment the Equal Treatment Directive came into force. The appeal would therefore be dismissed (see [11]–[15], [50], [51], [53], [54]–[59], [63], [64], below).

P v S Case C-13/94 [1996] All ER (EC) 397 and *KB v National Health Service Pensions Agency* Case C-117/01 [2004] IRLR 240 applied.

Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33 and *Bellinger v Bellinger* [2003] 2 All ER 593 distinguished.

Goodwin v UK (2002) 13 BHRC 120 considered.

Decision of the Court of Appeal [2003] 1 All ER 255 affirmed on different grounds.

Notes

For the Equal Treatment Directive, see 13 *Halsbury's Laws* (4th edn reissue) para 350.

For searches of detained persons, see 11(1) *Halsbury's Laws* (4th edn reissue) para 765.

For the Police and Criminal Evidence Act 1984, s 54, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 774.

Cases referred to in opinions

Amministrazione delle Finanze dello Stato v Srl Meridionale Industria Salumi Srl Joined Cases 66/79, 127/79 and 128/79 [1980] ECR 1237, ECJ.

B v France (1993) 16 EHRR 1, [1992] ECHR 13343/87, ECt HR.

Bellinger v Bellinger [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467, [2003] 2 WLR 1174; *affg* [2001] EWCA Civ 1140, [2002] 1 All ER 311, [2002] Fam 150, [2002] 2 WLR 411.

CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health Case 283/81 [1982] ECR 3415, ECJ.

Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33, [1971] P 83, [1970] 2 WLR 1306.

Cossey v UK (1991) 13 EHRR 622, ECt HR.

D and Sweden v Council of European Union Joined Cases C-122/99 P and C-125/99 P [2001] ECR I-4319, ECJ.

- a** *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ICR 547, [1976] ECR 455, ECJ.
Goodwin v UK (2002) 13 BHRC 120, ECt HR.
Grant v South-West Trains Ltd Case C-249/96 [1998] All ER (EC) 193, [1998] ICR 449, [1998] ECR I-621, ECJ.
- b** *Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] 3 WLR 1038, [1986] ECR 1651, ECJ.
KB v National Health Service Pensions Agency Case C-117/01 [2004] IRLR 240, ECJ.
P v S Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795, [1996] ECR I-2143, ECJ.
R v Tan [1983] 2 All ER 12, [1983] QB 1053, [1983] 3 WLR 361, CA.
Rees v UK (1987) 9 EHRR 56, [1986] ECHR 9532/81, ECt HR.
- c** *Sheffield and Horsham v UK* (1998) 5 BHRC 83, ECt HR.
Société Bautiaa v Directeur des Services Fiscaux des Landes (Cases C-197/94 and C-252/94) [1996] ECR I-505, ECJ.
S-T (formerly J) v J [1998] 1 All ER 431, [1998] Fam 103, [1997] 3 WLR 1287, CA.
Van Oosterwijk v Belgium App no 7654/76 (1 March 1979, unreported), E Com HR.
X, Y and Z v UK (1997) 24 EHRR 143, ECt HR.
- d**

Cases referred to in list of authorities

- Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629, ECJ.
- e** *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1991] 1 QB 344, [1991] 2 WLR 72, [1990] ECR I-1889, ECJ.
Belbouab v Bundesknappschaft Case 10/78 [1978] ECR 1915, ECJ.
Blaizot v University of Liege Case 24/86 [1988] ECR 379, ECJ.
Carpenter v Secretary of State for the Home Dept Case C-60/00 [2003] All ER (EC) 577, [2003] QB 416, [2003] 2 WLR 267, [2002] ECR I-6279, ECJ.
- f** *Chessington World of Adventures Ltd v Reed* [1998] ICR 97, EAT.
Croft v Royal Mail Group plc [2003] EWCA Civ 1045, [2003] IRLR 592, [2003] ICR 1425.
Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas Case C-260/89 [1991] ECR I-2925, ECJ.
- g** *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien et Wein & Co HandelsgesmbH, formerly Ikera Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* Case C-437/97 [2000] ECR I-1157, ECJ.
Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 1113, HL.
R v Harris and McGuiness [1988] 17 NSWLR 158, NSW CA.
- h** *Marckx v Belgium* (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.
Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR I-4135, ECJ.
Matthews v UK (1999) 5 BHRC 686, ECt HR.
R (on the application of Richards) v Secretary of State for the Home Dept [2004] EWHC 93 (Admin), [2004] All ER (D) 254 (Jan).
- j** *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15, [2001] 2 AC 19, [2000] 3 WLR 843, HL.
R v Kansal (No 2) [2001] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69, [2001] 3 WLR 1562.
R v Lambert [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206.

- R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562. a
- R v R* [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL.
- R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 1 All ER 910, [1995] 1 AC 1, [1994] 2 WLR 409, HL.
- Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] 2 All ER 26, [2003] ICR 337. b
- Smith and Grady v UK* (2000) 29 EHRR 493, [1999] ECHR 33985/96, ECt HR.
- Secretary, Dept of Social Security v SRA* (1993) 118 ALR 467, Aus FC.
- SW v UK, CR v UK* (1996) 21 EHRR 363, ECt HR.
- Tyrer v UK* (1978) 2 EHRR 1, [1978] ECHR 5856/72, ECt HR.
- Union Royale Belge des Societes de Football Association ASBL v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ. c
- Van Kuck v Germany* (2003) 37 EHRR 51, ECt HR.
- Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929, [1993] ICR 175, [1993] 1 WLR 49, HL.
- Yildiz v Austria* (2003) 36 EHRR 32, ECt HR. d

Appeal

The Chief Constable of West Yorkshire Police appealed with permission of the House of Lords Appeal Committee given on 19 March 2003 from the decision of the Court of Appeal (Kennedy, Buxton and Keene LJ) on 5 November 2002 ([2002] EWCA Civ 1584, [2003] 1 All ER 255, [2003] ICR 161) allowing the appeal of A from the decision of the Employment Appeal Tribunal (Lindsay J (President), D M Palmer and S M Springer) on 2 October 2001 ([2002] IRLR 103, [2002] ICR 552) dismissing the appeal of the chief constable from the decision of the employment tribunal on 18 March 1999 that his refusal to offer A employment as a constable was unlawful under the Sex Discrimination Act 1975. The Secretary of State for Trade and Industry appeared as an interested party. The facts are set out in the opinion of Baroness Hale of Richmond. e

Their Lordships took time for consideration. f

6 May 2004. The following opinions were delivered. g

David Bean QC, David Jones and Mathew Purchase (instructed by Sharpe Pritchard as agents for Ajaz Hussain, Wakefield) for the chief constable.

Nicholas Blake QC and Stephanie Harrison (instructed by Alice Leonard, Manchester) for Ms A. h

Rabinder Singh QC and James Strachan (instructed by the Treasury Solicitor) for the Secretary of State.

LORD BINGHAM OF CORNHILL.

[1] My Lords, on 9 March 1998 the Chief Constable of West Yorkshire (the chief constable) rejected Ms A's application to become a constable in the West Yorkshire Police on the ground that, as a male-to-female transsexual, she could not perform the full searching duties required of a police constable. The issue in this appeal is whether he thereby discriminated against her unlawfully in breach of the Sex Discrimination Act 1975. In addressing that issue I gratefully adopt and need not repeat the summary given by my noble and learned friend Baroness j

a Hale of Richmond of the facts, the history of the proceedings, the relevant statutory materials and the arguments.

[2] The chief constable rejected Ms A's application in March 1998 on grounds which were in substance the following. (1) He was advised that in English domestic law Ms A remained a man, despite the change of gender she had effected and the gender reassignment surgery she had undergone, because her biological sex at birth was male and nothing that happened thereafter could change it. (2) He concluded that as (legally) a man Ms A could not lawfully search women pursuant to s 54 of the Police and Criminal Evidence Act 1984. (3) He concluded that as an apparent woman Ms A could not in practice search men pursuant to s 54. (4) He regarded it as necessary that a constable should be capable of searching either men or women pursuant to s 54. In the course of these proceedings, but not (I think) as early as March 1998, he inferred that he could not excuse Ms A from all s 54 searching duty without alerting her colleagues to her transsexual history, which he believed would be deeply unacceptable to her.

[3] The advice given to the chief constable on English domestic law, summarised in [1], above, was correct. Such was the effect of *Corbett v Corbett* (otherwise *Ashley*) [1970] 2 All ER 33, [1971] P 83. That case, it is true, concerned the capacity of a male-to-female transsexual to marry. But the Court of Appeal (Criminal Division) applied the same rule to gender-specific criminal offences in *R v Tan* [1983] 2 All ER 12, [1983] QB 1053. Both decisions have been heavily criticised, and other jurisdictions have adopted other rules. But there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another, and there was no rule other than that laid down in *Corbett's* case and *R v Tan*.

[4] Since s 54(9) of the 1984 Act required a constable carrying out a search under the section to be of the same sex as the person searched, it necessarily followed that if Ms A was (legally) a man she could not lawfully search a woman under the section.

[5] Since it is a requirement laid down in para A 3.1 of the codes prescribed under s 66 of the 1984 Act that 'Every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience', it was plain that Ms A, who appeared in every respect to be a woman, could not, even if legally a man, be permitted to search a man.

[6] The chief constable was entitled to take the view summarised in [4], above. The employment tribunal found searching to be an integral function of a police constable and accepted the description of searching as a core competency. The tribunal considered it objectively 'unreasonable to require the [chief constable] to employ [Ms A] as a police constable if in law and fact she could not carry out the full range of a police constable's duties'.

[7] Having read the three judgments of the employment tribunal and both judgments of the Employment Appeal Tribunal ([2002] IRLR 103, [2002] ICR 552), I share the sense of surprise clearly felt by the Court of Appeal at the statement ([2002] EWCA Civ 1584, [2003] 1 All ER 255, [2003] ICR 161), made by Ms A's counsel on her behalf during her reply in the Court of Appeal, that if she became a constable Ms A would be willing for her colleagues at large, and if need be the public at large, to know of her transsexuality. The chief constable was well justified in believing that she would not be willing. But I do not think that the outcome of this appeal turns on whether she would or would not have been willing for such disclosure to be made.

[8] Thus, in terms of English domestic law, the chief constable was bound to accept, as he did, that on the grounds of her transsexuality he had treated Ms A less favourably than he would have treated a woman who was not a transsexual, by refusing to offer her employment at an establishment in Great Britain, contrary to ss 2 and 6(1)(c) of the 1975 Act. But he could claim that being a (non-transsexual) woman was a genuine occupational qualification for the job, since the job needed to be held by a woman to preserve decency or privacy because it was likely to involve physical contact with women in circumstances where they might reasonably object to its being carried out by a man, or because the holder of the job was likely to do her work in circumstances where women might reasonably object to the presence of a man (s 7(2)(b) of the 1975 Act). Put more shortly, it was a genuine occupational qualification of a constable to be capable of searching men or women under s 54, and Ms A could search neither. If the problem were purely one of domestic law, I very much doubt if this defence could be defeated.

[9] To outflank it, Ms A relied on the law of the European Community. Her starting point was the duty imposed on British courts by s 2(1) of the European Communities Act 1972 to give legal effect to all rights, liabilities, obligations and restrictions from time to time arising by or under the Treaty of Rome. It is of course well-established that the law of the Community prevails over any provision of domestic law inconsistent with it. Ms A relied on the prohibition in art 2(1) of Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) of 9 February 1976 (the equal treatment directive) of any 'discrimination whatsoever on grounds of sex either directly or indirectly'. This prohibition was qualified by reserving to member states the right to exclude from the field to which the equal treatment directive applied 'those occupational activities ... for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'. Section 17(1) of the 1975 Act provides that the holding of the office of constable shall be treated as employment, but does not exclude police searching activities from the application of the Act.

[10] The sheet-anchor of Ms A's case was the important judgment of the Court of Justice of the European Communities (the Court of Justice) in *P v S* Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795, which concerned the dismissal of a male-to-female transsexual at a time when she had embarked on but not completed a course of gender reassignment surgery. I need not repeat the passages in the judgment and the opinion of Advocate General Tesauro which Baroness Hale has cited. For present purposes the significance of the decision is twofold. First, it held in very clear and simple terms that the equal treatment directive prohibited unfavourable treatment on grounds of gender reassignment. Secondly, that prohibition was based not on a semantic analysis of the provisions of the equal treatment directive but on 'the principle of equality, which is one of the fundamental principles of Community law' and on the court's duty to safeguard the dignity and freedom to which an individual is entitled ([1996] All ER (EC) 397 at 410, [1996] ICR 795 at 814 (paras 18, 22)). The court adopted a similar approach in *KB v National Health Service Pensions Agency* Case C-117/01 [2004] IRLR 240. That case concerned equal pay, not equal treatment, and judgment was given years after the chief constable's decision to reject Ms A's application. But there is nothing here to displace the ordinary principle that a ruling on the interpretation of Community law takes effect from the date on which the rule interpreted entered into force (see *Société Buitaia v*

a *Directeur des Services Fiscaux des Landes* Cases C-197/94 and C-252/94 [1996] ECR I-505 at 548 (para 49)).

[11] The question then arises whether the decisions of the Court of Justice in *P v S* and *KB's* case, and the philosophical principles on which they rest, can cohabit with a rule of domestic law which either precludes the employment of a post-operative male-to-female transsexual as a constable of whom routine s 54 searching duties are required, or requires such a person to be willing to disclose her transsexual identity to working colleagues and, perhaps, members of the public. The first of these alternatives cannot be reconciled with the principle of equality: the exclusion is not one which applies to men or women but only to those who have changed their gender. Yet they also are entitled to be treated, so far as possible, equally with non-transsexual men or women. The second alternative derogates from the dignity and freedom to which a transsexual individual, like any other, is entitled. In my opinion, effect can be given to the clear thrust of Community law only by reading 'the same sex' in s 54(9) of the 1984 Act, and 'woman', 'man' and 'men' in ss 1, 2, 6 and 7 of the 1975 Act, as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search.

[12] In reaching this conclusion, I do not intend to question or derogate from the very recent decision of the House in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467, affirming the decision in *Corbett's* case. The House affirmed that decision not because it was insensitive to the hardship which the rule in *Corbett's* case, strictly applied, could cause; nor because it was unaware of the criticism to which the decision had been subject; nor because it ignored the Strasbourg authorities on transsexuals. It did so because, alive to the wide ramifications of departure from the established rule, it regarded the field as one calling for comprehensive legislative reform and not piecemeal judicial development. I have no doubt that the decision was wholly correct, and there was a prompt legislative response to it. But the case concerned marriage, perhaps the most important and sensitive of human relationships. It lacked any Community dimension, so that *P v S* was not cited and there was no need to consider it. And the House exercised its power under s 4 of the Human Rights Act 1998 to declare that s 11(c) of the Matrimonial Causes Act 1973 was incompatible with arts 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) in failing to make provision for the recognition of gender reassignment.

[13] I accordingly reach the same conclusion as the Court of Appeal, but in doing so I would not rely, as it did, on the decision of the European Court of Human Rights in *Goodwin v UK* (2002) 13 BHRC 120. When the chief constable made his decision in March 1998 the 1998 Act had not been enacted. When enacted the Act did not, generally, have retrospective effect. Had it had retrospective effect, it would not have overridden or displaced provisions of primary legislation. Most importantly, the decision in *Goodwin v UK* was, as its language makes clear and as the House held in *Bellinger's* case [2003] 2 All ER 593 at [24], 'essentially prospective in character'. There is nothing in the court's judgment to suggest that the earlier cases of *Rees v UK* (1987) 9 EHRR 56, *Cossey v UK* (1991) 13 EHRR 622 and *Sheffield and Horsham v UK* (1998) 5 BHRC 83, the last of these cases decided after the date of the chief constable's decision, had been wrongly decided. Rather, the court recognised that the legal or administrative

consensus among member states, the understanding of transsexuality, and evolving perceptions of individual dignity and freedom, had reached a point where the margin of appreciation accorded to a state could no longer be held to legitimise the denial of formal recognition to an acquired change of gender. The importance of the convention in this appeal derives not from the decision in *Goodwin v UK* but from the part which the convention has played in shaping the current European understanding of what fundamental human rights mean and require. a
b

[14] I would dismiss this appeal.

LORD STEYN.

[15] My Lords, I have read the opinions of my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond. I agree with their reasons and conclusions. I would also dismiss the appeal. c

LORD RODGER OF EARLSFERRY.

[16] Ms A is a post-operative male-to-female transsexual. Unhappily, in the past, when her situation became known in her local community, she suffered hostility, personal abuse, taunts and damage to her home and property; happily, she now lives in another community where she has always been known as a woman and where she experiences no such problems. In January 1997 she applied to become a police officer in the West Yorkshire Police Force, some distance from her home. In March 1998 the chief constable refused her application. d
e

[17] Ms A then lodged an application with the employment tribunal, alleging sex discrimination by the chief constable in terms of the Sex Discrimination Act 1975. It is common ground that, in light of the decision of the European Court of Justice (the Court of Justice) in *P v S* Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795, by 1998 it was known that discrimination against transsexuals fell within the scope of Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the equal treatment directive) and that, so far as possible, the 1975 Act had to be interpreted accordingly. It is also common ground that Ms A's application falls to be considered under the 1975 Act as it stood without the amendments introduced by the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102. The tribunal eventually held that Ms A was entitled both to a declaration that the chief constable had unlawfully discriminated against her and to compensation for that discrimination with effect from 1 September 1999. It remains the case that she seeks both remedies. f
g

[18] Because of what had happened in the past, Ms A was at pains to secure that she could conduct these proceedings without the facts being published in the media and her situation becoming known to the public. Not surprisingly, therefore, before the employment tribunal, the Employment Appeal Tribunal ([2002] IRLR 103, [2002] ICR 552) and—for most of the hearing—before the Court of Appeal ([2002] EWCA Civ 1584, [2003] 1 All ER 255, [2003] ICR 161), the proceedings were conducted on the basis that, at the time when the chief constable took his decision in March 1998, he was fully entitled to believe that she was not willing for her colleagues and the public at large to know that she was a transsexual. Towards the end of the hearing before the Court of Appeal, however, her counsel indicated that, if she became a police officer, Ms A would be willing for this matter to be made known to her colleagues. The Court of Appeal reached their judgment in favour of Ms A largely on the basis that this h
j

a was, in fact, her position. But, in my respectful opinion, whatever may be her position now, in a case where she is seeking a declaration of sex discrimination and compensation for that discrimination, the issues must be determined on the basis of the situation in March 1998 as disclosed in evidence before the tribunal. In other words, the question is whether, in March 1998, the chief constable discriminated against Ms A unlawfully on the ground of her sex by refusing her b application to become a police officer, at a time when he reasonably understood that she was unwilling to reveal, or to allow others to reveal, to her colleagues and to members of the public that she was a transsexual. It is particularly important to be clear on this point since, throughout, the chief constable has acted honourably and in good faith.

c [19] In March 1998 the chief constable had been advised that, even though she had successfully undergone all the usual treatment, including surgery, in law Ms A's sex was still male. In my view that advice on the domestic law of the United Kingdom was, and remains, correct: see *Bellinger v Bellinger* [2003] UKHL 21 esp at [45], [2003] 2 All ER 593 esp at [45], [2003] 2 AC 467 per Lord Nicholls of Birkenhead. Section 54(9) of the Police and Criminal Evidence Act 1984 provides: d 'The constable carrying out a search shall be of the same sex as the person searched.' Parliament's laudable aim is to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable. While her application to join the force was pending, Ms A herself very properly drew attention to the possible problem posed by this provision. On e the basis of the legal advice given to him, the chief constable considered that, because of s 54(9), Ms A could not lawfully search female suspects. And, in practice, she could not search male suspects. Nor could the chief constable arrange for Ms A not to have to carry out searches without it becoming known why he was doing so. Since he understood that she was not willing for this to happen, the chief constable decided that he could not accept her application to f join the force.

[20] My noble and learned friend, Baroness Hale, has set out the terms of the relevant legislation. Before the tribunal, the chief constable conceded that, but for s 7 of the 1975 Act, he would have unlawfully discriminated against Ms A on the ground of her sex by refusing to offer her employment: ss 1 and 6(1)(c). His g position was, however, that s 6(1)(c) did not apply in this case since it was excluded by the existence of a genuine occupational qualification in terms of s 7.

[21] My Lords, examination of the terms of s 7 soon shows that they were not drafted with the present kind of case in mind. In the first place, standing back, I find it impossible to say that being a man, as opposed to a woman, or vice versa, h is a genuine occupational qualification for the office of police constable. Both men and women hold that office. More particularly, s 7(2)(b) provides that being a man, or being a woman, is a genuine occupational qualification 'only where' the job needs to be held by a man, or a woman, to preserve decency or privacy. But, again, the office of police constable does not require to be held by a man, as j opposed to a woman, or by a woman, as opposed to a man, in order to preserve decency or privacy. Here too, the fact that there are many officers of both sexes disproves any such suggestion. Indeed, s 54(9) of the 1984 Act presupposes that there will be officers of both sexes. Male officers search male suspects and female officers search female suspects, but otherwise they are employed on the same terms and have the same duties—just as, in practice, in many department stores selling clothes for both men and women, male assistants may be asked to

measure male customers and female assistants female customers, but otherwise the assistants are employed on the same terms to carry out the same duties. a

[22] In reality, what the chief constable is arguing in the present case is not that being a man, as opposed to a woman, or a woman as opposed to a man, is a genuine occupational qualification for being a police officer, but rather that, in terms of s 7(2)(b), the job of police officer needs to be held by a man *who can decently search men* or a woman *who can decently search women*. In my view, however, that involves reading into the provision an idea that is simply not to be found in the tightly drawn terms of s 7. This is hardly surprising since the section was drafted at a time when questions relating to transsexuals were not at the forefront of Parliament's attention. On the other hand, as I have already noted, in 1999, following the decision of the Court of Justice in *P v S* Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795, Parliament approved an order that amended the 1975 Act and supplemented s 7 with ss 7A and 7B. The first of these sections introduced an exception that corresponds to s 7, but makes specific provision for the employer to show that the treatment of the transsexual is reasonable in the circumstances: s 7A(1)(b). The second introduced certain further genuine occupational qualifications in the case of transsexuals, including a much broader one for jobs which simply 'involves the holder of the job being liable to be called upon' to perform intimate physical searches pursuant to statutory powers: s 7B(2)(a). These amendments, which regulate the position today, cannot, of course, be used to construe the Act as it stood in 1998, but the fact that they were made does tend to confirm the conclusion that the chief constable's interpretation of s 7 is unsound. b
c
d
e

[23] Section 7 is to be regarded as an exercise of the United Kingdom's right, under art 2(2) of the equal treatment directive, to exclude from its field of application those occupational activities for which the sex of the worker constitutes a determining factor. While the proper interpretation of art 2(2) is relevant to defining the limits within which a member state may choose to exclude the application of the equal treatment directive, the very nature of the provision means that its terms do not provide the basis for adopting a broad interpretation of any exclusion that a member state has chosen to make. More particularly, nothing in art 2(2) would justify the House in adopting a generous interpretation of the terms of s 7 of the 1975 Act in favour of the chief constable. That being so, there is no question as to the interpretation of the equal treatment directive which it is necessary for the House to decide in order to enable it to give judgment—and hence no question which your Lordships are obliged to refer to the Court of Justice under art 234 EC: *CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health* Case 283/81 [1982] ECR 3415 at 3429 (para 10). f
g

[24] I conclude that being a man, as opposed to a woman, or vice versa, is not a genuine occupational qualification for the job of police officer in terms of s 7(2)(b) of the 1975 Act. It follows that s 7(1)(a) is not engaged and that s 6(1)(c) applies to such employment. In that situation the chief constable accepts that he discriminated unlawfully by refusing Ms A's application to join the force. This is so even though, in my view, s 54(9) of the 1984 Act means that it would have been unlawful for Ms A to search female suspects and in practice she could not have searched—and indeed would not have wanted to search—male suspects. The chief constable did not regard this problem as an insuperable obstacle to employing Ms A, however, if only because such searches have to be carried out relatively infrequently. He was prepared to employ Ms A on the basis that she would not carry out any necessary searches and that he would make h
j

- a arrangements for other officers to perform them. In other words, the chief constable regarded it as a precondition for employing anyone as a police officer, either that he or she should be able to carry out searches, or that the chief constable should be free to make appropriate arrangements for other officers to carry out the searches that would ordinarily have fallen to the officer in question. That was the only relevant occupational qualification for the job. Chief
- b constables in other forces appear to have adopted the same pragmatic, or proportionate, approach. Since it was therefore not in fact a precondition of employing Ms A that she should be able to search female persons in terms of s 54(9) of the 1984 Act, there was no bar to her being allowed to join the force by reason of that section and no issue as to its interpretation in the light of the directive arises. The decision of the Court of Justice in *KB v National Health Service Pensions Agency Case C-117/01* [2004] IRLR 240 is distinguishable.
- c

- [25] While the chief constable was happy to adopt this approach, he perceived that Ms A herself had placed a major obstacle in its way. Making arrangements for other officers to carry out any searches of women would have meant that, sooner or later, Ms A's transsexuality would have become known to her
- d colleagues and, therefore, more widely. The chief constable understood that she was anxious that this should not happen and he attached importance to that concern in deciding that he could not offer her employment. But the logic of the equal treatment directive, and of the 1975 Act, must be that, while a chief constable—who is the equivalent of an employer for these purposes—is not
- e entitled to refuse to employ a transsexual as a police officer on the ground of her sex, equally, she is not entitled, except as provided by the legislation, to insist that she be employed in a different way on the ground of her sex. More particularly, she cannot insist that she be employed in such a way that her transsexuality will be kept confidential in all circumstances, any more than a homosexual or dyslexic
- f officer is entitled to insist that he be employed in such a way that his homosexuality or dyslexia is kept confidential in all circumstances. Of course, the chief constable should not compromise the officer's privacy by revealing the matter in question when there is no good reason to do so. But, equally, an officer cannot insist that his or her chief constable should act unlawfully, or permit the officer to act unlawfully, in order to keep it confidential. More generally, the
- g chief constable must be free to take all appropriate decisions relating to the deployment of the officer even if, in consequence, the matter becomes known. It would have been open to the chief constable to explain this to Ms A and to indicate that he was prepared to accept her application to join the force on this basis. Ms A would then have had to choose whether to go ahead and join.
- h According to the position adopted by her counsel in the Court of Appeal and before this House, she recognises that this would have been a proper approach for the chief constable to take. For these reasons I would dismiss the chief constable's appeal.

j **BARONESS HALE OF RICHMOND.**

[26] My Lords, Ms A is a transperson. She does not consider that she has ever been male. She has lived for many years entirely successfully as a female, both before and after she underwent gender reassignment surgery in 1996. The people among whom she lives have never known her as anything else. The issue is whether it was lawful in March 1998 for the Chief Constable of West Yorkshire Police (the chief constable) to refuse her application to join the force as a woman.

THE FACTS

[27] She decided to apply to become a police officer in December 1996. After consulting the force medical officer, she was completely open in her application form about her status and the treatment she had undergone. She was informed in April 1997 that full consideration had been given to her application and the points she had raised and the force was happy for it to proceed. She successfully completed a recruit assessment in July 1997 and a further assessment and physical fitness test at the Police Training School in September. Background inquiries were then made. Becoming concerned at the apparent delay in proceeding to the final stages of the recruitment process, she wrote in November 1997 specifically drawing attention to the provisions of the Police and Criminal Evidence Act 1984 relating to police searches. In January 1998 she had a discussion with the force equal opportunities officer who reassured her that transpeople were allowed to serve as police officers although there would be occasions when they were not allowed to search. Still having heard nothing, she wrote again in February 1998. On 9 March 1998 she received the following reply:

'I regret to inform you that since your initial application to join this Force, the issue of transsexual applicants has been further considered and the decision has been made that transsexuals will not be appointed to the Force. The decision has been made on the basis that candidates will not be appointed unless they are capable of performing the full duties of a Police Constable. Unfortunately, as you are already aware, legislation affects the carrying out of searches on persons in custody by transsexuals and, therefore, you would not be able to undertake full duties.'

[28] The question, therefore, is whether this was unlawful discrimination on grounds of sex. The force has admitted, ever since its response to her SD74 questionnaire in April 1998, that it did discriminate against her on the grounds of her transsexuality but contends that this was not unlawful. Domestic law does not yet recognise gender reassignment. Ms A has therefore to be regarded as a man. As a man she cannot carry out routine searches upon women. As a person who presents to all practical purposes as a woman, she cannot search men. The ability to carry out searches is a genuine occupational qualification for the office of constable. Hence it was lawful to discriminate against her.

[29] As is so often the case, the way in which the arguments were put has evolved in the course of these proceedings, not least because there have been significant developments in domestic and European law, including the decision of the European Court of Human Rights in *Goodwin v UK* (2002) 13 BHRC 120 while they were going on. As timing plays a considerable part in the arguments presented to us, it may be helpful to sketch the development of the law in roughly chronological order. Much fuller accounts of these developments, and of the medical and scientific background, can be found in the reports of the decisions of Court of Appeal ([2001] EWCA Civ 1140, [2002] 1 All ER 311, [2002] Fam 150) and House of Lords in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467.

DOMESTIC LAW

[30] In the well-known case of *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33, [1971] P 83, Ormrod J held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. Accordingly a purported marriage in 1963 between a man and a male-to-female transperson was void ab initio.

a Shortly after this, the Nullity of Marriage Act 1971 provided that a marriage taking place after 31 July 1971 is void on the ground 'that the parties are not respectively male and female'. This was later consolidated as s 11(c) of the Matrimonial Causes Act 1973. The same approach was adopted by the Court of Appeal in *R v Tan* [1983] 2 All ER 12, [1983] QB 1053 for the gender specific offences in the Sexual Offences Acts. The court considered [1983] 2 All ER 12 at b 19, [1983] QB 1053 at 1064 that 'both common sense and the desirability of certainty and consistency' demanded that the *Corbett* decision should apply in both contexts. Since then, it has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions which make a distinction between men and women. *Corbett's* case was followed without challenge in *S-T (formerly J) v J* [1998] 1 All ER 431, [1998] Fam 103.

c [31] The relevant provisions of the Sex Discrimination Act 1975, as they stood in 1998, are as follows:

'1. *Direct and indirect discrimination against women.*—(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man ...

d 5. *Interpretation* ...

(3) A comparison of the cases of persons of different sex or marital status under section 1(1) ... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

e 6. *Discrimination against applicants and employees.*—(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or (b) in the terms on which he offers her that employment, or (c) by refusing or deliberately omitting to offer her that employment ...

f 7. *Exception where sex is a genuine occupational qualification.*—(1) In relation to sex discrimination—(a) section 6(1)(a) or (c) does not apply to any employment where being a man is a genuine occupational qualification for the job ...

g (2) Being a man is a genuine occupational qualification for a job only where ... (b) the job needs to be held by a man to preserve decency or privacy because—(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or (ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because h they are in a state of undress or are using sanitary facilities ...'

[32] By s 17 of the 1975 Act, holding the office of constable is treated as employment by the chief constable. Searching people is an integral part of the duties of a constable. But there are different kinds of search, roughly falling into j three categories. (1) At one extreme are the various powers to search people without first arresting them. By virtue of s 2(9) of the Police and Criminal Evidence Act 1984, these do not permit 'a constable to require a person to remove any of his clothing in public other than an outer coat, jacket and gloves'. (2) At the other extreme is an 'intimate' search, which may be authorised under s 55. By s 65(1), this means 'a search which consists of the physical examination of a person's body orifices other than the mouth'. By s 55(5) this has to be done

by a doctor or nurse unless this is impracticable, in which case it may be done by a constable, but by s 55(7) 'A constable may not carry out an intimate search of a person of the opposite sex'. Intimate searches are extremely rare and such searches by constables are even rarer. It is now common ground that this provision does not present an obstacle to the employment of a transperson as a police officer. (3) In the middle are searches, under s 54 of the Act, of people who have been arrested or committed to custody by a court. By s 54(8), these searches must be carried out by a constable and by s 54(9), that constable 'shall be of the same sex as the person searched'.

[33] On the face of it, therefore, if Ms A is still a man for the purpose of all legal provisions distinguishing between the sexes, she cannot carry out a search covered by s 54(9) or 55(7) upon a woman. And because to all intents and purposes she is a woman, a man might reasonably object to her carrying out a search upon him.

EC LAW

[34] The 1975 Act anticipated the Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (the equal treatment directive). By art 1(1) of the equal treatment directive:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."'

By art 2:

'1. ... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.'

[35] In *P v S* Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795, delivered on 30 April 1996, the European Court of Justice (the Court of Justice) held that it was contrary to the equal treatment directive to dismiss a person on the ground that they proposed to undergo or had undergone gender reassignment. This was discrimination based on sex. It will be necessary to return to the reasoning of the court and the Advocate General, but it should be noted that the case was decided before the act of discrimination complained of in this case. The same principle has recently been held to apply to the conditions governing entitlement to pay and related benefits, in *KB v National Health Service Pensions Agency* Case C-117/01 [2004] IRLR 240.

[36] *P v S* led to the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102. These amended the 1975 Act. A new s 2A was added to deal with less favourable treatment on grounds of gender reassignment in relation to

- a those areas covered by the equal treatment directive. Section 7A made a corresponding exception where being a man or being a woman was a genuine occupational qualification for the job. Section 7B created supplementary genuine occupational qualifications, the only relevant one of which is in s 7B(2)(a) 'the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers'. Other types of search
- b are not referred to.

JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

- [37] It is remarkable that, in each of the cases brought by transpeople under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), the European
- c Commission on Human Rights found a breach of a relevant article, whereas the court has been slower and more selective in taking that view. As long ago as 1979, in *Van Oosterwijck v Belgium* App no 7654/76 (1 March 1979, unreported), the Commission found that the refusal of Belgium to enable the registers of civil status to reflect lawful sex changes violated the right to respect for private life in
- d art 8. In *Rees v UK* (1987) 9 EHRR 56, the European Court of Human Rights, by a majority of 12 to three, held that the refusal of the United Kingdom to issue a new birth certificate to a post-operative trans person was not in breach of its positive obligations under art 8. The court was strongly influenced by the fact that in this country birth registration is regarded as a matter of historical record but that thereafter a trans person can be issued with a driving licence and passport
- e in the new name and title and thus present himself in the new gender for many practical purposes. The court took the same view in *Cossey v UK* (1991) 13 EHRR 622, but this time by the slender majority of ten to eight. There was a powerful dissent by Judge Martens, pointing to the increasing legislative and judicial recognition of transpeople in European states and elsewhere and to the
- f fundamental human rights involved which in his view should not be defeated by technicalities (at 648 (para 2.7)):

- g 'The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the *fait accompli* he has created ... This is a request which the law should refuse to grant only if it truly has compelling reasons, for ... such a refusal can only be qualified as cruel. But there are no such reasons.'

- j [38] In contrast, in *B v France* (1993) 16 EHRR 1 the court by a majority of 17 to one found France to be in breach of art 8 by refusing to recognise the reassigned gender. French people are required to carry identity cards at all times, so the degree of interference with the transperson's right to respect for her private life was much greater than in the United Kingdom. The Court of Justice's decision in *P v S* came next.

[39] Then in 1997, the European Court of Human Rights, in *X, Y and Z v UK* (1997) 24 EHRR 143 refused to find that the failure of United Kingdom law to recognise a female-to-male transperson as the father of a donor insemination child, born to his partner and brought up as their child, was a breach of their rights to respect for their family life under art 8. This trend was continued, shortly after the chief constable's decision in this case, in *Sheffield and Horsham v UK* (1998) 5 BHRC 83, where the court, by a majority of 11 to nine, again found no violation in the refusal to recognise the reassigned gender. By this stage, 37 out of the 41 member states of the Council of Europe recognised transpeople in their reassigned gender. The United Kingdom was said to be alone in allowing (and even funding) gender reassignment treatment and surgery but failing to recognise its results.

[40] But in all these cases, the court emphasised that times were changing, and that member states should keep the matter under review, as there might come a time when they would no longer enjoy a margin of appreciation. The United Kingdom had until then failed to heed such warnings, but in April 1999 the Home Secretary set up an interdepartmental working group. This reported in April 2000 and suggested putting the three options identified out to public consultation. To the dismay of the Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140 at [96], [2002] 1 All ER 311 at [96], [2002] Fam 150 this was not done. A year later, in *Goodwin v UK* (2002) 13 BHRC 120, the European Court of Human Rights unanimously found that English law was in breach of both arts 8 and 12.

DOMESTIC LAW AFTER *GOODWIN v UK*

[41] Following *Goodwin v UK*, this House declined, in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467 to read and give effect to s 11(c) of the 1973 Act so as to recognise the validity of a purported marriage in 1981 between a man and a male-to-female transperson. At the time the marriage had taken place, convention law did not require us to recognise the trans person's reassigned gender. The *Goodwin v UK* decision was prospective in nature, requiring the United Kingdom to change its law for the future. This raised many difficult questions, in particular of definition and proof, which were better dealt with by Parliament. But until then, as our law no longer complied with the convention, it was appropriate to make a declaration that s 11(c) of the 1973 Act was incompatible with the convention rights. *P v S* was cited and referred to without comment by the Court of Appeal in *Bellinger's* case but appears not to have been cited to the House of Lords.

[42] The Gender Recognition Bill is currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a transperson in defined circumstances. These are wider than the post-operative conditions with which the domestic and European case law has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that transpeople properly belong to the gender in which they live.

THESE PROCEEDINGS

[43] Ms A applied in May 1998 to an employment tribunal complaining of sex discrimination. On 18 March 1999, the tribunal decided unanimously that the

a refusal to offer her employment as a constable was unlawful under the 1975 Act. The tribunal found (at para 10) that Ms A had applied to this particular force—

‘because it was away from the area in which she lived but was accessible to it. In order to function normally in society, she needs to conceal the fact that she is a transsexual. She is willing, however to disclose that fact to those who need to know it for whatever purpose.’

b They also found (at para 30) that—

‘searching is an integral part of being a police constable. It is what the respondent describes as a core competency ... Further, we find that it would be objectively unreasonable to require the respondent to employ the applicant as a police constable if in law and fact she could not carry out the full range of a police constable’s duties.’

c They accepted ‘that there are many people in our society who would have religious, cultural or moral objections to being searched by a transsexual’. But they continued (at para 33):

d ‘Whilst respecting these objections, we do not think that they are contemplated by the expression “might reasonably object” [in s 7(2)(b) of the 1975 Act] ... Given the application of the principle of equal treatment, we cannot see that there is any obligation upon the respondent to disclose to anyone that the applicant is transsexual ... The respondent also employs officers who are known to be homosexual ... Again there are persons who for cultural or moral reasons might object to being searched by a homosexual. The common factor in such an objection is knowledge, something of which the suspect or prisoner is rightly deprived.’

e [44] After dismissing as negligible the risk of criminal or civil liability for assault, they concluded (at para 37):

f ‘We return to the principle of proportionality. We are required to reconcile the principle of equal treatment as far as possible with the requirement of full operational policing. In our judgment, the risks to the respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant’s fundamental right to equal treatment.’

g [45] The Employment Appeal Tribunal (reported as *Chief Constable of West Yorkshire Police v A* [2002] IRLR 103, [2002] ICR 552) held that the job did need to be held other than by a transsexual to preserve decency or privacy. Once it had been accepted that there were people with objections to being searched by a transsexual, these could not simply be dismissed on the basis that they were not reasonable. The police could not be involved in the deception of concealing the facts and the alternative of giving special instructions would destroy the privacy sought by the applicant.

j [46] By the time the case reached the Court of Appeal in October 2002 (reported at [2002] EWCA Civ 1584, [2003] 1 All ER 255, [2003] ICR 161), the European Court of Human Rights had decided the case of *Goodwin v UK*: the refusal of English law to recognise the applicant’s gender reassignment was, in the absence of significant factors of public interest, a breach of her rights under

arts 8 and 12 of the convention. The Court of Appeal allowed Ms A's appeal on the basis that the convention jurisprudence was read into domestic law through the medium of the equal treatment directive. If, in the light of *Goodwin v UK*, the chief constable was bound to treat Ms A as female, it was not open to him to discriminate against her on the basis that she was a transsexual and no possibility of invoking s 7 of the 1975 Act could arise. Buxton LJ, however, pointed out that art 8 rights were not absolute, so that there might be countervailing factors of public interest. The court could give weight to the difficulties perceived by the chief constable but he had an obligation to manage his force in such a way as to avoid situations arising which would threaten the individual's art 8 interests. This might not be possible if the individual insisted on her transsexuality remaining undisclosed. But it had been made clear in the course of the hearing that she had no objection to colleagues generally, and if need be members of the public with whom she dealt, knowing of her transsexuality. Accordingly that problem did not arise.

THIS APPEAL

[47] The Secretary of State for Trade and Industry has intervened in this appeal. She has ministerial responsibility for the 1975 Act and the implementation of EC law on sex discrimination in domestic law. Her main concern, as Mr Rabinder Singh QC made plain on her behalf, was with the reasoning in the Court of Appeal on the interplay between the convention and the equal treatment directive. The *Goodwin v UK* decision was plainly prospective, as this House held in *Bellinger's* case. Yet because the normal rule is that decisions on the interpretation of EC legislation operate *ex tunc*, the Court of Appeal held that the *Goodwin v UK* decision required that the equal treatment directive be interpreted in the light of *Goodwin v UK*. Mr Singh accepts that it would have been possible so to interpret it before then, based upon the human rights values which underpin the EC treaties. His quarrel is with the suggestion that *Goodwin v UK* required this result. In the light of the Gender Recognition Bill, currently before Parliament, there is no policy objection to regarding Ms A as female for all purposes, including intimate searches. Nor would it be inconsistent with the wider-ranging provisions in the Bill for us to hold that EC law required that it be anticipated in this respect.

[48] Mr David Bean QC, on behalf of the appellant chief constable, also argues that it was wrong to give retrospective effect to *Goodwin v UK* simply because the matter is governed by EC law. He accepts that if Ms A is to be treated as a woman for the purpose of s 54(9) of the 1984 Act she must succeed. But to do so she must displace the domestic law decided in *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33, [1971] P 83 and *R v Tan* [1983] 2 All ER 12, [1983] QB 1053. The equal treatment directive and the cases of *P v S* and *KB's* case did not require this result.

[49] Mr Nicholas Blake QC, on behalf of Ms A, accepts, as he has to do, that in the light of *Bellinger's* case, *Corbett's* case remains the domestic law on capacity to marry unless and until it is changed by the Gender Recognition Bill. He argues that it was open to this House to hold that *R v Tan* was not good law, so that even in domestic law gender reassignment might be recognised for some purposes and not for others. His principal submission, however, is that EC law required the chief constable to recognise Ms A's sexual identity as female for the purpose of appointment as a constable and of any domestic legislation restricting access to such appointment. His secondary submission is that a blanket policy of denying access could not satisfy the strict requirements for a genuine occupational

- a qualification and in particular the principle of proportionality as an aspect of that concept.

DISCUSSION

- b [50] In my view, the answer to this appeal must turn upon the rights of a transperson under the equal treatment directive in March 1998, rather than upon domestic law or the impact of the *Goodwin v UK* decision. Before turning to that issue, however, I would venture a few comments upon the other two.

- c [51] As to domestic law, there might be good policy reasons for distinguishing between the different purposes for which the decision in *Corbett's* case may be invoked. Marriage can readily be regarded as a special case. True, it is perfectly possible to have a valid marriage between two people who cannot have children together. Also true, the fact that marriage law traditionally distinguished between husband and wife cannot be a conclusive argument against the marriage of two people who for all practical purposes are of opposite sexes. But marriage is still a status good against the world in which clarity and consistency are vital. In England, the Church has a role in celebrating marriages which means that special exceptions have to be made for people who are able to marry in civil but not ecclesiastical law. It is scarcely surprising that this House, in *Bellinger's* case, held that these difficult questions of definition, demarcation and impact upon others were for Parliament rather than the courts to decide.

- e [52] But the House in *Bellinger's* case was concerned only with capacity to marry and in particular with the meaning of the words 'respectively male and female' in s 11(c) of the 1973 Act. These presuppose two clearly distinguished genders. It is less clear why the immutability of birth gender for marriage purposes should apply for all other purposes, in particular to those criminal offences which used to depend upon the gender of the accused or the victim. Many of those distinctions were of historical origin having nothing to do with the different physical characteristics of the people concerned. It was a nonsense at the time of *R v Tan* that the offence of living on the immoral earnings of a prostitute could only be committed by a man and scarcely surprising that the Court of Appeal found it convenient to apply the *Corbett* reasoning in that case. On the other hand, in so far as criminal offences did depend upon sexual differences, it might be thought that the physical differences which enabled the various acts to be performed were more important than chromosomal similarities, so that a female-to-male transperson might be guilty of rape (as originally defined) and a male-to-female transsexual might be its victim. For present purposes, it is unnecessary to decide the point. The Sexual Offences Act 2003 adopts a gender neutral approach which makes it much less important irrespective of the Gender Recognition Bill.

- j [53] As to the convention, the court in *Goodwin v UK* held that the refusal of domestic law to recognise the reassigned gender 'no longer falls within the United Kingdom's margin of appreciation'. But it would be for the United Kingdom to decide how to fulfil its obligation to secure to transpeople their right to respect for their private life and their right to marry. *Goodwin v UK* was clearly intended to operate prospectively rather than retrospectively. The Human Rights Act 1998 is only retrospective to the limited extent provided for in the Act. Hence, the House decided in *Bellinger's* case that neither could be used to legitimate a marriage which had taken place in 1981. For the same reason, I agree with the Secretary of State that the *Goodwin v UK* decision did not require that the

equal treatment directive be interpreted as if *Goodwin v UK* had been the law from the moment the directive came into effect.

[54] However, this clearly does not preclude a decision that the equal treatment directive is indeed to be interpreted as requiring that transpeople be recognised in their reassigned genders for the purposes covered by the directive. The general rule is that the interpretation given to a rule of Community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force'. Temporal restrictions can only exceptionally be allowed by the Court of Justice and then without prejudice to individuals who had already made a claim: see *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122 at 137–138, [1976] ICR 547 at 571 (paras 69–75); *Amministrazione delle Finanze v Srl Meridionale Industria Salumi* Joined Cases 66, 127 and 128/79 [1980] ECR 1237 at 1261 (para 11). The human rights values which led to the decisions in *B v France* in 1992 and *Goodwin v UK* in 2002, as well as to the many Commission decisions and dissenting opinions, also underpin the EC legislation.

[55] What interpretation is then to be given to the directive? This depends upon the two decisions of the Court of Justice referred to earlier. In *P v S* Case C-13/94 [1996] All ER (EC) 397, [1996] ICR 795 the applicant was dismissed from her employment as a manager in an educational establishment because she was undergoing male-to-female gender reassignment treatment and surgery. She notified her superiors of her intention to do so. She was given notice after it had begun and the final operation was performed during her notice period. She brought proceedings for sex discrimination. These were resisted on the ground that a female-to-male transperson would have been treated in the same way. The court pointed out ([1996] All ER (EC) 397 at 410, [1996] ICR 795 at 814 (para 18)) that 'the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'; and that 'the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the court has a duty to ensure' (para 19). It continued:

'20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially, if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard.

23. Dismissal of such a person must therefore be regarded as contrary to art 5(1) of the directive, unless the dismissal could be justified under art 2(2). There is, however, no material before the court to suggest that this was so here.'

[56] It might be possible to regard this as simply a decision that discrimination on grounds of transsexuality is discrimination 'on grounds of sex' for the purpose

- a of the directive. But there are many reasons to think that it is not so simple. The purpose of the directive, set out in art 1(1), is to 'put into effect in the Member States the principle of equal treatment for men and women'. The opinion of Advocate General Tesouro ([1996] All ER (EC) 397 at 406, [1996] ICR 795 at 810 (para 22)) was emphatic that 'transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the
- b directive, having regard also to the above-mentioned recognition of their right to a sexual identity'. The 'right to a sexual identity' referred to is clearly the right to the identity of a man or a woman rather than of some 'third sex'. Equally clearly it is a right to the identity of the sex into which the transperson has changed or is changing. In sex discrimination cases it is necessary to compare the applicant's treatment with that afforded to a member of the opposite sex. In gender
- c reassignment cases it must be necessary to compare the applicant's treatment with that afforded to a member of the sex to which he or she used to belong. Hence the Court of Justice observed that the transsexual 'is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'. Thus, for the purposes of discrimination
- d between men and women in the fields covered by the directive, a transperson is to be regarded as having the sexual identity of the gender to which he or she has been reassigned.

- [57] That this is the correct interpretation of *P v S* emerges clearly from the recent decision in *KB v National Health Service Pensions Agency* Case C-117/01 [2004] IRLR 240. The female applicant complained that the denial of a widower's pension
- e to the female-to-male transperson, with whom she had celebrated what would have been a marriage had it been possible in English law, was sex discrimination contrary to the principles of equal pay contained in art 141 of the EC Treaty and Council Directive (EEC) 75/117 (OJ 1975 L45 p 19) (the equal pay directive). The Court of Justice had earlier held that it is permissible to withhold such benefits from
- f unmarried partners, including those in homosexual relationships who are also not permitted to marry by English law: see *Grant v South-West Trains Ltd* Case C-249/96 [1998] All ER (EC) 193, [1998] ICR 449; *D and Sweden v Council of European Union* Joined Cases C-122/99 P and C-125/99 P [2001] ECR I-4319. The question was whether the prohibition of transpeople marrying in their reassigned gender was in the same category, and thus not sex discrimination because it applied equally both
- g ways, or whether it was discrimination on grounds of sex. *P v S* showed that this was sexual discrimination. The only difference in this case was that it related to one of the preconditions for the enjoyment of a Community right rather than directly to the right itself. This made no difference. Hence in principle it was incompatible with art 141. But since the conditions for the recognition of gender reassignment
- h had been left to the national authorities in *Goodwin v UK*, it was for the national court to determine whether the applicant could rely on art 141 to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

- [58] This decision confirms the right of the transperson to be recognised in the reassigned gender, not only for the purpose of the direct enjoyment of
- j Community rights, but also for the purpose of the preconditions of such a right. This must have an effect upon the proper approach to the question of 'genuine occupational qualification' under s 7 of the 1975 Act, which in turn rests upon the legality of searches under s 54 of the 1984 Act. Article 2(2) of the equal treatment directive allows member states to exclude 'those occupational activities ... for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'. But art 2(2) is a derogation

from an individual right which must be interpreted strictly and in accordance with the principle of proportionality: see *Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135 at 158–159, [1987] QB 129 at 151 (paras 36, 38).

[59] If in principle the trans-partner of an employee must be recognised in the reassigned gender for the purpose of death benefits, the employee herself must in principle be recognised in the reassigned gender for the purpose of carrying out the duties of the post. This means that s 54(9) of the 1984 Act must be interpreted as applying to her in her reassigned gender, unless, as was acknowledged in *P v S*, there are strong public policy reasons to the contrary. It is difficult to argue that such public policy reasons existed in this case even in 1998. Intimate searches were expressly recognised as a supplementary genuine occupational qualification under s 7B of the 1975 Act, but the chief constable accepts that they do not present a practical problem to which exclusion from the force would be a proportionate response. If the Gender Assignment Bill becomes law, they will cease to be recognised as such at all. Section 54 searches were not expressly recognised in s 7B, which was introduced in 1999 but in response to the decision in *P v S* in 1996. This is not surprising. By that time, the United Kingdom authorities were already doing everything they could to enable a transperson to live a normal life in her reassigned gender. There are many occupations which involve physical contact with members of the opposite sex. Although these are not usually in the circumstances of compulsion entailed in a s 54 search, they are often not truly voluntary—as for example in hospital wards where there are doctors and nurses of both sexes. And there are some, such as compulsory hospital patients, who have no choice. We generally depend upon the professionalism of the individual, backed up by the ordinary law and complaints mechanisms, to protect people's sensibilities. Those sensibilities may be rational as well as real. For example, it may well be rational to object to being nursed by a heterosexual person of the opposite sex. It may also be rational to object to being nursed by a homosexual person of the same sex. But it would not be rational to object on similar grounds to being nursed by a transperson of the same sex. In those circumstances it is not surprising that the employment tribunal held that an objection to being searched by a transperson would not be reasonable.

[60] Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these, for the reasons explained in *Bellinger's* case, will be sensitive and difficult. That is presumably why the Court of Justice in *KB's* case acknowledged the role of the national court in deciding whether the principle did in fact apply in the particular case. One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the acquired gender. (One could also envisage a relationship which was not as close to marriage as the relationship in that case.) The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the employment tribunals to make that judgment in a borderline case.

[61] In this case, however, Ms A has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She believes that she presents as a woman in every respect.

[62] She meets entirely the plea of Advocate General Ruiz-Jarabo Colomer in *KB's* case [2004] IRLR 240 at 247–248 (para 79):

- a* "Transsexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond so far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should
- b* take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won.'

- c* [63] In my view Community law required in 1998 that such a person be recognised in her reassigned gender for the purposes covered by the equal treatment directive. This conclusion does not depend upon *Goodwin v UK* and this case can readily be distinguished from *Bellinger's* case. I would dismiss this appeal.

LORD CARSWELL.

- d* [64] My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond. I am in agreement with them and for the reasons which they have given I too would dismiss the appeal.

Appeal dismissed.

Dilys Tausz Barrister.

Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)

[2004] EWCA Civ 218

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS MR, LONGMORE AND THOMAS LJJ

26, 27, 29 JANUARY, 1 MARCH 2004

Discovery – Legal professional privilege – Communications between legal adviser and client – Communications between solicitors and client advising on presentation of evidence and submissions to inquiry – Whether communications attracting legal professional privilege.

In the course of litigation arising out of the collapse of the Bank of Credit and Commerce International SA (BCCI), the claimants, the liquidators and creditors of BCCI, applied for disclosure of documents and the Court of Appeal made an order for disclosure. Before the Court of Appeal the claimants had not sought disclosure of documents passing between the Bank of England's solicitors and the Bank officials (the inquiry unit) appointed to deal with all communications between the Bank and the private, non-statutory inquiry set up to inquire into the supervision and regulation of BCCI, conceding that such documents were covered by legal advice privilege, but had successfully argued that documents prepared by employees of the Bank with the intention that they be sent to the Bank's solicitors had not been prepared for the dominant purpose of obtaining legal advice from the solicitors, but for the purpose of placing facts before the inquiry and assisting it, and so were not privileged. In the light of that success the claimants withdrew their concession and argued that communications between the inquiry unit and the solicitors were not covered by legal advice privilege. The judge permitted that withdrawal, and held that the documents were not capable of being the subject matter of a claim for privilege unless they had come into existence for the purpose of obtaining legal advice. He considered that the Court of Appeal had, in its earlier judgment, decided that requests for and provision of advice as to how material should be presented to the inquiry, so as to present the Bank in the best possible light, did not constitute legal advice for the purpose of legal advice privilege. The Bank appealed, contending that the scope of legal advice privilege had widened with the expansion in modern times of the professional role of the solicitor, and that the provision of advice in relation to an inquiry involved the type of professional relationship that attracted legal advice privilege.

Held – Where the dominant purpose of a solicitor-client relationship was not the obtaining of advice and assistance in relation to legal rights and obligations, the principle that broad protection would be given to communications between solicitor and client in the course of that relationship did not apply. The traditional role of solicitors had expanded so that the fact that the work done had been within what might now be the ordinary business of a solicitor did not necessarily mean that it attracted privilege. On the facts of the instant

- a case the extension of legal advice privilege to the provision of advice in relation to an inquiry could not be justified. The inquiry was private, non-statutory, and one of its sponsors, albeit reluctantly, had been the Bank itself. The Bank's primary concern had been, or ought to have been, to ascertain whether the collapse of BCCI had been attributable to any regulatory shortcomings in the United Kingdom. Communications between the Bank and the solicitors who had been assisting in the obtaining, preparation and presentation of evidence and submissions to the inquiry did not attract privilege, even if the Bank had been anxious that that assistance should enable its role to be presented in the best possible light. Accordingly, the appeal would be dismissed (see [26], [28], [30], [37], [40], below).

Balabel v Air India [1988] 2 All ER 246 considered.

Notes

For the nature of legal professional privilege, the cases in which it arises, and its extent, see 37 (4th edn reissue) *Halsbury's Laws* paras 570–573.

d Cases referred to in judgment

Balabel v Air India [1988] 2 All ER 246, [1988] Ch 317, [1988] 2 WLR 1036, CA.

Carpmael v Powis (1846) 1 Ph 687, 41 ER 794, LC.

Gardner v Irvin (1878) 4 Ex D 49, CA.

- e *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485, [1981] 1 WLR 529, CA.

Greenough v Gaskell (1833) 1 My & K 98, [1824–34] All ER Rep 767, 39 ER 618, LC.

Hagart and Burn-Murdoch v IRC [1929] AC 386, HL.

- f *L (a minor) (police investigation: privilege)*, Re [1996] 2 All ER 78, [1997] AC 16, [1996] 2 WLR 395.

Lawrence v Campbell (1859) 4 Drew 485, 62 ER 186.

Minet v Morgan (1873) LR 8 Ch App 361, LC and LJ.

Minter v Priest [1930] AC 558, [1930] All ER Rep 431, HL.

O'Shea v Wood [1891] P 286, CA.

- g *Three Rivers DC v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, [2003] QB 1556, [2003] 3 WLR 667.

Wheeler v Le Marchant (1881) 17 Ch D 675, CA.

Wilson v Northampton and Banbury Junction Rly Co (1872) LR 14 Eq 477.

h Cases referred to in skeleton arguments

Akzo Nobel Chemicals Ltd v EC Commission Joined cases T-125/03R and T-253/03R [2004] 4 CMLR 744, CFI.

AM & S Europe Ltd v EC Commission Case 155/79 [1983] 1 All ER 705, [1983] QB 878, [1983] 3 WLR 17, [1982] ECR 1575, ECJ.

- j *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, [1874–80] All ER Rep 396, CA.

Jacobs v London CC [1950] 1 All ER 737, [1950] AC 361, HL.

R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21, [2002] 3 All ER 1, [2003] 1 AC 563, [2002] 2 WLR 1299.

- R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] AC 487, [1995] 3 WLR 681, HL. a
- United States of America v Phillip Morris Inc* [2003] EWHC 3028 (Comm), [2003] All ER (D) 191 (Dec); *aff'd* [2004] EWCA Civ 330, [2004] All ER (D) 448 (Mar), (2004) 148 Sol Jo LB 388.
- Ventouris v Mountain, The Italia Express* [1991] 3 All ER 472, [1991] 1 WLR 607, CA. b

Appeal

The Bank of England (the Bank) appealed from the order of Tomlinson J on 4 November 2003 ([2003] EWHC 2565, [2003] All ER (D) 40 (Nov)) for disclosure of certain documents sought by the claimants, Three Rivers District Council, several thousand other depositors with the Bank of Credit and Commerce International SA, and the Bank of Credit and Commerce International SA (in liquidation) (the liquidators), in proceedings brought by the liquidators against the Bank. c

Bankim Thanki QC and *Ben Valentin* (instructed by *Freshfields Bruckhaus Deringer*) for the Bank. d

Gordon Pollock QC, *Barry Isaacs* and *Nathan Pillow* (instructed by *Lovells*) for the liquidators.

Cur adv vult e

1 March 2004. The following judgment of the court was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION f

[1] This appeal is a consequence of the previous judgment of this court on an earlier disclosure application now reported as *Three Rivers DC v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, [2003] QB 1556, [2003] 3 WLR 667 (the previous Court of Appeal decision). In that appeal this court decided that documents prepared by employees or ex-employees of the Bank of England (the Bank) with the intention that they be sent to the Bank's solicitors (Freshfields) whether or not they were prepared for the dominant purpose of obtaining legal advice were not privileged and should be disclosed. This was because, as the Bank accepted, there was no litigation privilege in such material (see *Re L (a minor) (police investigation: privilege)* [1996] 2 All ER 78, [1997] AC 16) and the Bank had to rely on legal advice privilege which extended only to communications between a client (or his agent for the purpose) on the one hand and his solicitor on the other. g

[2] The Bank's original claim for privilege was attacked by Mr Pollock QC for the liquidators on the basis (1) that the documents for which privilege was claimed were not documents of a class comprised within the doctrine of legal advice privilege and (2) that, in any event, they had not been prepared for the dominant purpose of obtaining legal advice from Freshfields but for the purpose of placing facts before Bingham LJ and assisting him in the inquiry into the collapse of the Bank of Credit and Commerce International SA (BCCI) which he was conducting at the request of the government and the Bank. The h

a court accepted the first of these arguments on the basis of established authority; it also decided that, even if the first argument was wrong and the relevant documents could theoretically be the subject of a claim for privilege, the documents, which were the subject matter of the application, had not been prepared for the dominant purpose of obtaining legal advice so that the claim for privilege would, in any event, have failed. The court held (in the previous Court of Appeal decision [2003] QB 1556 at [35]) that the dominant purpose for which these documents were prepared was 'so that the Bank could comply with its primary duty of putting all relevant factual material before Bingham LJ'.

b [3] In the course of his submissions in the previous Court of Appeal decision Mr Pollock made it clear that he was not seeking disclosure of any documents passing between Freshfields and the Bingham inquiry unit (BIU), which was set up as described in the previous Court of Appeal decision ([2003] QB 1556 at [3]) and was agreed to constitute the client in this context. That was because he accepted that such documents were covered by legal advice privilege. In the light of the decision of the court to accept the second part of his argument c in relation to what we may call 'third-party documents', he decided to withdraw that concession and argue that even communications between the BIU and Freshfields are not properly within the category of legal advice privilege as claimed by the Bank. Tomlinson J ([2003] EWHC 2565 (Comm) at [3], [2003] All ER (D) 40 (Nov) at [3]) has permitted Mr Pollock to withdraw his concession. There are no grounds on which that decision can be challenged, d since it was a matter for his discretion. Tomlinson J then held further that what we may call 'solicitors' documents' were not in this case capable of being the subject matter of a privilege claim unless they came into existence for the purpose of obtaining legal advice; the reason for this decision was, broadly, that any other decision would have been inconsistent with the previous Court of e Appeal decision. He made a declaration in the following terms:

g 'It is declared that the only documents or parts of documents in the Bank's control and coming into existence between the closure of BCCI SA on 5 July 1991 and the issue of the present proceedings in May 1993 which the Bank is entitled to withhold from inspection on the ground of legal h advice privilege are: (1) communications passing between the Bank and its legal advisers (including any solicitor seconded to the Bank) for the purposes of seeking or obtaining "legal advice" (which means, for the avoidance of doubt, advice concerning the Bank's rights and obligations); and (2) any part of a document which evidences the substance of such a communication.'

He then ordered a further and better list to be prepared in accordance with this declaration.

j THE CONTENTIONS

[4] Mr Thanki QC for the Bank submitted: (1) Tomlinson J was wrong to hold that this court in the previous Court of Appeal decision had, expressly or by necessary inference, already decided that the documents now sought did not come into existence for the purpose of giving or obtaining legal advice; (2) Tomlinson J should therefore have looked at the matter afresh and decided

whether the documents did come into existence for that purpose; he should then have decided that the purpose for which the documents came into existence was so that Freshfields could give and the BIU receive legal advice; (3) the phrase 'legal advice' included giving legal assistance in the relevant legal context; (4) the relevant legal context was, immediately, the Bingham inquiry but also the possible ramifications that might occur after the inquiry; (5) part of that assistance was the use of Freshfields' skills in trying, by presenting material to the Bingham inquiry in what seemed to them and the BIU the most effective way, to counteract any suggestion of blameworthiness on the part of the Bank's officials; (6) assistance of this kind, which many solicitors provide for their clients if they take part in a non-statutory inquiry, is part of the ordinary business of a solicitor; documents coming into existence as part of that assistance are, therefore, privileged; (7) in the absence of an assurance that such communications are privileged, parties will no longer co-operate with non-statutory inquiries. a
b
c

[5] Mr Pollock for the liquidators submitted: (1) on a proper reading of the judgment in the previous Court of Appeal decision, this court had already decided that the documents, of which he now sought disclosure, had not come into existence for the purpose of giving or obtaining legal advice; (2) whether that had been decided or not, the documents did not come into existence for that purpose and, certainly, any such purpose was not the dominant purpose; (3) whereas legal advice, in the context of legal advice privilege, could include 'assistance' that assistance had to be rendered in the context of a request for legal advice in connection with a legal transaction; (4) neither the Bingham inquiry nor its ramifications could be a legal transaction for the purpose of legal advice privilege; (5) assistance to counteract suggestions of blameworthiness was no part of legal advice; (6) before legal advice privilege can arise, there must be a context of legal advice being requested; (7) the suggestion of non-co-operation with non-statutory inquiries was, if relevant at all, much exaggerated. d
e
f

DID THE PREVIOUS COURT OF APPEAL DECISION DECIDE THE ISSUE?

[6] In the previous Court of Appeal decision the court held that the dominant purpose of obtaining documents from third parties was to provide evidence to the Bingham inquiry. The same is not true of correspondence created by and passing directly between the BIU and Freshfields. That correspondence was likely to include a high proportion of requests for and provision of advice as to how that material should be presented to the Bingham inquiry, and one object of such advice would be to present the Bank and its officials in the best possible light. It would be advice on presentation. Does such advice constitute 'legal advice' for the purpose of legal advice privilege? The court posed that question in the course of discussion in the previous Court of Appeal decision [2003] QB 1556 at [32]. It was not unreasonable to expect the court to go on to answer that question. Tomlinson J thought that it had done so, in the negative. Submissions made by counsel for the Bank in the context of seeking permission to appeal to the House of Lords suggest that they were of the same view. Subsequently, however, they argued that the court had answered that question not in the negative but in the affirmative. g
h
j

- a* [7] We have given careful consideration to the passages in the judgment that followed the posing of the question. We have concluded that they do not give a clear answer to it. We must address it ourselves, but in the light of the judgment in the previous Court of Appeal decision. Tomlinson J thought that, if the judgment did not give an express answer to the question, the answer could none the less be deduced from the reasoning of the court. The issue for *b* us is whether Tomlinson J's conclusion was correct.

THE NATURE OF THE ADVICE

[8] In the judgment under appeal Tomlinson J said this about the advice sought from and given by Freshfields ([2003] All ER (D) 40 (Nov) at [8]):

- c* '... the evidence demonstrates that assistance and advice was sought not as to what was required to be done in order to comply with the Bank's obligations but rather on how to present its evidence to the inquiry in the way least likely to attract criticism. That is not a matter concerning the *d* Bank's rights and obligations.'

Subsequently, at [16], he added:

- e* 'Of course it is possible that the dominant purpose of some communications between the BIU and Freshfields during the period when the conduct of the inquiry was a live issue may have been the provision of advice as to the legal rights and obligations of the Bank as opposed to the question how the Bank's evidence might be presented to the inquiry in the way least likely to attract criticism.'

- f* [9] We propose to consider first whether the corpus of advice that related to presentation, if considered in isolation, is capable of amounting to 'legal advice' for the purpose of legal advice privilege. We will then turn to consider whether the context in which that advice was given and, in particular, the fact that Freshfields may also, under the same retainer, have given advice in relation to *g* the Bank's legal rights and obligations, brought the presentation advice within the cloak of privilege.

THE MEANING OF 'LEGAL ADVICE'

- h* [10] 'Legal advice' is a phrase frequently used in the authorities that were extensively considered in the previous Court of Appeal decision. Before turning to those authorities it is logical to start by considering what 'legal advice' means as a matter of ordinary language. It does not mean 'advice given by a lawyer'. Indeed it has not been suggested by the Bank that communications between a solicitor seeking or giving advice will automatically attract legal advice privilege, *j* regardless of the nature of the advice or the circumstances in which it is given. The natural meaning of legal advice is 'advice in relation to law'. That is, in effect, the meaning that Tomlinson J held the phrase had when declaring that legal advice 'means, for the avoidance of doubt, advice concerning the Bank's rights and obligations' (see [3], above). That is also the meaning that Mr Pollock submits the phrase should have.

[11] Mr Thanki's submissions can, we believe, be summarised as follows. Legal advice is advice given by a solicitor to his client in the normal course of his business. It is advice which arises out of and is given in the context of the normal professional relationship between a solicitor and his client and is not confined to advice about rights and obligations. a

[12] Support for each of the rival propositions is to be found in judicial statements, but it is important to pay careful regard to the context in which the statements have been made when considering the weight to be attached to them. Thus, in *Greenough v Gaskell* (1833) 1 My & K 98, [1824–34] All ER Rep 767, which was cited at length in the previous Court of Appeal decision [2003] QB 1556 at [8], Lord Brougham LC stated ((1833) 1 My & K 98 at 102, [1824–34] All ER Rep 767 at 770), in relation to lawyers: b

‘If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business ... they are not only justified in withholding such matters, but bound to withhold them ...’ c

[13] Lord Brougham LC went on, however, to explain the reason for this privilege: d

‘... for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry ... The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially medical advisers. But it is out of regard to the interests of justice ... which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources ...’ e
f
g

[14] The two passages, when read as a whole, do not support the proposition that legal advice extends beyond advice in respect of rights and liabilities which are capable of being the subject of proceedings in a court of law. h

[15] *Wheeler v Le Marchant* (1881) 17 Ch D 675, which again is extensively cited in the previous Court of Appeal decision [2003] QB 1556 at [17], [18], was a case about legal advice privilege, not litigation privilege. The issue was whether legal advice privilege extended to documents obtained from third parties. In the course of his judgment Jessel MR said ((1881) 17 Ch D 675 at 681–682): j

‘... it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining

a the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently.'

b Brett LJ added (at 683):

c 'The rule as to the non-production of communications between solicitor and client is a rule which has been established upon grounds of general or public policy. It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case.'

d [16] Once again, these statements lend support to the argument that legal advice privilege is restricted to advice about legal rights and liabilities. In 1881 the rights in question were, when litigation was not in prospect, no doubt frequently rights to property, but we would not read the judgment of Jessel MR as confining privilege to advice about those rights. The principle to be derived from his judgment is, however, that legal advice is advice about legal rights and liabilities.

e [17] Mr Thanki relied upon statements in three leading cases. The first was this passage from the judgment of Lord Lyndhurst LC in *Carpmael v Powis* (1846) 1 Ph 687 at 692, 41 ER 794 at 796:

f 'I am of opinion that the privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor's duty.'

The context in which this statement was made appears in the following further passage from his judgment:

g 'Now it cannot be denied that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well h to anyone else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction—the sale of an estate: and that a transaction in which solicitors are ordinarily employed by their client. That being the case, I j consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged.'

[18] This decision affords little assistance to Mr Thanki. The advice in question was held to be inextricable from assistance being provided by a solicitor to his client in relation to the requirements of the law relating to a sale of real property.

[19] Next Mr Thanki relied on the following statement by Lord Buckmaster in *Minter v Priest* [1930] AC 558 at 568, [1930] All ER Rep 431 at 434:

‘The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship ...’

At issue in that case was whether a conversation between a person seeking the services of a solicitor in relation to the purchase of real property and the solicitor was privileged in circumstances where the solicitor was being requested to lend the deposit payable under the transaction but was not prepared to do so and declined to act. In holding that the conversation was privileged, Lord Buckmaster said:

‘... the idea that it was possible to split the interview into two parts, treating the first as a proposal to lend money personally and the second, contingent on this, to act as a solicitor is, to my mind, outside the bounds of reasonable inference. I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor’s business is shown by the case of *Hagart and Burn-Murdoch v IRC* [1929] AC 386. But it does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature. In this case the contemplated relationship was that of solicitor and client, and this was sufficient.’

[20] In the same case, Lord Dunedin observed ([1930] AC 558 at 573, [1930] All ER Rep 431 at 436):

‘Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion.’

The most detailed and precise analysis is to be found in this passage of the speech of Lord Atkin ([1930] AC 558 at 580–581, [1930] All ER Rep 431 at 440):

‘The test for such protection has been defined in different words in a number of cases. I think it is best expressed in two phrases used in the Court of Appeal in the leading case of *O’Shea v. Wood* ([1891] P 286 at 289). Lindley L.J. adopts the language of Cotton L.J. in *Gardner v. Irvin* ((1878) 4 Ex D 49 at 53): “professional communications of a confidential character for the purpose of getting legal advice.” Kay L.J. refers to the language of Kindersley V.-C. in *Lawrence v. Campbell* ((1859) 4 Drew 485 at 490, 62 ER 186 at 188), and adopted by Lord Selborne L.C. in *Minet v Morgan* ((1873) LR 8 Ch App 361 at 368), communications passing as “professional communications in a professional capacity.” The Lord Justice prefers the former phrase, and emphasizes the importance of the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed

a confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined.'

b [21] It seems to us that the speeches in this case demonstrate that, if privilege is to attach, the starting point is that the services of a solicitor must be sought for the purpose of providing professional advice of a kind to be sought from lawyers. Communications ancillary to that purpose will be privileged. The services in question were conveyancing services—a paradigm example of

c assistance requiring the expertise of a lawyer.
[22] The third statement upon which Mr Thanki relied was that of Templeman LJ in *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485 at 489–490, [1981] 1 WLR 529 at 535–536. The issue in that case was whether the plaintiffs could adduce evidence of part of a memorandum, but decline to disclose the rest on the ground of privilege. The Court of Appeal

d held that the entirety of the document was privileged and that, by disclosing part, the plaintiffs had waived privilege in relation to the whole document. The observations of Templeman LJ relied upon by Mr Thanki were:

e 'In *Minter v Priest* [1930] AC 558, [1930] All ER Rep 431 the House of Lords affirmed that a communication between a solicitor and his client is privileged provided that the relationship of solicitor and client is established and that the communication is such as "within a very wide and generous ambit of interpretation, must be fairly referable to the relationship ..." ... In the present case the relationship of solicitor and client between the American attorneys and the plaintiffs is undoubted.

f The plaintiffs were seeking and the American attorneys were proffering advice in connection with a business transaction. The fact that litigation was not then contemplated is irrelevant. This appeal may serve a useful purpose if it reminds the profession that all communications between solicitor and client where the solicitor is acting as a solicitor are privileged

g subject to exceptions to prevent fraud and crime and to protect the client and that the privilege should only be waived with great caution.'

[23] It is important to note that, before making these observations, Templeman LJ had identified as the 'clearest authority relevant to the present point' the case of *Wilson v Northampton and Banbury Junction Rly Co* (1872) LR 14

h Eq 477, from which he had cited the following passages [1981] 2 All ER 485 at 482–483, [1981] 1 WLR 529 at 535:

i 'It is of the highest importance ... that all communications between a solicitor and his client upon a subject which may lead to litigation should be privileged, and I think the Court is bound to consider that ... almost any contract entered into between man and man ... may lead to litigation before the contract is completed. Any correspondence passing between the date of the contract which afterwards becomes the subject of litigation and the litigation itself is, in my opinion, on principle, within the privilege extended to the non-production of communications between solicitors and clients ... it is absolutely essential to the interest of mankind that a person

should be free to consult his solicitor upon anything which arises out of a contract which may lead to litigation; that the communications should be perfectly free, so that the client may write to the solicitor, and the solicitor to the client, without the slightest apprehension that those communications will be produced if litigation should afterwards arise on the subject to which the correspondence relates.’

[24] The subject matter of the advice with which Templeman LJ was concerned was a reinsurance contract which ultimately led to litigation.

[25] All of the cases to which we have thus far referred were ones in which the relationship of client and solicitor arose in relation to transactions involving legal rights and obligations capable of becoming the subject matter of litigation. We have been referred to no case in which legal advice privilege has been established where this was not the case. The authorities appear to us to support the following statement in the 16th Report of the distinguished Law Reform Committee on *Privilege in Civil Proceedings* (Cmnd 3472 (1967)) who, having observed at p 9 (para 18) of their report that the true rationale of legal advice privilege was that it was ‘a privilege in aid of litigation’, continued:

‘19. What distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, i.e. in the ultimate resort by litigation in the courts or in some administrative tribunal. It is, of course, true that on many matters on which a client consults his solicitor he does not expect litigation and certainly hopes that it will not occur; but there would be no need for him to consult his solicitor to obtain legal advice unless there were some risk of litigation in the future in connection with the matter upon which advice is sought. As Lord Brougham pointed out, it is to minimise that risk by ensuring that he so conducts his affairs as to make it reasonably certain that he would succeed in any litigation which might be brought in connection with them, that the client consults his solicitor at all.’

[26] In summary, the authorities to which we have referred show that, where a solicitor-client relationship is formed for the purpose of obtaining advice or assistance in relation to rights and liabilities, broad protection will be given to communications passing between solicitor and client in the course of that relationship. In all the cases, however, the primary object of the relationship was to obtain assistance that required knowledge of the law. We do not consider that the same principle applies to communications between solicitor and client when the dominant purpose is not the obtaining of advice and assistance in relation to legal rights and obligations.

THIS CASE

[27] Mr Thanki argued that the advice given by Freshfields was given in the course of a professional relationship that related to the Bank’s legal rights and obligations. In the course of his reply he drew our attention to Mr Croall’s second witness statement in the following terms:

‘I am informed by Lord Kingsdown [the Governor of the Bank of England at the time] ... that from the time of the government’s decision to establish the Bingham inquiry it was clear to him that the inquiry would require the assistance of the Bank. It was also obvious to Lord Kingsdown

- a that anything the Bank did or said in relation to the inquiry was legally very sensitive. This concern underpinned the retention of Freshfields and counsel to advise the Bank from the earliest stages of the inquiry. The Bank was conscious of the need to deal with the Bingham inquiry as efficiently and effectively as possible and to seek to limit any “blame” (the word used by the Prime Minister in Parliament) that might be attached to the Bank or any criticism of its conduct of the supervision of BCCI. The Bank remained, at that time, responsible for the supervision of banks under the Banking Act 1987 and any criticism and consequential damage to its reputation (or to that of any of its senior officials in the banking supervision division) might impair its ability to supervise efficiently. The Bank was also conscious from a very early stage of the danger of litigation against the Bank (or otherwise affecting the Bank) that might follow if the Bank were the subject of criticism or if blame was attached to it or any of its officials.’
- b
- c

Mr Croall does not explain why Lord Kingsdown thought that anything done by the Bank was ‘legally’ very sensitive as opposed to sensitive in general as a result of possible ‘blame’ that might be attached to the Bank which appears to have been Lord Kingsdown’s primary concern. The last sentence, however, does refer to the danger of litigation ‘if the Bank were the subject of criticism or if blame was attached to it’. Mr Thanki submitted that this statement was a complete answer to Mr Pollock’s application and claimed that the judge had wrongly ignored this vital evidence.

- e [28] This amounted to an attack on Tomlinson J’s findings in the first quotation at [8], above. Indeed Mr Thanki attacked those findings in his skeleton argument. Tomlinson J dealt at length with the nature of the assistance provided by Freshfields in his judgment of 13 December 2002 ([2002] EWHC 2730 (Comm), [2002] All ER (D) 201 (Dec)). The findings in question were a distillation of that part in his judgment and, in particular, his finding (at [10]) that the function of Freshfields was ‘to prepare submissions and/or to advise on the nature, presentation, timing and/or content of the Bank’s submission to, evidence for and response to requests from the inquiry’. There is no basis upon which, in this appeal, we can review the findings made by Tomlinson J on the basis of detailed consideration of the evidence as to the nature of the role played by Freshfields. We conclude that the dominant role of Freshfields was to advise on preparation and presentation of evidence for the Bingham inquiry but that it is possible that they may have given some advice as to the Bank’s legal rights and obligations. We do not consider that this possibility, should it be established as a fact, can clothe the entirety of the advice given by Freshfields with privilege on the ground that it was all ‘in the context of’ a professional relationship that involved advising on legal rights and obligations. This appeal falls to be determined on the basis of Tomlinson J’s finding that the advice and assistance sought was primarily in relation to the presentation of evidence to the inquiry rather than in relation to the Bank’s rights and obligations.
- f
- g
- h

- j [29] Mr Thanki contended that the professional role of the solicitor has widened in modern times and that the scope of legal advice privilege has widened with it. In support of this submission Mr Thanki relied upon the following passages from the judgment of Taylor LJ in *Balabel v Air India* [1988] 2 All ER 246 at 254, [1988] Ch 317 at 330:

'Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.'

[30] Mr Thanki pointed out that in the previous Court of Appeal decision [2003] QB 1556 at [29] this court summarised the effect of *Balabel's* case as follows:

'... once a solicitor had been instructed, legal advice privilege extend[s] to all communications between solicitor and client on matters within the ordinary business of the solicitor and referable to the relationship ...'

Mr Pollock submitted that this summary was not correct. We agree with him, if it is considered in isolation. The material passage in the judgment of Taylor LJ is [1988] 2 All ER 246 at 255, [1988] Ch 317 at 331–332 where, after considering a number of authorities, he said:

'It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communications upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters "within the ordinary business of a solicitor" would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.'

a We agree with this observation of Taylor LJ to the effect that in circumstances where the traditional role of a solicitor has expanded, it is necessary to keep legal professional privilege within justifiable bounds. The fact that work done is within what may be the ordinary business of a solicitor does not necessarily mean that it attracts privilege. This case raises the question of the scope of the 'justifiable bounds'.

b INQUIRIES

[31] One activity that now falls within the ordinary business of a solicitor is the representation of witnesses at inquiries. Public inquiries are now commonplace, both statutory and non-statutory. It is also commonplace for witnesses at such inquiries to be represented by lawyers. Often witnesses will be exposed to, and concerned about, the risk of legal liability as a consequence of their role in the matter under inquiry. In such circumstances their communications with their lawyers will plainly be subject to legal advice privilege. Sometimes, however, the concern of witnesses is not that they will be exposed to legal liability but simply that they will be exposed to criticism. The BSE inquiry is an example of such an inquiry; Lord Hutton's inquiry is another. Criticism can be a serious matter, as the resignations following Lord Hutton's report demonstrate. Are individuals whose concern is solely for their reputation not entitled to legal advice privilege?

[32] Mr Pollock submitted that witnesses at statutory inquiries are entitled to legal advice privilege by virtue of s 1(3) of the Tribunals of Inquiry (Evidence) Act 1921, which provides:

'A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness in civil proceedings before the High Court or the Court of Session.'

f This provision begs the question rather than answers it. It seems to us that its principal target is protection in relation to evidence given in the proceedings. If a witness in civil proceedings consults a lawyer, this will normally be because of concern as to the impact of the proceedings on his rights and liabilities. Communications in such circumstances will be privileged whether or not the proceedings are in court, before a statutory tribunal or before a non-statutory tribunal. If the witness' concern is only to have advice on presentation, the question remains of whether the advice attracts privilege. We know of no case in which the issue now under consideration has been raised. It can be argued that an individual whose reputation is in jeopardy at a public inquiry, but who needs no advice in relation to his legal rights and obligations, ought to be able to seek the assistance of a solicitor without inhibition. Is reputation to be equated with legal rights and obligations so that the advice of a solicitor for the purpose of protecting reputation attracts legal advice privilege?

[33] We do not find it necessary to answer that question on the facts of the present case. Freshfields were retained by the Bank. No claim for privilege has been advanced by any individual witness. The precise status of the Bank has not been explored before us as only its regulatory functions are directly in issue, but it seems to us questionable as to whether our private law affords any protection to the reputation of the Bank. Certainly it does not afford the same protection as is afforded by the law of defamation to the reputation of an individual. It has been suggested that the Bank was concerned to protect its

reputation because it was anxious to avoid more intrusive regulation. We do not think that a desire to protect reputation for this reason puts the Bank on the same footing as an individual whose reputation is at risk in a public inquiry, whatever that footing may be. a

[34] Is the interest that the client seeks to protect relevant to the question of legal advice privilege in the present context? The role of Freshfields in assisting with the preparation of evidence and submissions for the Bingham inquiry was very similar to the role that a solicitor plays in relation to litigation. But, in contradistinction to litigation, a typical inquiry is not necessarily (or even primarily) concerned with legal rights and liabilities. Does the provision of advice in relation to an inquiry involve the type of professional relationship between solicitor and client that attracts legal advice privilege regardless of whether any legal rights or liabilities are in play? b

[35] Mr Pollock described this possibility as 'quasi-litigation privilege'. He submitted that no such privilege existed. He also argued that it was not open to the Bank to invoke privilege on this basis, having specifically renounced any reliance on litigation privilege. c

[36] We have found this the most difficult question that arises on this appeal. No authority bears on it. An affirmative answer will extend legal advice privilege to circumstances where the established test of whether the advice and assistance relates to legal rights and liabilities is not satisfied. d

[37] We do not consider that the facts of this case justify this extension to the law of privilege. The inquiry in this case was a private, non-statutory inquiry. One of the sponsors of that inquiry, albeit a reluctant sponsor, was the Bank itself. The Bank's primary concern was, or should have been, to ascertain whether the collapse of BCCI was attributable to any regulatory shortcomings in this country. We cannot see that in these circumstances communications between the Bank and the solicitors who were assisting in the obtaining, preparation and presentation of evidence and submissions to the inquiry should attract privilege, even if the Bank was anxious that this assistance should enable the Bank's role to be presented in the best possible light. e

[38] Mr Pollock emphasised that he was not asserting that no communications passing between the BIU and Freshfields could be privileged; he was merely objecting to an assertion that all such communications were automatically privileged. If some such communications were made in the context of seeking specific legal advice (whether about the construction of the provisions of the Banking Act or any other point of law) then a statement to that effect can be made and all documents coming into existence during that part of the investigation necessary for that advice to be given will, as Mr Pollock accepted, be privileged in accordance with the decision in *Balabel's* case. But no examination of the communications now sought had been carried out to see if they had indeed come into existence for the purpose of giving specific legal advice; Tomlinson J's order now requires that exercise be done. We consider that Tomlinson J was right to so order. f

[39] We have found this area of law not merely difficult but unsatisfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege g

h

j

a were not available in such circumstances, communications between solicitor and client would be inhibited. Nearly 40 years have passed since the Law Reform Committee looked at this area. It is perhaps time for it to receive a further review.

[40] For the reasons that we have given we would dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd

[2003] EWHC 1252 (Ch)

CHANCERY DIVISION

NEUBERGER J

7-9 MAY 2003

Landlord and tenant – Business premises – Application for new tenancy – Time – Computation of time – Four months from giving of landlord's notice terminating tenancy – Landlord's notice sent by recorded delivery – Whether notice served on date of posting or date of delivery – Landlord and Tenant Act 1927, s 23 – Landlord and Tenant Act 1954, s 25 – Interpretation Act 1978, s 7 – Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1.

The respondent was the tenant of business premises and entitled to the security of tenure provided by Pt II of the Landlord and Tenant Act 1954. On 7 January 2002, the appellant landlord sent by recorded delivery a notice under s 25^a of the 1954 Act to the tenant at the premises. The notice was received by the tenant on 9 January. The tenant served a counter-notice and applied to the county court on 8 May for a new tenancy. Such an application had to be made within four months of the service of the s 25 notice. Section 23^b of the Landlord and Tenant Act 1927 applied for the purposes of the 1954 Act. By that section, any 'notice ... may be served on the person on whom it is to be served either personally or by leaving it for him at his last known place of abode in England and Wales or by sending it through the post in a registered letter addressed to him there ...' 'Place of abode' included place of business and the Recorded Delivery Service Act 1962 effectively extended delivery by a registered letter to recorded delivery. The landlord applied to strike out the tenant's application as being out of time, submitting that the effect of s 23 of the 1927 Act was that a notice posted by recorded delivery was irrevocably deemed to have been received on the date of posting. The tenant submitted (i) that there was an implied term under s 23 that a such a notice was irrevocably deemed to have been served when it would have been received in the ordinary course of the post so that the notice would be deemed to have been served on 8 January; or alternatively (ii) that s 23 was to be read as subject to s 7^c of the Interpretation Act 1978, which provided that where an Act authorised or required any document to be served by post, then, unless the contrary intention appeared, the service was deemed to be effected by properly posting a letter containing the document and, unless the contrary were proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post, so that the notice would be deemed to have been served on the date it was received, 9 January. The judge refused to strike out the tenant's application and the landlord appealed from that decision. On appeal, the tenant contended, inter alia, that its right to access to the courts contained in art 6^d of the European

a Section 25, so far as material, provides: '(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form ...'

b Section 23, so far as material, is set out at [6], below

c Section 7, so far as material, is set out at [8], below

a Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and its right to the enjoyment of property under art 1^e of the First Protocol to the convention required that s 23 of the 1927 Act should be construed as being subject to s 7 of the 1978 Act.

b **Held** – (1) The effect of s 23 of the 1927 Act was that where a notice under s 25 of the 1954 Act was sent through the post by recorded delivery to the addressee at the place of his abode it was irrebuttably deemed to have been served; and service was deemed to have been made on the date the notice was put in the post for recorded delivery and not the date of actual receipt. Section 23 was not to be read as subject to s 7 of the 1978 Act. The purpose of a provision such as s 23 of the 1927 Act was to introduce an element of certainty and allocation of risk so far as service was concerned; if the server of a notice under Pt II of the 1954 Act chose a method of service which was within s 23 of the 1927 Act the risk of non-service shifted from the server to the addressee (see [12], [50]–[52], [63], [72], [74], below);

c *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, *Galinski v McHugh* [1989] 1 EGLR 109, *Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29, *Lex Service plc v Johns* [1990] 1 EGLR 92 considered.

(2) It was not necessary to construe s 23 of the 1927 Act as being subject to s 7 of the 1978 Act in order to protect the tenant's rights under the convention. The legislature had been entitled to balance certainty, allocation of risk, and the purpose behind s 23 in the way in which it had done. Moreover, in the instant case, the fact that the tenant had been deprived of two days of his two-month period for serving a counter-notice, and of two days of his four-month period for applying to the court, could not constitute an infringement of any of its human rights. The appeal would, accordingly, be allowed (see [76], [86], [87], below);

e *Anderton v Clwyd CC* [2002] 3 All ER 813 considered.

Per curiam. Section 7 of the 1978 Act does not apply to service of a notice under the 1954 Act through the ordinary post (see [68], below).

g Notes

For the statutory provisions as to the service of notice, and for a landlord's notice to terminate a business tenancy and a tenant's request for a new tenancy, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 197, 198, 570, 572

For the Landlord and Tenant Act 1927, s 23, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 84.

h For the Landlord and Tenant Act 1954, s 25, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 147.

For the Interpretation Act 1978, s 7, see 41 *Halsbury's Statutes* (4th edn) (2000 reissue) 580.

j For the Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1, see 8(2) *Halsbury's Statutes* (4th edn) (2002 reissue) 554, 556.

d Article 6, so far as material, provides: '(1) ... everyone is entitled to a fair ... hearing ...'

e Article 1, so far as material, provides: 'Every ... person is entitled to the peaceful enjoyment of his possessions ...'

Cases referred to in judgment

- Anderton v Clwyd CC* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174. a
- Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29.
- C v DPP* [1994] 3 All ER 190, [1996] AC 1, [1994] 3 WLR 888, DC; *rvsd* [1995] 2 All ER 43, [1996] AC 1, [1995] 2 WLR 383, HL.
- Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181, CA. b
- Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 2 All ER 601, [1986] Ch 80, [1984] 3 WLR 693.
- Commercial Union Life Assurance Co Ltd v Label Ink Ltd* [2001] L & TR 380.
- Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44.
- Cote, Ex p, re Deveze* (1873) 9 Ch App 27. c
- English Exporters (London) Ltd v Eldonwall Ltd* [1973] 1 All ER 726, [1973] Ch 415, [1973] 2 WLR 435.
- Galinski v McHugh* [1989] 1 EGLR 109, CA.
- Hosier v Goodall* [1962] 1 All ER 30, [1962] 2 QB 401, [1962] 2 WLR 157, DC.
- Italica Holdings SA v Bayadea* [1985] 1 EGLR 70. d
- Lex Service plc v Johns* [1990] 1 EGLR 92, CA.
- Minister of Pensions v Higham* [1948] 1 All ER 863, [1948] 2 KB 153.
- Norman v Ricketts* (1886) 3 TLR 182, CA.
- Price v West London Investment Building Society* [1964] 2 All ER 318, [1964] 1 WLR 616, CA. e
- R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682, [1956] 2 WLR 800, CA.
- Railtrack plc v Gojra* [1998] 1 EGLR 63, CA.
- Retail Dairy Co Ltd v Clarke* [1912] 2 KB 388, DC.
- Sandland v Neale* [1955] 3 All ER 571, [1956] 1 QB 241, [1955] 3 WLR 689, DC. f

Cases referred to in skeleton arguments

- Family Housing Association v Donnellan* [2002] 1 P & CR 449.
- Pye (JA) (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865, [2003] 1 AC 419, [2002] 3 WLR 221. g
- Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA.
- WX Investments Ltd v Begg (Fraser, Pt 20 defendant)* [2002] EWHC 925 (Ch), [2002] 1 WLR 2849. h

Appeal

Beanby Estates Ltd (the landlord) appealed from the decision of Judge Cotran in the Central London County Court on 21 January on the preliminary issue set out at [3] and [4], below in proceedings under Pt II of the Landlord and Tenant Act 1954 dismissing the landlord's application to strike out the application of Egg Stores (Stamford Hill) Ltd (the tenant) for a new tenancy of business premises at 46 Stamford Hill, London, N6. The facts are set out in the judgment. j

Siri Cope (instructed by *Pothecary & Barratt*) for the landlord.

Marie-Claire Bleasdale (instructed by *Bude Nathan Iwanier*) for the tenant.

NEUBERGER J.

a [1] Egg Stores (Stamford Hill) Ltd is the tenant, and Beanby Estates Ltd is the landlord, of premises at 46 Stamford Hill, London N6. The tenant is in occupation of the premises under a lease which attracts the protection of Pt II of the Landlord and Tenant Act 1954.

b [2] On 7 January 2002, the landlord sent in the post by recorded delivery to the tenant at the premises a notice under s 25 of the 1954 Act. The notice was actually received by the tenant on 9 January 2002. The tenant served a counter-notice on 28 January 2002, and applied to the Central London County Court for a new tenancy on 8 May 2002.

c [3] Under s 29(3) of the 1954 Act, that application had to be made within four months of the service of the s 25 notice. The landlord took the point that, by virtue of s 66(4) of the 1954 Act, the notice was served on 7 January 2002, the date it was put in the post, and therefore the application was out of time and should be struck out. The tenant contended that the provisions of the 1954 Act resulted in the notice being served on the date it was actually received, 9 January 2002, and therefore the application for a new tenancy was in time.

d [4] Very sensibly, the parties agreed that that dispute should be determined as a preliminary issue, and it came before Judge Cotran on 21 January 2003. He concluded that the tenant's argument was to be preferred, and that, in those circumstances, the application was valid and should not be struck out. The landlord now appeals that decision.

e [5] I turn to the relevant statutory provisions. Section 66(4) of the 1954 Act provides: 'Section twenty-three of the Landlord and Tenant Act 1927 (which relates to the service of notices) shall apply for the purposes of this Act.'

[6] Section 23(1) of the 1927 Act is in these terms:

f 'Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there ... and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf.'

g [7] I interpose to make two points. First of all, the place of abode includes place of business (see *Price v West London Investment Building Society* [1964] 2 All ER 318, [1964] 1 WLR 616). Secondly, the Recorded Delivery Service Act 1962 effectively extends any statutory provision such as s 23 of the 1927 Act, which
h deals with delivery by a registered letter, to delivery by recorded delivery.

[8] Section 7 of the Interpretation Act 1978, which is effectively identical to s 26 of the Interpretation Act 1889, which it replaced, is in the following terms:

j 'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

[9] The arguments which have been addressed before me are in summary as follows. The landlord contends that the effect of s 23 is that, if a notice is posted by recorded delivery, then it is irrebuttably deemed to have been received on the date of posting. The tenant contends either (a) that there is an implied term under s 23 that such a notice is irrevocably deemed to have been served when it would have been received in the ordinary course of post, or (b) that s 23 is to be read as effectively subject to s 7 of the 1978 Act.

[10] The effect of the landlord's argument is that the notice under s 25 of the 1954 Act in this case was served on 7 January 2002, so that the tenant's application for a new tenancy made on 8 May 2002 was out of time, and this appeal should be allowed. The effect of the tenant's first contention is that the notice is irrevocably deemed to have been served on 8 January 2002 (if the ordinary course of post would have involved receipt the day following posting) so that the application was just in time made, namely, on the last possible day. The effect of the tenant's alternative contention is that the notice would be deemed to have been served on 8 January 2002 unless the contrary has been proved. In this case it has been proved, so that the notice is deemed to have been served on the date it was received, 9 January 2002, and therefore the application was made in time.

[11] The precise point at issue in the present case, namely the deemed date of service, has not been the subject of any decision, albeit it has been the subject of one observation in the Court of Appeal. However, there are a number of cases to which I have been referred where the court has been concerned with the effect of s 23 of the 1927 Act. Miss Siri Cope, who appears on behalf of the landlord, contends that those cases establish the proposition that, if a notice is posted by recorded delivery and addressed to the recipient at his 'place of abode', then it is irrevocably deemed to have been served on the addressee by virtue of the posting.

[12] I accept her submission that, if the effect of s 23 is that where a notice is sent through the post by recorded delivery to the addressee at his place of abode it is irrevocably deemed to have been served, then it follows that service is deemed to have been made on the date the notice was put in the post for recorded delivery, and not the date of actual receipt.

[13] There are five reasons for this conclusion, albeit that the reasons may overlap. First, s 23 describes three alternative permitted methods of service: personal service, service at the premises, and service through the post by recorded delivery. The first two options clearly envisage service occurring at the moment that it is described as effected, ie the moment of personal service in the one case, and the moment the notice is left at the premises in the other case. Accordingly, logic strongly suggests that, if the act of posting of the notice by recorded delivery effects service, then the moment at which the notice is put in the post is the moment at which service is effective.

[14] Secondly, if the effect of the authorities is as contended for by Miss Cope, the actual receipt of the notice plays no part in the role of service of the notice under s 23. Accordingly, if the vital action is posting the notice, actual receipt of the notice is irrelevant. It would seem to me to follow that it is the act of posting, rather than the act of receipt, that is vital for the purpose of determining the moment of service.

[15] Thirdly, if an addressee could say that a notice was received very late, he would be better off than an addressee who never received the notice at all: the addressee who received a notice very late could rely on the date of late receipt as

a the date of service, but the addressee who never received the notice could not rely on the fact that he had never received the notice, and would be bound to accept that service was effected on posting (or in the ordinary course of post, if the tenant's case is correct).

b [16] Fourthly, if an addressee was permitted to contend that a notice sent by recorded delivery, but which was actually received many months later, was served at the date of actual receipt, that would take away much, perhaps most, of the intended effect of s 23 if, as I say, the presumption under which I am proceeding is correct, namely that s 23 deems service to be effective by post. Fifthly, my view is supported by an observation in the Court of Appeal and in *Woodfall on Landlord and Tenant* vol 2, para 22.068.2 (which I quote below).

c [17] Accordingly, it is necessary for me to consider whether s 23 has the effect for which Miss Cope contends, namely that service is irrebuttably deemed to have been effected when the notice, addressed to the addressee at the right premises, is put in the post through recorded delivery.

d [18] That point raises an issue of statutory construction. Although one would therefore normally go straight to the statutory provisions, the state of the authorities, and Miss Cope's understandable reliance on them, means that I should start with those authorities.

e [19] In *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181, a notice under the 1954 Act had been sent by ordinary post. Accordingly, the observations of Megaw LJ ([1975] 2 All ER 665 at 671, [1975] 1 WLR 1181 at 1188–1189) were obiter. They were as follows:

f '... s 23 of the 1927 Act lay[s] down the manner in which service can be effected. It is provided, as what I may call at any rate the primary means of effecting service, that it is to be done either by "personal" service or by leaving the notice at the last-known place of abode, or by sending it through the post in a registered letter, or (as now applies) in a recorded delivery letter. If any of those methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved. Thus, if it is proved, in the event of dispute, that a notice was sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient. It does not matter, even if it were to be clearly established that it had gone astray in the post. There is the obvious, simple way of dealing with a notice of this sort. But, as may be assumed for the purposes of this appeal, if the person who gives the notice sees fit not to use one of those primary methods, but to send the notice through the post, not registered and not by recorded delivery, that will nevertheless be good notice, if in fact the letter is received by the person to whom the notice has to be given. But a person who chooses to use that method instead of one of the primary methods is taking the risk that, if the letter is indeed lost in the post, notice will not have been given.'

j [20] Although an obiter observation, this amounts to a strong, clear and authoritative statement that supports Miss Cope's submission. It appears to me to be a view with which Roskill LJ also agreed (see [1975] 2 All ER 665 at 671, [1975] 1 WLR 1181 at 1188).

[21] However, there is in that observation no express consideration of either of the two ways in which Miss Marie-Claire Bleasdale, who appears on behalf of

the tenant in this case, puts the contrary argument. Certainly, there appears to have been no argument along the lines of Miss Bleasdale's first point relating to an implied term. a

[22] So far as Miss Bleasdale's second point, based on the interrelationship of s 23 of the 1927 Act and s 7 of the 1978 Act (or s 26 of the 1889 Act as it then was) is concerned, it is clear that s 26 of the 1889 Act was discussed in argument in *Chiswell's* case. Indeed, it is considered in some detail by Megaw LJ in a passage which immediately follows that which I have quoted. However, he did not consider the interrelationship of ss 23 and 7. b

[23] In *Italica Holdings SA v Bayadea* [1985] 1 EGLR 70, a notice under the 1954 Act was sent by recorded delivery. Although French J found that the notice had actually been received by an agent of the tenant, he also found (at 71), as the first basis for his conclusion, that, because the notice had been sent by recorded delivery addressed to the tenant, at the premises concerned, it was therefore validly served following the reasoning of Megaw LJ in *Chiswell's* case. c

[24] In *Galinski v McHugh* [1989] 1 EGLR 109, the issue before the court was whether the service of a notice under the 1954 Act on an agent of a tenant was valid service; accordingly, the issue which I am considering did not directly arise. However, in giving the judgment of the Court of Appeal, Slade LJ had to address the contention that, because s 23 does not expressly provide for service on an agent of the tenant, albeit that it provides the service on an agent of the landlord, service in that case was ineffective. d

[25] He said (at 111):

[That] submission involves a misunderstanding of the nature and purpose of section 23(1) ... This is a subsection appearing in an Act which, like the 1954 Act, contains a number of provisions requiring the giving of notice by one person to another and correspondingly entitling that other person to receive it. In our judgment, the object of its inclusion ... is not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be deemed to be valid service, even if in the event the intended recipient does not in fact receive it. e

[26] In *Lex Service plc v Johns* [1990] 1 EGLR 92, the Court of Appeal had to consider a case where a notice under the 1954 Act had been sent through the post by recorded delivery but allegedly had not been received. In the leading judgment, Glidewell LJ, having set out the facts, turned to the relevant statutory provisions which I have set out. He then referred to two authorities not concerned with s 23 but with service of process in the magistrates' court, namely, *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682 and *Hosier v Goodall* [1962] 1 All ER 30, [1962] 2 QB 401. He then turned to *Chiswell's* case and cited the passage which I have quoted in the judgment of Megaw LJ. Glidewell LJ said ([1990] 1 EGLR 92 at 94): g

"That passage which I have read is, of course, in the context of that case, *obiter dicta*, but obviously it is of considerable persuasive authority and was adopted and followed by the learned judge in this case. The sentence "does not matter, even if it were to be clearly established that it had gone astray in the post" may, perhaps, apply only in particular circumstances, but the antecedent sentence "if it is proved, in the event of dispute, that a notice was h

not received" is, in my view, a statement of principle. It is a statement of principle j

a sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient" is, of course, directly in point in this case.'

[27] Glidewell LJ went on: 'The real issue in the present case is whether, for the purposes of section 7 ... the evidence of Mr Johns that he did not receive the letter ... proves the contrary ...' Glidewell LJ then turned to consider the facts
b and the evidence, and concluded that the contrary was not established.

[28] The other member of the Court of Appeal, Balcombe LJ, began his judgment in agreement by saying (at 95): 'As my lord has said, the case really turns on section 7 ...'

[29] In *Railtrack plc v Gojra* [1998] 1 EGLR 63, the Court of Appeal had to
c consider a case where a notice under the 1954 Act was allegedly misaddressed. In the course of his judgment, with which Evans LJ agreed, Wilson J set out (at 65) the passage which I have also quoted of Megaw LJ in *Chiswell's* case.

[30] Wilson J then said:

d 'I agree with the tentative conclusion in *Woodfall's Law of Landlord and Tenant*, vol 2, para 22.068, that, since the primary methods of service do not depend on receipt, the date of receipt is irrelevant and ... that the notice is served—and given—on the date when it is sent by registered post or recorded delivery.'

[31] He then emphasised that the position was different where, as in the case
e before him, the notice had been served in the ordinary course of post. The passage I have quoted is obiter, but it is the one observation, to which I have made a passing reference, which could be said to bear precisely on the point I have to consider.

[32] Miss Bleasdale draws attention to the fact that the current edition of
f *Woodfall* (January 2003) vol 2, para 22.068.2 says:

'It is not entirely clear when a notice served by one of the primary methods of service is to be treated as having been served ... Since the primary methods of service are designed to cast the risk of non-delivery on the intended recipient, the date of actual receipt would appear not to be a
g relevant date. This "tentative conclusion" has been endorsed by the Court of Appeal' (being, of course, *Railtrack plc v Gojra* [1998] 1 EGLR 63).

[33] In *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44,
h Smedley J was faced with a case where a notice under a different Act, namely, the Landlord and Tenant (Covenants) Act 1995, had been sent by recorded delivery but had in fact been returned to the sender as undelivered. Section 27(5) of the 1995 Act incorporates the provision of s 23 of the 1927 Act, and accordingly the case is directly in point.

[34] The argument Smedley J had to deal with was the addressee's contention
j that he had not been served, and should not be treated as having been served, because s 23 should be read together with s 7 of the 1978 Act, the second argument raised by Miss Bleasdale. Smedley J was faced with the somewhat unenviable task of deciding whether he should follow the observations of Megaw LJ, as applied by French J and supported by the reasoning in *Galinski's* case, and consistent with the approach in the *Railtrack* case, or whether he should follow the approach of the Court of Appeal in the *Lex Service* case.

[35] Smedley J said ([1999] 2 EGLR 44 at 48) of *Galinski's* case and the *Lex Service* case: a

‘Clearly, the two decisions are not reconcilable. Bearing in mind that the decision in *Galinski* was given by a court composed of three lord justices and that it was subsequently followed in *Railtrack plc v Gojra*, it seems to me that I have to follow the decision of the Court of Appeal in *Galinski v McHugh* ...’ b

[36] The final case to which I must refer in this review of the authorities is *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29. In that case the issue before the Court of Appeal was whether a notice under the 1954 Act which had been sent by recorded delivery was validly served even though, as in *Moustafa's* case, it had been returned to the sender. c

[37] In the principal judgment, Robert Walker LJ considered the authorities to which I have referred and a number of other authorities. After referring in particular to the *Lex Service* case and *Moustafa's* case, he said (at [39]):

‘Smedley J commented that it was not clear how many of the earlier authorities had been cited in *Lex Service*, and, in particular, that there was no reference to *Galinski*. He regarded the two cases as irreconcilable, and he thought he should follow *Galinski* and *Railtrack*. I am not convinced that these cases are irreconcilable, rather than concerned with different aspects of service. *Galinski* and *Railtrack* were both concerned with the identity of the recipient of the notice, rather than delivery or non-delivery of a letter through the post. On the other hand, most legal notices, especially in the field of landlord and tenant, are time-specific in one way or another.’ d
e

[38] Robert Walker LJ said (at [44]):

‘... section 23 ... does not contain any exception for letters that are returned. Once Mr Berkley's second pre-emptive point is out of the way, therefore, the only possible means of avoiding the conclusion that there was good service under section 23(1) would be an argument on the lines of that in *Lex Service*. That argument would involve: (i) relying upon section 7 ... (ii) contending that [a certain contractual provision] was time-specific; and (iii) establishing that [*Moustafa's* case] was wrongly decided. Mr Berkley did not put forward any argument on those lines, and I certainly would not criticise him for not doing so.’ f
g

[39] That, then, is a summary of the relevant authorities for the purpose of considering whether or not I am effectively bound to find in favour of the landlord on the issue of whether or not posting a notice by recorded delivery leads to the irrebuttable presumption under s 23 that it is served, irrespective of whether it is actually received and even if it is returned to the server as undelivered. h

[40] I do not consider that I am strictly bound to reach that conclusion. j There are arguably conflicting decisions of the Court of Appeal in that the *Lex Service* case does appear to treat s 23 of the 1927 Act as subject to s 7 of the 1978 Act, whereas the other four decisions suggest the opposite. *Chiswell's* case and the *Railtrack* case have only obiter observations on the issue, and it is arguable that that is true of *Galinski's* case as well. In *Galinski's* case it would seem likely,

a and in *Blunden's* case it appears clear, that the points specifically raised by Miss Bleasdale in this appeal were not raised.

b [41] There are also two first instance decisions of importance, the *Italica Holdings* case, and (perhaps more importantly because it considered all the relevant authorities, other, inevitably, than *Blunden's* case) *Moustafa's* case. In each case, a judge of coordinate jurisdiction to myself has decided the case (as one of two grounds in the *Italica Holdings* case and as effectively the only ground in *Moustafa's* case) on the basis that s 23 results in the irrebuttable presumption for which Miss Cope argues.

c [42] It would not be impermissible for me to reach a conclusion on a question of the construction and effect of a statute which is different from that reached by two judges of coordinate jurisdiction, and which would mean that a very recent and carefully considered decision of the Court of Appeal, namely *Blunden's* case, was effectively per incuriam. However, I consider that it is a course which I should take only if I am clearly satisfied that it is right. In *Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 2 All ER 601, [1986] Ch 80, Nourse J was faced with two previous decisions of other High Court judges d which were inconsistent, the second decision having considered the first. He quoted an observation of Denning J in *Minister of Pensions v Higham* [1948] 1 All ER 863, [1948] 2 KB 153 to this effect ([1984] 2 All ER 601 at 604, [1986] Ch 80 at 85):

e 'In this respect I follow the general rule that where there are conflicting decisions of the courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision.'

Nourse J agreed with that and then said:

f 'It is that it is desirable that the law, at whatever level it is declared, should generally be certain. If a decision of this court, reached after full consideration of an earlier one which went the other way, is normally to be open to review on a third occasion when the same point arises for a decision at the same level, there will be no end of it.'

g [43] A little later, Nourse J said ([1984] 2 All ER 601 at 605, [1986] Ch 80 at 85): 'I would make an exception only in the case, which must be rare, where the third judge is convinced that the second was wrong in not following the first.' It can be said that it should be at least as difficult for me to refuse to follow the earlier first instance decisions on the point at issue here: there are two first instance decisions, as in the *Colchester Estates* case, but, unlike that case, they are mutually consistent.

h [44] A similar point was considered in *C v DPP* [1994] 3 All ER 190 at 199, [1996] AC 1 at 12–13, where the Divisional Court stated that it had power to depart from its own previous decision but that it would follow that decision, unless persuaded that it was 'clearly wrong'.

j [45] Miss Bleasdale referred to the decision of Megarry J in *English Exporters (London) Ltd v Eldonwall Ltd* [1973] 1 All ER 726 at 741–742, [1973] Ch 415 431–432, where he explained why he was differing from Stamp J. I think there is some force in the contention that his approach indicated a slightly greater preparedness to depart from an earlier decision than that expressed by Nourse J, but the difference is one of emphasis rather than principle. Megarry J emphasised that the court's duty, irrespective of other earlier decisions of

coordinate jurisdiction, was ultimately, in that case as in this, to construe the statutory provision which was before it. a

[46] I therefore approach this case on the basis that I should only reach a conclusion which would mean that the decision of Smedley J was effectively wrong, that one of the two grounds for French J's decision was wrong, that the decision of the Court of Appeal in *Blunden's* case was per incuriam and that clear observations in three other Court of Appeal cases, *Chiswell's* case, *Galinski's* case and the *Railtrack* case, were also per incuriam, if I am satisfied that that conclusion is clearly right. b

[47] I turn to the arguments which Miss Bleasdale raises to support her contention that I should be so satisfied. The first such argument is that it is anomalous and unfair if a tenant is effectively deprived of his right to a new tenancy because he is unaware of a notice which has been put in the post by the landlord, and which, through no fault of the tenant, has never been served on him. c

[48] There is no doubt that, from the point of view of a tenant in such a case, it would seem a very unfair result. However, a tenant would normally have nothing to complain of if he was absent from the premises when delivery was attempted because, as cases such as *Moustafa's* case and *Blunden's* case show, and indeed one's own experience shows, if the postman attempts to deliver a recorded delivery letter to premises where nobody is present, he will, and certainly should, post notification through the letterbox to inform the absent person that there is a recorded delivery letter for collection. d

[49] This aspect of the recorded delivery system is particularly relevant, as Miss Cope points out, in relation to notices under the 1954 Act from the tenant's point of view. One of the places, and indeed the obvious place, for service of a notice, other than the registered office where the tenant is a company, is the demised premises themselves and a tenant is only entitled to the protection of the 1954 Act if he is occupying those premises for business purposes (see s 23(1) of the 1954 Act). e

[50] So far as anomaly is concerned, it seems to me that the purpose of a provision such as s 23, if its effect is as Miss Cope contends, is to introduce an element of certainty and allocation of risk so far as service is concerned. It is important that the parties know where they stand and that the possibility of satellite litigation is kept to a minimum. Any system of service of notices can lead to hardship in particular cases. A provision such as service on the premises, specifically catered for in s 23, can involve hardship if, as happened in one case, the notice is posted under the door and goes under the floor covering, or if it is given to someone employed by the addressee who forgets to hand it over to him, or if it is eaten by the dog, or if the addressee is absent due to prolonged illness. f

[51] If s 23 has the effect for which Miss Cope contends, it provides that if the server (and it should be remembered that in many cases it will be the tenant who is serving a notice on the landlord) chooses a method of service which is within s 23, then the risk of non-service shifts from the server to the addressee. That is effectively the approach of the Court of Appeal in *Galinski's* case and it is the way in which Mr Kim Lewison QC put the point in *Blunden's* case, and it does not seem that Robert Walker LJ disagreed (see [2002] 2 EGLR 29 at [27]). g

[52] Furthermore, the idea of an addressee being deemed to receive a document, if it is posted, at the date of posting irrespective of when, or even h

a whether, it is actually received, is by no means foreign to English law. In relation to contract, the law is as set out in 9(1) *Halsbury's Laws* (4th edn reissue) paras 676–679. This is stated (para 677):

b '... if the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the offer may be accepted by a letter sent through the post. Such posted acceptances prima facie take effect on posting.'

[53] There is this (para 679):

c 'Where the postal rule applies, the acceptor is not responsible for any delay or failure on the part of the Post Office, provided that it is not caused by any default on his part. Thus, even though he was unaware of that fact, the offeror is bound by the acceptance from the time when it was posted, notwithstanding that the letter of acceptance is lost in the post, or that its delivery is delayed, or that it is returned to the acceptor owing to a mistake in the address caused by the person who made the offer.'

d The postal rule applies even to a document sent by ordinary pre-paid post.

e [54] Further, money is often deemed to be paid once a properly executed cheque is put in the post (if sending a cheque by post is an appropriate way of payment) even if the cheque goes astray (see *Norman v Ricketts* (1886) 3 TLR 182, recently followed and applied by Judge Rich QC sitting as a deputy judge of the High Court in *Commercial Union Life Assurance Co Ltd v Label Ink Ltd* [2001] L & TR 380). Further, the notion of letters being deemed to be served at the date of posting irrespective of whether or not they are received was briefly considered and approved by the Court of Appeal in *Ex p Cote, re Deveze* (1873) 9 Ch App 27.

f [55] Of course, the common law rule relating to notices served by post is different because the purpose of a notice is, as Robert Walker LJ emphasised in *Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29 at [26], to notify a person. Therefore I accept that a common law notice is not served merely by putting it in the post unless, of course, the terms of the contract under which the notice is served indicate otherwise. However, the point I wish to emphasise is that the notion of a person being bound by a document which was put in the post but which he did not actually receive is by no means unknown or foreign to English law.

g [56] The second argument that Miss Bleasdale raises is that I should follow *Lex Service plc v Johns* [1990] 1 EGLR 92. Of all the cases to which I have been referred, it is the most difficult to follow. As I see it, Glidewell LJ appears to have accepted that, while there may be some (albeit unspecified) exceptions, the obiter observations of Megaw LJ in *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181 should be treated as being correct. Certainly nothing in his judgment, either in the passage I have read, or elsewhere, suggests in terms that Glidewell LJ had any reason to disagree with what Megaw LJ said. Indeed, one would have expected him to say so if that was his view.

j [57] If, as appears to have been Glidewell LJ's view, Megaw LJ's obiter remarks were correct, then that would have been the end of the appeal: it would not have been necessary for him to go on to do that which he did,

namely to consider the effect of s 7 of the 1978 Act. Further, as pointed out by Smedley J, it does not seem that the observations of the Court of Appeal, arguably obiter but on any view powerful, in *Galinski v McHugh* [1989] 1 EGLR 109 were considered in the *Lex Service* case.

[58] In those circumstances, it seems to me that, even ignoring the fact that the *Lex Service* case was considered by Smedley J in *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44 and by the Court of Appeal in *Blunden's* case, it does not provide a particularly comfortable basis on which to rest a reason for departing from Smedley J's conclusion. If, as could be the case, the Court of Appeal in the *Lex Service* case effectively decided not to follow Megaw LJ but to follow the two decisions not concerned with s 23 of the 1927 Act to which it made reference, then examination of those two cases does not cause me to doubt my view that I should not be persuaded to depart from Smedley J on a closer analysis of the *Lex Service* case.

[59] *Hosier v Goodall* [1962] 1 All ER 30, [1962] 2 QB 401 contains a short judgment from the Divisional Court, effectively applying *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682. So far as *Ex p Rossi* is concerned, it involved notification to a party of an appeal in connection with criminal proceedings, which could be served by registered post under s 3(1) of the Summary Jurisdiction (Appeals) Act 1933. There were earlier decisions such as *Sandland v Neale* [1955] 3 All ER 571, [1956] 1 QB 241 where the Divisional Court had held that that provision irrevocably deemed service to have been effected and that s 7 had no part to play. The Court of Appeal in *Ex p Rossi* rejected that conclusion. Accordingly, it could be said that the reasoning in *Ex p Rossi* gives support for Miss Bleasdale's second argument, and her reliance on the *Lex Service* case.

[60] However, it seems to me that great emphasis was laid in all three judgments in *Ex p Rossi* on the argument that one has to construe a provision such as s 23 of the 1927 Act, or s 3 of the 1933 Act, by reference not only to its phraseology, but also to its context and the purpose with which it was concerned.

[61] Denning LJ ([1956] 1 All ER 670 at 674, [1956] 1 QB 682 at 691–692) gave an eloquent analysis of the importance that the common law attached to the fact that in the context of criminal proceedings 'the defendant is fully apprised of the proceedings before it makes any order against him'. The effect of the decision of the Divisional Court, which was overruled in that case, was that a defendant could be, as it were, condemned in criminal proceedings of which he was unaware. The present case is purely concerned with the loss of a property right or privilege. Morris LJ made the same point, where he said ([1956] 1 All ER 670 at 678, [1956] 1 QB 682 at 696):

'We were referred to a number of statute provisions relating to the serving or sending of various kinds of notices in various circumstances and to certain decisions relating to these provisions. Though it was proper and helpful to be referred to such provisions and decisions, the present case must depend on the interpretation of this particular section of this particular Act.'

[62] Parker LJ in his judgment made the same point, and he quoted ([1956] 1 All ER 670 at 681, [1956] 1 QB 682 at 701) from a judgment of Ridley J in *Retail*

a *Dairy Co Ltd v Clarke* [1912] 2 KB 388 at 393, where he said this, which seems to me consistent with the contention of Miss Cope in this case:

b 'Sending in the ordinary sense is merely dispatching. The word "send" may, however, be used in connection with other words so as to imply that by "sending" is meant such a sending as that the thing may by the time specified pass into the hands of the person to whom it was sent.'

c [63] In light of those observations, it seems to me that the two cases cited in *Lex Service plc v Johns*, *Ex p Rossi* and *Hosier's* case, do not provide a convincing basis for invoking s 7 of the 1978 Act when construing s 23 of the 1927 Act, especially in the light of the obiter observations of Megaw LJ with which

d Roskill LJ agreed in *Chiswell's* case and the unanimous (if arguably obiter) observations of the Court of Appeal in *Galinski's* case (which does not appear to have been cited in *Lex Service plc v Johns*).

e [64] I must also confess to a little difficulty in understanding the reasoning of the court in the *Lex Service* case when they came to apply s 7. It seems to me that, in the passage in the judgment of Glidewell LJ ([1990] 1 EGLR 92 at 95), he was not applying the normal civil burden of proof in relation to the question of whether 'the contrary is proved'. It appears to me that he was seeking to reconcile s 23 of the 1927 Act and s 7 of the 1978 Act in such a way that s 23 was not absolute in its effect in relation to service by recorded delivery (as suggested in all the other authorities on the section to which I have referred), but none

f the less affected the standard of proof imposed by s 7 on the addressee if he wished to establish non-service. It seems to me that such an approach to s 7 is hard to justify in principle or logic.

[65] Miss Bleasdale's third point is that it would be peculiar if, by serving a notice through the post, a landlord could, as it were, knock a couple of days off

g the period for the service of the tenant's counter-notice (which has to be done within two months of the landlord's notice) or the making of the tenant's application to the court (which has to be done within four months of the landlord's notice).

h [66] I do not find that a particularly surprising result. If the notice was delivered to the premises on, say, a Friday night, or even on the evening of 24 December, it would not actually be received by the addressee until a few days, or even a couple of weeks, later, but that would not alter the fact that the notice would have been served by leaving it at the premises. I accept that, if Miss Cope's argument is correct, it would be an inevitable consequence of serving through the post that one or two days would always be knocked off the period according to the tenant, whereas service on the premises would only sometimes have such a result. However, I do not find that a particularly persuasive point in relation to this case.

j [67] Before turning to the human rights aspect, which was raised during argument, there are two additional points I should mention. Miss Cope contends that, given that s 7 of the 1978 Act would apply to service of a notice under the 1954 Act by ordinary post, rejection of her argument would result in the reference to delivery by registered post in s 23 of the 1927 Act having no real effect. She says that, if Miss Bleasdale is correct, sending the letter by registered post or recorded delivery would have no different effect from sending through the ordinary post.

[68] Miss Bleasdale's answer is that s 7 does not apply to service of a notice, under the 1954 Act or the 1927 Act, through the ordinary post. That is because of the opening words of s 7 and the fact that there is nothing in s 23, or elsewhere in the 1927 or 1954 Acts, which expressly permits service by ordinary post. In other words, she says that there is nothing in those two Acts which 'authorise or requires service by post' other than the reference to registered post in s 23. I am of the view that Miss Bleasdale is right on this point, although it does not cause me to alter my conclusion. I do not consider that the mere fact that a statute requires or permits service of, sending, or giving a notice or other document without any reference to posting brings it within s 7.

[69] Miss Cope says that there are two ways in which it could be said that it did so. The first is on the basis that any reference to giving, sending, or serving should as a matter of common sense extend to service by post. I do not think that the way s 7 is worded, at least if one forgets the words in brackets, are apt to cover such an implied concept in a statute. Miss Cope's second, and primary, point on the issue is that the words in brackets in s 7 are of general application and are not limited to cases where the Act refers to 'by post'. I do not think that is a correct reading of s 7. It appears to me that the words in brackets all refer back to the words 'served by post', ie they envisage an authorisation or requirement which is expressly by post. The words in brackets are simply there to rebut an argument that, where an Act refers to giving by post or sending by post, s 7 does not apply because it only refers to service by post. However, if I am right on that point, it merely means that one of Miss Cope's additional arguments does not apply. If I am wrong on that point, then it is an additional reason for supporting the landlord's case.

[70] The second additional point is that it is not uninformative to compare s 23 of the 1927 Act with s 196(3) and (4) of the Law of Property Act 1925, which deal with notices 'required or authorised' to be served under that Act. Section 196(3) and (4) specifically refer to any such notice which is to be served on a 'lessee [or] lessor'. Section 196(4) provides that such a notice is 'sufficiently served' if 'sent by post in a registered letter'. However, unlike s 23, s 196(4) of the 1925 Act adds the qualifications 'and if that letter is not returned by the postal operator ... undelivered' and that 'service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered'.

[71] I do not think that it is illegitimate to compare s 196(4) of the 1925 Act, which was concerned with notices served between, inter alia, landlords and tenants with s 23 which was included in a statute which was passed only two years later, and which was almost exclusively concerned with landlords and tenants. The fact that the legislature did not include in s 23 the two additional qualifications included in s 196(4) of the 1925 Act lends some support to the reasoning in the cases relied on by Miss Cope, and also for her argument as to the deemed day of service under s 23.

[72] In these circumstances, subject to the Human Rights Act 1998 point to which I will very shortly turn, it appears to me that I should reject Miss Bleasdale's two arguments. In relation to the first argument, which, as far as I am aware, has never been raised before, I consider that, while it is not without its attractions, I do not think it could succeed in any event. First, it involves implying words into s 23, and to imply words into a statute is a course that the court should take only as a matter of absolutely last resort. It is to my

a mind, if anything, more difficult to imply words into a statute than into a commercial contract.

[73] Secondly, it seems to me that the implication does not get rid of what Miss Bleasdale identifies as the primary anomaly in s 23 if it has the meaning for which Miss Cope contends. Section 23 would still result in a notice returned in the post being deemed to be served; the only difference the implied term would make is that it would deem the notice to have been served one or two days after the date upon which it was put in the post.

b [74] As for Miss Bleasdale's second argument, which found favour with Judge Cotran, for the reasons I have given, I am not clearly satisfied that the decisions of French J in *Italica Holdings SA v Bayadea* [1985] 1 EGLR 70 and of Smedley J in *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44 were wrong and I am equally not clearly satisfied that the decision of the Court of Appeal in *Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29 was per incuriam, or that the clear and strong observations in *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181 and *Galinski v McHugh* [1989] 1 EGLR 109 were per incuriam.

d [75] Finally, I must deal with a point which has not so far been raised in any proceedings relating to s 23 of the 1927 Act so far as I am aware. The point, raised by Miss Bleasdale, is that s 23 should be construed as being subject to s 7 of the 1978 Act because otherwise the construction of s 23, which I would otherwise favour, would or at least could infringe the human rights of an addressee of a notice sent by recorded delivery.

e [76] In the present case, I do not consider that there could be a human rights point on the facts. As Miss Cope says, the fact that the tenant was deprived of two days of his two-month period for serving a counter-notice, and two days of his four-month period for applying to the court, cannot constitute a significant infringement, or even an infringement, of any of its human rights.

f [77] However, the point is obviously more arguable in a case such as *Moustafa's* case or *Blunden's* case, where a notice sent by recorded delivery was not received by the tenant and was returned to the landlord, where the very existence of the notice was unknown to the tenant. The fact that, in such a case, the notice should none the less be deemed to have been served on the tenant on the date it was posted could be said to infringe the tenant's right to property, namely to a new tenancy under the provisions of the 1954 Act, and his right of access to the courts in light of the fact that, as I have mentioned, his application to the court had to be made within four months of receipt or deemed receipt of the notice.

h [78] As a matter of principle, it appears to me that, if this human rights argument is correct, then by virtue of s 3 of the 1998 Act the court has a duty, if it can properly do so, to construe s 23 of the 1927 Act so it does not have this effect. In my judgment, irrespective of previous decisions, if Miss Cope's argument falls foul of s 3 of the 1998 Act, then it is possible to construe s 23 as being subject to s 7 of the 1978 Act, albeit that, in the absence of the human rights dimension, I would not so construe it. The central issue, therefore, is whether there is an infringement of the tenant's human rights, if my construction of s 23 is correct.

j [79] In that connection, the point is not entirely dissimilar from that considered in *Anderton v Clwyd CC* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174 where the Court of Appeal had to consider whether deemed

service on a certain date under CPR 6.7 was inconsistent with the 1998 Act, bearing in mind that, in that case, the deemed receipt was one day later than actual receipt and that therefore the claim was statute-barred, whereas if one took the date of actual receipt it would not have been.

[80] Mummery LJ, giving the judgment of the court, explained why the court was not persuaded that the provision was incompatible with art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), the right of access to courts. He said ([2002] 3 All ER 813 at [36], [2002] 1 WLR 3174):

'The aim of r 6.7 is to achieve procedural certainty in the interests of both the claimant and the defendant. Certainty in the time of service of a claim form is an important requirement for the efficient performance of the case management functions of the court. It is legitimate to promote that aim by setting a deadline of four months from issue for the service of the claim form by one of the permitted methods and by using the legal technique of deemed service to bolster the certainty. The rules employ a carefully and clearly defined concept of the "service" of a document, which focuses on the stated consequences of the sending of the document by the claimant, rather than on evidence of the time of its actual receipt by the defendant. The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points.'

[81] In my judgment, while those observations were concerned with a somewhat different issue, namely service of process, and a slightly different and on the facts a less potentially unfair result than that which I am considering, they do assist the landlord's case here.

[82] The purpose of s 23 of the 1927 Act, as explained in *Chiswell's* case, *Galinski's* case and *Blunden's* case, is very much like that of CPR 6.7, as explained by Mummery LJ in *Anderton's* case. It is not as if there will be no occasions when another form of service cannot lead to hardship: thus, as I have mentioned, service on the premises can result in unfairness where the service is on an absent-minded employee, where the notice goes under the floor covering, where the notice is eaten by the dog, or where the addressee has an unexpected and long absence.

[83] Furthermore, as already mentioned, if a letter is sent by recorded delivery then, absent incompetence on the part of the Post Office or rank bad luck, even if nobody is at the relevant premises, a note will be put through the letterbox drawing the attention of the tenant, who, as I have mentioned, should in some way be in occupation in light of s 23 of the 1954 Act, to the fact that there is a letter to be picked up from the nearest post office which has been sent to the premises by recorded delivery.

[84] Additionally, this is not, as it were, a result which prejudices tenants or confers an advantage on landlords. The 1954 Act provides for notices (see, for instance, s 26) or counter-notices (see, for instance, s 25) to be served by the tenant on the landlord. My conclusion on the effect of s 23 of the 1927 Act applies both ways.

[85] It is true that it is somewhat unattractive that, as Miss Bleasdale points out, the server of the notice will in many cases know that the addressee has not received it because it will have been returned in the post, or, as I understand it,

a will be able to see it as not being delivered by looking at the Post Office's website.

[86] It seems to me, however, that one has to balance the sort of factors identified by Mummery LJ in *Anderton's* case, namely certainty, and as identified in *Blunden's* case, allocation of risk, and the purpose behind s 23 as explained in *Galinski's* case, against the fact that there will be occasional harsh or unfair results. In my view the legislature was entitled, on the assumption b that s 23 has the effect which I hold it has, to carry out the balancing act in the way in which it did. That view is reinforced when one considers the nature of the rights which the tenant claims to be infringed. Although it may be characterised as a right to property and a right of access to the court, it is, in fact, an extra-contractual privilege conferred on business tenants to obtain a new c tenancy if certain steps—including the service of notices—are taken (ss 24–29 of the 1954 Act) and unless certain conditions are satisfied (ss 30–31A of the 1954 Act). The access to the court is merely the means by which the privilege is exercised. If the legislature imposes provisions as to the taking of the steps, such as the service of notices which occasionally, due to mischance or d oversight, result in the privilege being lost, in the interest of certainty, that does not appear to me to engage, let alone to fall foul of, the 1998 Act, unless those provisions are unreasonable. Accordingly, in my view there is no human rights infringement dimension to this case.

[87] In those circumstances, with gratitude for the arguments on which I have been addressed on this short and case-ridden point, I propose to allow the e landlord's appeal.

Appeal allowed.

Victoria Parkin Barrister.

CA Webber (Transport) Ltd v Railtrack plc a

[2003] EWCA Civ 1167

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON AND LONGMORE LJ b

14, 15 JULY 2003

Landlord and tenant – Business premises – Notice by landlord to terminate tenancy – Time – Computation of time – Not less than six months before date of termination specified in notice – Landlord’s notice sent by recorded delivery – Whether notice served on date of posting or date of delivery – Landlord and Tenant Act 1927, s 23 – Landlord and Tenant Act 1954, s 25 – Interpretation Act 1978, s 7, Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1. c

The claimant tenant held business tenancies protected by Pt II of the Landlord and Tenant Act 1954. The defendant landlord sent the tenant covering letters enclosing notices under s 25^a of the 1954 Act indicating that the tenancies would be terminated on 22 January 2002. The letters were dated 20 July 2001 (which was a Friday) and were handed over on that date to the Royal Mail for recorded delivery. By arrangement with the Post Office the tenant did not receive post on a Saturday. It received the letters containing the notices on either 23 or 24 July. Section 23^b of the Landlord and Tenant Act 1927 applied for the purposes of the 1954 Act, and provided that any notice ‘may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode ... or by sending it through the post in a registered letter addressed to him there ...’. For the purposes of s 23 of the 1927 Act ‘place of abode’ included the place of business, and under the Recorded Delivery Service Act 1962 reference to delivery by a registered letter included delivery by recorded delivery. The tenant issued proceedings in the county court seeking a declaration that the notices were invalid in that they had been served on 23 July, less than six months before the date of termination specified in the notices and so failed to conform with the requirements of s 25 of the 1954 Act. The tenant contended that s 23 of the 1927 Act was qualified by s 7^c of the Interpretation Act 1978, which provided that, unless a contrary intention appeared, where an Act authorised or required any document to be served by post, the service was deemed to be effected by properly posting a letter containing the document and, unless the contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. The judge held that a s 25 notice sent by recorded delivery was deemed to be served when posted. The tenant appealed contending inter alia: (i) that the date of receipt of the notices was governed by s 7 of the 1978 Act, so that they had not been received in time; and (ii) that the Human Rights Act 1998 required that s 23 of the 1927 Act be interpreted so as to give effect to its right to a fair trial (including access to justice) under art 6^d of the d
e
f
g
h
j

a Section 25, so far as material, provides: ‘(1) The landlord may terminate a tenancy ... by a notice given to the tenant ... (2) ... a notice ... shall not have effect unless it is given ... not less than six months before the date of termination specified therein ...’

b Section 23, so far as material, is set out at [8], below

c Section 7, so far as material, is set out at [10], below

- a** European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) and its right to enjoyment of property under art 1^e of the First Protocol to the convention.

Held **γ** (1) Where a notice relating to a tenancy protected by Pt II of the 1954 Act was served by a primary method authorised by s 23 of the 1927 Act, such as by recorded delivery post, it did not matter whether the notice was received and there was no scope for the application of s 7 of the 1978 Act. Where recorded delivery post was the method used, the date of service was the date when the server entrusted the notice to the post (see [41]–[43], [55], [56], below); *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, *Galinski v McHugh* [1989] 1 EGLR 109, *Railtrack plc v Gojra* [1998] 1 EGLR 63 applied; *Italica Holdings SA v Bayadea* [1985] 1 EGLR 70, *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2004] 3 All ER 184 approved; *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, *Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29 considered; *Lex Service plc v Johns* [1990] 1 EGLR 92 disapproved.

- d** (2) Having regard to the aim of s 23 of the 1927 Act to assist the server of the notice, to establish a fair allocation of the risk of any failure of communication, and to avoid disputes of fact where the true facts were likely to be unknown to the server of the notice and difficult for the court to ascertain, it was neither unreasonable nor disproportionate to achieve certainty for landlords and tenants alike by interpreting s 23 of the 1927 Act as excluding the applicability of s 7 of the 1978 Act. That construction was in the public interest and it was impossible to say that the legislature had attached insufficient importance to the tenant's convention rights. Accordingly, the appeal would be dismissed (see [53], [54], [62], [63], below); *Wilson v First County Trust Ltd* [2003] 4 All ER 97 applied.

f Notes

For the statutory provisions as to the service of notice, and for a landlord's notice to terminate a business tenancy, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 197, 198, 570.

For the Landlord and Tenant Act 1927, s 23, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 84.

- g** For the Landlord and Tenant Act 1954, s 25, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 147.

For the Interpretation Act 1978, s 7, see 41 *Halsbury's Statutes* (4th edn) (2000 reissue) 580.

- h** For the Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554, 556.

Cases referred to in judgments

Anderton v Clwyd CC [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174.

- j** *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] 1 WLR 2064.

d Article 6, so far as material, provides: '(1) ... everyone is entitled to a fair ... hearing ...'

e Article 1, so far as material, provides: 'Every ... person is entitled to the peaceful enjoyment of his possessions ...'

- Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29. a
Chiswell v Griffon Land and Estates Ltd [1975] 2 All ER 665, [1975] 1 WLR 1181, CA.
Commercial Union Life Assurance Co Ltd v Moustafa [1999] 2 EGLR 44.
Galinski v McHugh [1989] 1 EGLR 109, CA.
Italica Holdings SA v Bayadea [1985] 1 EGLR 70.
Lex Service plc v Johns [1990] 1 EGLR 92, CA.
Mellacher v Austria (1989) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR. b
Price v West London Investment Building Society [1964] 2 All ER 318, [1964] 1 WLR 616, CA.
Railtrack plc v Gojra [1998] 1 EGLR 63, CA.
Stretch v UK [2004] 03 EG 100, [2003] ECHR 44277/98, ECt HR.
Sun Alliance and London Assurance Co Ltd v Hayman [1975] 1 All ER 248, [1975] 1 WLR 177, CA. c
Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568.

Cases referred to in skeleton arguments

- Newborough (Lord) v Jones* [1974] 3 All ER 17, [1975] Ch 90, [1974] 3 WLR 52, CA. d
WX Investments Ltd v Begg (Fraser, Part 20 defendant) [2002] EWHC 925 (Ch), [2002] 1 WLR 2849.

Appeal

CA Webber (Transport) Ltd (Webber) appealed, with the permission of Mrs Recorder Bickford-Smith QC, from her decision in the Wandsworth County Court on 17 April 2003 dismissing the tenant's proceedings against Railtrack plc (Railtrack) seeking a declaration that notices served by the landlord on the tenant under s 25 of the Landlord and Tenant Act 1954 were invalid and of no effect. The Recorder directed the appeal be made to the Court of Appeal pursuant to CPR 52.14. The facts are set out in the judgment of Peter Gibson LJ. e
f

Anthony Tanney (instructed by *William Heath & Co*) for Webber.
Romie Tager QC and *Justin Kitson* (instructed by *Thomas Eggar*) for Railtrack. g

PETER GIBSON LJ.

- [1] This is the latest in a long line of cases in which the effect of a statutory deeming provision relating to service of a document has fallen to be examined. All such provisions are capable of working hardship by deeming that which did not in fact occur to have occurred. Some provisions allow for the deemed effect to be rebuttable by evidence to the contrary. Others do not. h
- [2] The context in which the present dispute arises is the service of a notice relating to a tenancy protected by Pt II of the Landlord and Tenant Act 1954.
- [3] On Friday, 20 July 2001 the defendant, Railtrack plc (Railtrack), as landlord of the claimant, CA Webber Transport Ltd (Webber), under two business tenancies of adjoining parcels of land in Battersea caused to be sent to Webber notices pursuant to s 25 of the 1954 Act with covering letters. They indicated that the tenancies would be terminated on 22 January 2002 and that Railtrack would oppose the grant of a new tenancy under ground (f) in s 30(1) of the 1954 Act because it intended to redevelop (amongst other parcels of land) the tenanted land. The letters were dated 20 July 2001, were marked 'recorded' j

a delivery' and were handed over, together with their enclosures, on the same day to the Royal Mail for recorded delivery. Webber, by arrangement with the Post Office, does not receive post on a Saturday. However, it could have cancelled the arrangement, in which case post would have been delivered on a Saturday and that would include letters sent by recorded delivery. Webber received the letters and notices on either Monday, 23 July, or Tuesday, 24 July, b the latter date being when Webber replied to the letters and notices. Webber indicated that it was not willing to give up possession of the two properties. On 6 November 2001 proceedings were commenced for a declaration that the notices were invalid and of no effect because they were served on 23 July 2001, that is less than six months before the date of termination specified in the notice, and so failed to conform with the requirements of s 25(2) of the 1954 c Act.

[4] The proceedings came before Mrs Recorder Bickford-Smith QC in the Wandsworth County Court. She said that there were two issues for her to decide: (1) whether a notice under s 25 sent by recorded delivery post is deemed to be served when posted or when it would be received in the ordinary d course of post; (2) whether the s 25 notices posted on 20 July 2001 would have been delivered in the ordinary course of post on Monday, 23 July.

[5] The recorder on 17 April 2003, in a full and careful judgment in which she examined the authorities in detail, held (not without hesitation) on the first issue that a notice under s 25 sent by recorded delivery post is deemed to be e served when posted. That was on the basis that s 7 of the Interpretation Act 1978 did not apply to this case, but, if contrary to that conclusion, s 7 did apply, the recorder held on the second issue that the notices would have been delivered on Saturday, 21 July, not Monday, 23 July 2001. Webber appeals to this court with the permission of the recorder who said that the case raised an important point of principle, there being a great many notices served under s 25 f and similar notices under other statutes. She directed a leap frog appeal to this court pursuant to CPR 52.14.

[6] It is, I think, common ground between the parties that the contractual provisions, to which we have not been referred, in the two leases do not assist in the determination of the issues. It is on the true construction of the relevant g statutory provisions that the issues fall to be decided.

[7] Those provisions are the following. Section 25(1) of the 1954 Act allows a landlord to terminate a business tenancy by a notice given to the tenant in the prescribed form, specifying the date at which the tenancy is to come to an end. Section 25(2) provides that a notice under the section shall not have effect h unless it is given not more than 12, nor less than 6, months before the date of termination specified therein. Section 66(4) of the 1954 Act provides that s 23 of the Landlord and Tenant Act 1927 shall apply for the purposes of the 1954 Act.

[8] Section 23 is in this form so far as material:

j '(1) Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there ... and in the case of a notice to a landlord,

the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf.' a

[9] It is not in dispute that the place of abode for the purposes of s 23 includes the place of business (see *Price v West London Investment Building Society* [1964] 2 All ER 318, [1964] 1 WLR 616). It is also clear from s 1 of the Recorded Delivery Service Act 1962 that reference to delivery by a registered letter includes delivery by recorded delivery. b

[10] Section 7 of the 1978 Act provides:

'References to service by post. Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.' c

Thus, where s 7 applies, a rebuttable presumption arises as to the time of delivery. d

[11] Mr Anthony Tanney puts Webber's case in three ways. His primary submission is that the language of s 23 of the 1927 Act and s 7 of the 1978 Act is clear, and that there is nothing in s 23 to indicate a contrary intention to s 7 applying to s 23. He points out that that is what this court in *Lex Service plc v Johns* [1990] 1 EGLR 92 appears to have assumed. That, he says, means that the date of receipt is governed by s 7 and that Railtrack's notice was not received in the ordinary course of post until it was too late. He further argues that the authorities leave this court free to follow the *Lex Service* case. e

[12] His secondary submission is that if he is wrong on the application of s 7 to s 23, the reference in s 23 to 'sending ... through the post' should be construed as requiring an attempt to deliver or actual delivery. f

[13] His third submission is a point not taken below but to the taking of which no objection is raised by Railtrack. It is that s 3 of the Human Rights Act 1998 requires the court, so far as possible, to give effect to s 23 in a way which is compatible with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). He submits that two convention rights are involved, art 6, conferring the right to a fair trial, which includes access to the courts, and art 1 of the First Protocol, protecting the right of property. He says that this argument lends support to his primary and secondary submissions. g

[14] For Railtrack Mr Romie Tager QC, appearing with Mr Justin Kitson, supports the decision of the recorder and by a respondent's notice takes further points of which the most significant is that this court is bound by the decision of the Court of Appeal in *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29 to hold that s 7 of the 1978 Act has no application to s 23 of the 1927 Act. I shall consider Mr Tanney's three submissions in turn. h

(I) SECTION 7

[15] In the absence of authority, Mr Tanney's simple submission that s 23 contains nothing to exclude the applicability of s 7 would be well arguable. j

a However, in the light of the authorities, several of them in this court, it seems to me impossible that Mr Tanney's first submission should prevail. There are nine decisions to which I shall refer.

[16] (1) *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177. In that case the question was whether a notice by the landlord, not in the prescribed form, was substantially to the like effect as the prescribed form. The prescribed form required the tenant to notify the landlord, within two months after the giving of the notice by the landlord terminating the tenancy, whether the tenant would be willing to give up the tenancy. The notice which was sent referred to 'two months *after receiving* [the landlord's] notice'. The tenant argued that there was a real difference between giving the notice under s 23 and its receipt. Stephenson LJ disagreed. He said ([1975] 1 All ER 248 at 251–252, [1975] 1 WLR 177 at 183):

d 'In my judgment, the effect of s 66(4) of the 1954 Act is that a notice under the provisions of the Act is both given and received when it is served in accordance with s 23(1) of the 1927 Act, and to anyone who knows the law, the time when it is given and the time when it is received are one and the same, namely, the time of service when the giving of the notice is in law complete. There is therefore on a true construction of the old form no material departure from the statute and no material difference from the new form. It is a distinction without a difference. It describes the same act from the landlord's and tenant's points of view. The giving and receiving of the notice are two aspects of the same action and are simultaneous, like "the giving and receiving of a ring" in the Form of Solemnization of Matrimony in the Book of Common Prayer. The one gives, the other receives. The tenant takes what the landlord gives when he gives it, and he need not be there to take it from the landlord. The time when this two-sided act is done is the time when it is deemed to be done by the statutory provisions as to service. The tenant cannot say that he has not received it when the Act says that it has been served on him.'

Lord Salmon agreed with Stephenson LJ, saying ([1975] 1 All ER 248 at 254, [1975] 1 WLR 177 at 185):

g 'Statutes and contracts often contain a provision that notice may be served on a person by leaving it at his last known place of abode or by sending it to him there through the post. The effect of such a provision is that if notice is served by any of the prescribed methods of service, it is, in law, treated as having been given and received.'

I would infer from those remarks that it is the date of the act of the person serving the notice that determines the date of service. That is supported by the later authorities.

j [17] (2) *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181. In that case the question was whether a tenant's notice of willingness to give up his tenancy had been served on the landlord within the time prescribed by the 1954 Act when it was sent by ordinary post but not received. Megaw LJ said ([1975] 2 All ER 665 at 671, [1975] 1 WLR 1181 at 1188–1189):

‘... s 23 of the 1927 Act lay[s] down the manner in which service can be effected. It is provided, as what I may call at any rate the primary means of effecting service, that it is to be done either by “personal” service or by leaving the notice at the last-known place of abode, or by sending it through the post in a registered letter, or (as now applies) in a recorded delivery letter. If any of those methods is adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved. Thus, if it is proved, in the event of dispute, that a notice was sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient. It does not matter, even if it were to be clearly established that it had gone astray in the post.’

[18] Megaw LJ then went on in the next paragraph to consider the application of s 26 of the Interpretation Act 1889, which is the predecessor of, and contained much the same terms as, s 7 of the 1978 Act. He did so on the assumption that that section applied to the sending of the notice by ordinary post. However, it is to be observed that he did not expressly consider that provision in the previous paragraph when dealing with the primary methods of effecting service in accordance with s 23. It would appear that he did not consider that the provision now to be found in s 7 had any application to service by the primary means provided for in s 23.

[19] Roskill LJ made observations to the like effect. He said in relation to a letter which was lost in the post ([1975] 2 All ER 665 at 671, [1975] 1 WLR 1181 at 1188):

‘The consequences of it having been lost in the post (since the tenant’s solicitors failed to take advantage of the provisions incorporated in the 1954 Act from the 1927 Act about posting by recorded delivery) must fall on the tenant. It is his misfortune, which he has to bear.’

[20] (3) *Italica Holdings SA v Bayadea* [1985] 1 EGLR 70. French J, in a case involving service of a notice by recorded delivery post, adopted and applied the remarks of Megaw LJ in *Chiswell’s* case in holding that it was irrelevant for the purposes of s 23 whether a notice ever reached the premises to which it was addressed or whether, having reached the premises, it actually reached the tenant.

[21] (4) *Galinski v McHugh* [1989] 1 EGLR 109. The issue in this case was whether the service of a statutory notice on the tenant’s solicitors was good service. It was argued for the tenant that it was not, because s 23 implicitly prohibited service on the agent of a tenant in contrast with service on the agent of a landlord. Slade LJ, delivering the judgment of the court in which Ralph Gibson and Lloyd LJ concurred, said (at 111):

‘In our judgment, this last submission involves a misunderstanding of the nature and purpose of section 23(1) of the 1927 Act. This is a subsection appearing in an Act which, like the 1954 Act, contains a number of provisions requiring the giving of notice by one person to another and correspondingly entitling that other person to receive it. In our judgment, the object of its inclusion in the 1927 Act, and of its incorporation in the

a 1954 Act, is not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be *deemed* to be valid service, *even if in the event the intended recipient does not in fact receive it.*

b [22] The general proposition laid down by this court in that case was that the purpose of s 23 is not to protect the addressee of the notice, but to assist the server of the notice by offering him choices as to how to effect service in ways which will be deemed to be good service, even if the notice is never received by the intended recipient. That, as it appears to me, was a necessary part of the reasoning for the decision of this court. It is a part which was detached and abstracted from the specific peculiarities of the particular case which gave rise to the decision. Accordingly, in my judgment, that was ratio and binding on this court.

c [23] (5) *Lex Service plc v Johns* [1990] 1 EGLR 92. In this case a tenant denied receiving a notice under s 25 of the 1954 Act sent by the landlord by recorded delivery. Glidewell LJ cited what was said by Megaw LJ in *Chiswell's* case, a passage which I have already cited. He commented that what Megaw LJ said was obiter but of considerable persuasive authority, and noted as directly in point Megaw LJ's observation that it did not matter that the recorded delivery letter may not have been received. One would have thought that Glidewell LJ at that point, if he accepted what was said by Megaw LJ, would have found it necessary to proceed further to consider s 7. However, Glidewell LJ continued (at 94–95):

f 'The real issue in the present case is whether, for the purposes of section 7 of the Interpretation Act 1978, the evidence of Mr Johns that he did not receive the letter and the associated evidence to which I have referred proves the contrary; that is to say, is contrary evidence which contradicts the statutory provision that the service is deemed to be effected. In my judgment, what for this purpose is necessary to prove the contrary is either positive evidence that the document has been returned to the sender or, if it be sent by registered or recorded delivery post, that there is no acknowledgment of its ever having been received by the recipient. If there were evidence of such a document having been received by some person but it were proved that that person was not the person upon whom the document was required to be served and that the person who received the document had not brought it to the attention of the person upon whom it was required to be served, then that, I would accept, would prove that the document had not been properly served. But in the absence of such evidence then, in my judgment, the contrary there is not proved. In other words, the statutory provisions are there to entitle those who have to serve documents by taking the steps laid down by the statute, unless the document is returned to them, to be satisfied that service has been effected. It is not sufficient thereafter for the person upon whom service is required to be made to assert that the document has not been served upon him, albeit somebody has acknowledged receipt of the document required to be served.'

Glidewell LJ then went on to say that service had been properly effected and dismissed the appeal. a

[24] Balcombe LJ in his judgment said that the case turned on s 7 of the 1978 Act. He pointed out (at 95) that the section fell into two parts:

‘First, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document. That has happened here, so the service is deemed to be effected.’ b

He continued:

‘Then the second part of the section refers to “unless the contrary is proved, to have been effected at *the time* at which the letter would be delivered in the ordinary course of post”.’ c

He said that in a case where time was relevant the contrary may be proved. He also said that in that case the contrary was not proved, and that it would not be sufficient for the addressee merely to deny receiving the letter: d

‘If it were otherwise, the very convenient provisions enabling service in so many cases to be effected by one form of post or another, or by leaving at the person’s last known place of abode, would be rendered nugatory, because anyone could always say “I did not receive this notice” and thus raise a triable issue.’ e

He said that he would prefer to reserve his judgment as to the particular circumstances which amount to proving the contrary for the purposes of s 7 to a case where the particular matters arose. Subject to that, however, he agreed that the appeal should be dismissed. f

[25] It is clear, therefore, that both members of this court proceeded on the basis that s 7 of the 1978 Act applied to s 23 of the 1927 Act. However, neither considered whether s 23 disclosed a contrary intention. The report of the case does not reveal any argument that there was a contrary intention disclosed by s 23. The applicability of s 7 to s 23 appears simply to have been assumed by this court. Mr Tanney originally submitted that this decision was binding on the court for the proposition that s 7 does qualify s 23. However, in the course of his oral argument he accepted, in my view rightly, that he could not go as far as that. g

[26] I have to say that I find *Lex Service* a puzzling decision. There is no mention of *Galinski*’s case, even though a report of *Galinski*’s case appeared in the *Estates Gazette* on 4 February 1989, whereas the *Lex Service* case was a decision of the Vacation Court on 22 August 1989. Glidewell LJ shows no sign of having appreciated that the remarks of Megaw LJ in *Chiswell*’s case, although cited with apparent approval, to the effect that service by a primary method in s 23 will be deemed to have taken effect even if the letter was never received, might be inconsistent with the applicability of s 7 to s 23 with its rebuttable presumption of delivery in the ordinary course of post. The *Lex Service* case has been criticised by the textbook writers: see *Woodfall on Landlord and Tenant* vol 2, para 22.068.2 and *Hill and Redman’s Law of Landlord and Tenant* vol I, h
j

a A[8499], repeated at A[8781]. I will cite just three sentences from *Woodfall* from the paragraph to which I have referred:

‘Since the primary methods of service are designed to cast the risk of non-delivery on the intended recipient, the date of actual receipt would appear not to be a relevant date.’

b Then a footnote referring to the *Lex Service* case:

‘Glidewell L.J. ... appears to have overlooked the point that since the risk of non-receipt is cast on the recipient, even proof of non-receipt would not invalidate service.’

Thirdly:

c ‘It is considered that the casting of the risk of non-receipt onto the intended recipient is a sufficient “contrary intention” to prevent the Interpretation Act from being brought into play. Accordingly, a notice is served when it is sent by one of the prescribed methods of service, even if it is not received.’

d In my judgment the *Lex Service* case should be treated as decided per incuriam. [27] (6) *Railtrack plc v Gojra* [1998] 1 EGLR 63. The question for this court was whether a notice sent by ordinary post by the tenant was served on the landlord. Wilson J referred to the comments of Megaw LJ in *Chiswell’s* case and said (at 65):

e ‘I agree with the tentative conclusion in *Woodfall’s Law of Landlord and Tenant*, vol 2, para 22.068, that, since the primary methods of service do not depend on receipt, the date of receipt is irrelevant and, to take the third method, that the notice is served—and given—on the date when it is sent by registered post or recorded delivery. When, however, as here, notice is

f sent by ordinary post instead of by a primary method, it is served—and given—on such date, if any, as it is received.’

Evans LJ agreed.

[28] (7) *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44. This was a case where a notice under an Act which incorporated s 23 of the 1927 Act had been sent by recorded delivery but had been returned to the sender as undelivered. It was argued that s 7 of the 1978 Act had to be read as qualifying s 23. Smedley J reviewed the authorities. He held that the *Galinski* and *Lex Service* decisions were not reconcilable and he followed *Galinski’s* case as being a decision of three Lord Justices which was followed in the *Railtrack* case. He

g accordingly held that the notice was validly served as sent by recorded delivery to its recipient at his last place of abode whether it was received by that recipient or not.

[29] (8) *Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29. The question in this case was whether a notice under the 1954 Act sent by recorded delivery was validly served when it had been returned to the sender undelivered.

j Robert Walker LJ, with whom Schiemann and Carnwath LJJs agreed, cited Slade LJ’s remarks in *Galinski’s* case (to which I have referred) and said (at [28]):

‘I accept that one of the purposes of these provisions is to establish a fair allocation of the risks of any failure of communication. The other main purpose is to avoid disputes on issues of fact (especially as to whether a

letter went astray in the post, or was accidentally lost, destroyed or overlooked after delivery to the premises of the intended recipient), where the true facts are likely to be unknown to the person giving the notice, and difficult for the court to ascertain.’ a

Robert Walker LJ referred to Smedley J’s comment in the *Commercial Union* case that *Galinski’s* case and the *Lex Service* case were irreconcilable, saying that he was not convinced that that was so rather than that the cases were concerned with different aspects of service, *Galinski’s* case being concerned with the identity of the recipient rather than delivery or non-delivery through the post. For my part, I have to say that I respectfully disagree with Robert Walker LJ’s view on that point. I cannot see that the factual distinction drawn by Robert Walker LJ between the two cases really makes those cases reconcilable. For the reasons already given, it seems to me that the ratio of *Galinski’s* case is inconsistent with that of the *Lex Service* case in so far as the *Lex Service* case decides that s 7 applies to s 23. b

[30] Robert Walker LJ described as the second of the issues before the court: ‘Did [the landlord] achieve good service by post under section 23(1) of the 1927 Act (as incorporated into the 1954 Act) despite the known non-delivery?’ He said (at [44]): c

‘On the second issue, section 23(1) of the 1927 Act does not contain any exception for letters that are returned. Once [counsel for the tenant’s] second pre-emptive point is out of the way, therefore, the only possible means of avoiding the conclusion that there was good service under section 23(1) would be an argument on the lines of that in *Lex Service*. That argument would involve: (i) relying upon section 7 of the Interpretation Act 1978; (ii) contending that the clause 6.4 notice was time-specific; and (iii) establishing that *Commercial Union* was wrongly decided. [Counsel for the tenant] did not put forward any argument on those lines, and I certainly would not criticise him for not doing so.’ d

Thus, Robert Walker LJ was saying that no argument on the lines which he was suggesting had in fact been advanced. Accordingly, in those circumstances I do not see that *Blunden’s* case can be taken to establish as a matter of ratio that s 7 has no application to s 23. Robert Walker LJ was only suggesting a possible argument, and, in my view, it is plain that he was not encouraging an argument on those lines. e

[31] (9) *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] 1 WLR 2064. In this case the landlord sent a s 25 notice on 7 January 2002 by recorded delivery post to the tenant. It was actually received by the tenant on 9 January 2002. The tenant served a counter-notice and applied for a new tenancy on 8 May 2002. Under s 29(3) of the 1954 Act that application had to be made within four months of the service of the s 25 notice. The landlord said that the s 25 notice was served on 7 January. The tenant said that that notice was served when received, and so the application for the new tenancy was in time. The landlord contended that the effect of s 23 was that if a notice was posted by recorded delivery it was irrevocably deemed to have been received on the date of posting. The tenant contended either that there was an implied term under s 23 that such a notice is irrevocably deemed to have been served when it would have been received f

a in the ordinary course of post, or that s 23 was to be read as effectively subject to s 7.

[32] Neuberger J, in a detailed judgment which I have found helpful, accepted the landlord's submission that, if the effect of s 23 is that where a notice is sent through the post by recorded delivery to the addressee at his place of abode it is irrevocably deemed to have been served, then it follows that
b service is deemed to have been made on the date that the notice was put in the post for recorded delivery and not the date of actual receipt. He gave what to my mind are cogent reasons for that conclusion.

[33] First, he said that s 23 described three alternative permitted methods of service: personal service, service at the premises and service through the post by recorded delivery. The first two options clearly envisaged service occurring
c at the moment that it was described as effected, that is to say the moment of personal service in one case, the moment the notice is left at the premises in the other. Logic strongly suggested that, if the act of posting of the notice by recorded delivery effects service, then the moment at which the notice is put in the post is the moment at which service was effective.

d [34] Secondly, Neuberger J said that the actual receipt of the notice played no part in the role of service of the notice under s 23 according to the earlier authorities. He said that if the vital action was posting the notice, actual receipt of the notice is irrelevant.

[35] Third, he pointed out that if an addressee could say that a notice was received very late, he would be better off than an addressee who never received the notice at all. The addressee who received a notice late could rely on the date of late receipt as the date of service. The addressee who never received the notice could not rely on the fact that he had never received the notice and would be bound to accept that the service was effected on posting.
e

[36] Fourth, if an addressee was permitted to contend that a notice sent by
f recorded delivery, but which was actually received many months later, was served at the date of actual receipt, that would take away much of the intended effect of s 23 if it was correct that s 23 deemed service to be effected by posting.

[37] Fifth, he referred to what had been said in *Railtrack plc v Gojra* [1998] 1 EGLR 63 and in *Woodfall*.

g [38] Neuberger J then considered the question whether service was irrebuttably deemed to have been effected when the notice addressed to the addressee at the right premises is put in the post through recorded delivery. He considered the authorities to which I have referred (other than the *Sun Alliance* case) and said that he did not consider he was strictly bound to come to a conclusion in favour of the landlord on that question. He approached the case
h on the basis that he should only reach a conclusion which would mean that the decisions of Smedley and French JJ were wrong and that the decision in *Blunden's* case was per incuriam and that the observations in *Chiswell's* case, *Galinski's* case and the *Railtrack* case were also per incuriam if he was satisfied that that conclusion was clearly right. Having considered the arguments, he
j found he was not so satisfied.

[39] The first argument of the tenant was that it was anomalous and unfair if a tenant was effectively deprived of the right to a new tenancy through being unaware of a notice put in the post by the landlord and which, through no fault of the tenant, was never served on the tenant. Neuberger J said that there was no doubt that from the point of view of a tenant that would seem a very unfair

result. However, he pointed out also that a tenant would normally have nothing to complain of if absent from the premises when delivery was attempted, because cases showed, and his own experience showed, that if the postman attempted to deliver a recorded delivery letter to premises where nobody was present he would, and certainly should, post notification through the letterbox. He also adverted to the fact that a tenant is only entitled to the protection of the 1954 Act if occupying the premises for business purposes (see s 23(1) of the 1954 Act).

[40] He continued ([2004] 3 All ER 814 at [50]):

‘So far as anomaly is concerned, it seems to me that the purpose of a provision such as s 23 ... is to introduce an element of certainty and allocation of risk so far as service is concerned. It is important that the parties know where they stand and that the possibility of satellite litigation is kept to a minimum. Any system of service of notices can lead to hardship in particular cases. A provision such as service on the premises, specifically catered for in s 23, can involve hardship if, as happened in one case, the notice is posted under the door and goes under the floor covering, or if it is given to someone employed by the addressee who forgets to hand it over to him, or if it is eaten by the dog, or if the addressee is absent due to prolonged illness.’

He continued (at [51]):

‘If s 23 has the effect for which [counsel for the landlord] contends, it provides that if the server (and it should be remembered that in many cases it will be the tenant who is serving a notice on the landlord) chooses a method of service which is within s 23, then the risk of non-service shifts from the server to the addressee. That is effectively the approach of the Court of Appeal in *Galinski’s* case and it is the way in which Mr Kim Lewison QC put the point in *Blunden’s* case, and it does not seem that Robert Walker LJ disagreed (see [2002] 2 EGLR 29 at [27]).’

He considered an argument that he should follow the *Lex Service* case, but he voiced his unease with that decision and (at [64]) expressed strong criticism of some of the reasoning of Glidewell LJ. He therefore rejected the tenant’s argument. He went on to deal with the argument that, because of the possibility of an infringement of the human rights of an addressee, s 23 of the 1927 Act should be construed as subject to s 7 of the 1978 Act. I will come back to that later.

[41] I conclude on this review of the authorities that, save only for the *Lex Service* case, the consistent view taken by the courts has been that where a notice is served by a primary method authorised by s 23, such as by recorded delivery post, it matters not whether the notice was received and that there is no scope for the application of s 7, the risk of non-receipt being cast on the intended recipient. The date of service is the date when the server entrusts the notice to the post for recorded delivery, and that provides certainty for those who are required to serve documents. That too is the view of *Woodfall* in the paragraph to which I have already referred (at [26], above). The *Lex Service* case has been criticised, and I have expressed my opinion that it was decided per incuriam. Accordingly, it seems to me that, having regard to the cogent and consistent (save for *Lex Service*) reasoning in the authorities, it is not open to this

a court now to return to the line apparently taken in the *Lex Service* case that s 23 is subject to s 7. Accordingly, I would reject Mr Tanney's primary submission.

(II) ATTEMPTED DELIVERY

b [42] Mr Tanney submitted that the words of s 23(1), 'sending' through the post, were significant, and that merely committing a letter to the post is not enough because the words imply that some sort of onward transmission is required. He described that as a sensible and fair interpretation of the section. It is sensible, he said, because, where an attempt is made to deliver by recorded delivery but the attempt fails, notification would be left for the addressee that there is a letter waiting to be collected at the Post Office. It is fair, he said, because it is wrong that a person should be affected by a notice of which he has c no knowledge, whereas it would be less wrong that he should be affected by a notice which he is told awaits collection at the Post Office.

[43] In my judgment this submission places on the preposition 'through' a weight which I do not think it can reasonably bear. 'Through' in the phrase 'sending ... through' to my mind naturally connotes the method of sending. It d says nothing of the onward transmission of the type contended for by Mr Tanney. All that the sender by recorded post can do is to entrust the notice to the Post Office: that is the act which is described in s 23(1). There is not a hint in s 23 that there must be some attempt at delivery at the last known abode of the addressee, nor has it ever been suggested in any of the authorities which have set out what s 23 entails. Further, it is inconsistent with what Megaw LJ e said in *Chiswell's* case that, even if the notice goes astray, it will have been served through being sent by recorded delivery. To the like effect was French J in the *Italica Holdings* case. In truth what Mr Tanney is asking the court to do is to rewrite the section to include words which are simply not there. In my judgment that is not permissible.

f (III) SECTION 3 OF THE HUMAN RIGHTS ACT 1998

[44] Mr Tanney has resorted to s 3 in a supporting role (as he put it), that is to support the construction for which he contended in his two earlier submissions. Section 3(1) provides:

g 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

h He submits that the court should ignore the particular facts of the present case. He does not claim that Webber's rights have been materially affected in some unfair way on the facts of this case. He says that it is appropriate to consider circumstances in which, if the statutory provisions are not construed in the way for which he contended, a tenant of business premises can lose his right to a new lease where a s 25 notice sent by recorded delivery post goes astray. He says that the interpretation of s 23 of the 1927 Act must cater for such a meritorious case as well as for cases like the present.

j [45] Mr Tanney, relying on both art 6 of the convention and art 1 of the First Protocol to the convention, accepted that it was sufficient for this court to consider art 6 on the basis that if he did not succeed on art 6 he would not succeed on art 1. Mr Tager submitted that it was necessary to consider whether art 1 was infringed, because, if there was no breach of art 1, there would be no right under art 6 capable of being infringed in litigation. Mr Tager

took us to two very recent decisions, one of the European Court of Human Rights in *Stretch v UK* [2004] 03 EG 100, a decision given on 24 June 2003, and the other a decision of the House of Lords in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568, delivered on 10 July 2003, for observations on what constituted a 'possession' for the purposes of art 1, to the peaceful enjoyment of which every person is entitled and of which no person is to be deprived, subject to stated exceptions. Mr Tager submitted that the statutory right of the tenant is not a possession. Mr Tanney argued that the right was such a possession. I intend no discourtesy to counsel when I decline to enter into that particular controversy, which undoubtedly gives rise to points of difficulty. Mr Tanney submitted that art 6 applies to the determination of civil rights which may be engaged even if the litigant does not have a private law right. That, to my mind, is plainly correct.

[46] It is sufficient that I should consider whether interpreting s 23, as I have done, in a way which excludes the application of s 7 and which does not import what I would call the 'attempted delivery' gloss urged by Mr Tanney, is incompatible with art 6 and art 1, or whether s 23, as so interpreted, is a reasonable and proportionate response by the legislature to the problem addressed by s 23. In this context, I bear in mind the remarks of Lord Nicholls of Birkenhead in *Wilson's* case when he said ([2003] 4 All ER 97 at [69]):

'There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact.'

And Lord Nicholls said (at [70]):

'... courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified (see the Rent Act case of *Mellacher v Austria* (1989) 12 EHRR 391 at 411 (para 53)). The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.'

[47] A somewhat similar issue was considered by this court in *Anderton v Clwyd CC* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174, where this court considered a number of cases arising out of the application of CPR 6.7, which provides that when a document is served in accordance with the CPR or any relevant practice direction, it is to be deemed to be served on the day shown in a table attached to the rule.

[48] In *Anderton's* case three of the cases considered covered the deemed date of service which had the effect that the claims were struck out as being out of time, even though there was evidence that service was in fact earlier and in

a time. This court considered the argument put forward, that by preventing proof of the fact that the defendant received the claim form before the end of the period for service and before the deemed day of service which occurred after the end of the period, the claimant, asserting a civil right, was precluded from access to the court and that the very essence of his right was impaired. The argument continued that limitations are allowed by the margin of appreciation afforded to states in regulating the right of access to a court, provided that the limitations did not restrict or reduce the access in such a way or to such an extent that the very essence of the right was impaired, pursued a legitimate aim and represented a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

b [49] The decision of this court, consisting of Lord Phillips of Worth Matravers MR, Mummery and Hale LJ was given by Mummery LJ, who said ([2002] 3 All ER 813 at [36]):

c 'The aim of r 6.7 is to achieve procedural certainty in the interests of both the claimant and of the defendant. Certainty in the time of service of a claim form is an important requirement for the efficient performance of the case management functions of the court. It is legitimate to promote that aim by setting a deadline of four months from issue for the service of the claim form by one of the permitted methods and by using the legal technique of deemed service to bolster the certainty. The rules employ a carefully and clearly defined concept of the "service" of a document, which focuses on the stated consequences of the sending of the document by the claimant, rather than on evidence of the time of its actual receipt by the defendant. The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points.'

d [50] In *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2004] 3 All ER 184, Neuberger J, as I have indicated, considered the question whether s 3 of the 1998 Act required the court to construe s 23 of the 1927 Act as subject to s 7 of the 1978 Act. He rightly accepted that if, on the construction which he found to be correct, s 7 did not qualify s 23 and the tenant's human rights were infringed, his duty under s 3 would be to construe s 23 so far as possible so that it did not have that effect. He said that the point was not entirely dissimilar to that considered in *Anderton's* case. He cited *Anderton's* case [2002] 3 All ER 813 at [36] and said that, whilst it was concerned with a somewhat different issue, service of process, and a slightly different and less potentially unfair result than that which he was considering, that passage assisted the landlord's case in the *Beanby Estates* case. Neuberger J then continued:

e [82] The purpose of s 23 of the 1927 Act, as explained in *Chiswell's* case, *Galinski's* case and *Blunden's* case, is very much like that of CPR 6.7, as explained by Mummery LJ in *Anderton's* case. It is not as if there will be no occasions when another form of service cannot lead to hardship: thus, as I have mentioned, service on the premises can result in unfairness where the service is on an absent-minded employee, where the notice goes under the floor covering, where the notice is eaten by the dog, or where the addressee has an unexpected and long absence.

j [83] Furthermore, as already mentioned, if a letter is sent by recorded delivery then, absent incompetence on the part of the Post Office or rank

bad luck, even if nobody is at the relevant premises, a note will be put through the letterbox drawing the attention of the tenant, who, as I have mentioned, should in some way be in occupation in light of s 23 of the 1954 Act, to the fact that there is a letter to be picked up from the nearest post office which has been sent to the premises by recorded delivery.

[84] Additionally, this is not, as it were, a result which prejudices tenants or confers an advantage on landlords. The 1954 Act provides for notices (see, for instance, s 26) or counter-notices (see, for instance, s 25) to be served by the tenant on the landlord. My conclusion on the effect of s 23 of the 1927 Act applies both ways.

[85] It is true that it is somewhat unattractive that, as [counsel for the tenant] points out, the server of the notice will in many cases know that the addressee has not received it because it will have been returned in the post, or, as I understand it, will be able to see it as not being delivered by looking at the Post Office's website.

[86] It seems to me, however, that one has to balance the sort of factors identified by Mummery LJ in *Anderton's* case, namely certainty, and as identified in *Blunden's* case, allocation of risk, and the purpose behind s 23 as explained in *Galinski's* case, against the fact that there will be occasional harsh or unfair results. In my view the legislature was entitled, on the assumption that s 23 has the effect which I hold it has, to carry out the balancing act in the way in which it did. That view is reinforced when one considers the nature of the rights which the tenant claims to be infringed. Although it may be characterised as a right to property and a right of access to the court, it is, in fact, an extra-contractual privilege conferred on business tenants to obtain a new tenancy if certain steps—including the service of notices—are taken (ss 24–29 of the 1954 Act) and unless certain conditions are satisfied (ss 30–31A of the 1954 Act). The access to the court is merely the means by which the privilege is exercised. If the legislature imposes provisions as to the taking of the steps, such as the service of notices which occasionally, due to mischance or oversight, result in the privilege being lost, in the interest of certainty, that does not appear to me to engage, let alone to fall foul of, the 1998 Act, unless those provisions are unreasonable. Accordingly, in my view there is no human rights infringement dimension to this case.

[51] Mr Tanney said that *Anderton's* case was distinguishable. In that case the claimant was in a position to comply with the limitation period of which he fell foul, whereas in the case of a s 25 notice under the 1954 Act, if service occurs, even if the notice goes astray the tenant will have been unable to do anything about it. Mr Tanney also pointed out that in *Beanby Estates* [2004] 3 All ER 184 at [48], Neuberger J gave as a reason for rejecting an argument based on unfairness the fact that when recorded delivery is unsuccessfully attempted a 'while you were out' notice is likely to be left by the postman, alerting the addressee to the notice. He said that his 'attempted delivery' construction of s 23 accords with that view.

[52] Mr Tager submitted that Neuberger J was correct on this point. He acknowledged the potential for hardship, but submitted that this is likely to occur in such rare circumstances that it cannot be said that the legislature, seeking to achieve the aim of certainty and to meet the mischief caused if the matter were left uncertain, was unreasonable or disproportionate in the

a method chosen. He pointed out that s 23 relates to service by recorded delivery on business premises, and the likelihood is that service will be achieved in all but a mere handful of cases.

[53] I agree with Mr Tager. In my judgment, having regard to the aim of s 23 as identified in *Chiswell's* case and *Galinski's* case, that is to say to assist the server of the notice, and in *Blunden's* case, that is to say to establish a fair allocation of the risk of any failure of communication and to avoid disputes of fact, where the true facts are likely to be unknown to the server of the notice and difficult for the court to ascertain, it is neither unreasonable nor disproportionate to achieve certainty for landlords and tenants alike by s 23 being interpreted (as the courts have done subject only to the *Lex Service* case) as excluding the applicability of s 7 of the 1978 Act to s 23 and if Mr Tanney's secondary argument is also rejected. In my judgment so to construe s 23 does not fall foul of the 1998 Act.

[54] Accordingly, despite the admirable arguments of Mr Tanney, who has put with moderation and lucidity every point which could properly be taken for Webber, I would dismiss this appeal.

d LONGMORE LJ.

[55] I agree with the judgment of Peter Gibson LJ on the construction of s 25 of the Landlord and Tenant Act 1954 and s 23 of the Landlord and Tenant Act 1927. I do not see how *Lex Service plc v Johns* [1990] 1 EGLR 92 can stand with *Galinski v McHugh* [1989] 1 EGLR 109, which was not cited in the later case. *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181, *Galinski's* case itself, and *Railtrack plc v Gojra* [1998] 1 EGLR 63 (not contradicted by *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29) provide a consistent line of authority of this court to the effect that s 23 of the 1927 Act contains a contrary intention for the purposes of s 7 of the Interpretation Act 1978 which is therefore inapplicable. It is not for this court to depart from that line of consistent authority.

[56] I also agree with Peter Gibson LJ's rejection of Mr Tanney's second argument.

[57] I have found the human right points somewhat more difficult. Mr Tanney relied on both art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), that everyone is entitled to access to a court for a fair and public hearing in determination of his civil rights and obligations, and art 1 of the First Protocol, that no one is to be deprived of his possessions except in the public interest and subject to the conditions provided for by law. He submitted that the construction, adopted by previous Courts of Appeal and now by this court, of s 25 of the 1954 Act and s 23 of the 1927 Act have the potential to prevent a court hearing the substance of an application for a new business tenancy in cases where a notice was sent by recorded delivery but got lost in the post or otherwise never reached the intended recipient. He submitted further that a tenant had a statutory right to renew, albeit subject to conditions, and that such a right to renew constituted a possession, just as a contractual option to renew a lease was held to constitute a possession for the purposes of art 1 of the First Protocol in *Stretch v UK* [2004] 03 EG 100. For these reasons Mr Tanney submitted that s 23 of the 1927 Act should, pursuant to s 3 of the 1998 Act, be read so as to mean that the relevant notice is only to be

understood as 'given' at the time of delivery or attempted delivery to the intended recipient. a

[58] I do not myself consider that art 6 of the convention is engaged, or potentially engaged, by the construction of the statute which this court has adopted. The essence of the complaint is that an application by a tenant to renew his business tenancy cannot be made in cases where he has never received the notice given by a landlord who has entrusted it to recorded delivery. But that is the nature of the right which Parliament has conferred. There may be a restriction on the scope of the right of the tenant as conferred by the statute, but that is all. Access to the court is not barred for the purpose of deciding whether the tenant's rights are defeated by that restriction. This was the approach that commended itself to Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd* [2003] UKHL 40 at [36], [2003] 4 All ER 97 at [36], [2003] 3 WLR 568 in relation to s 127(3) of the Consumer Credit Act 1974, with whom Lord Rodger of Earlsferry agreed. I think, further, that Lord Hobhouse of Woodborough sufficiently agreed with the approach of Lord Nicholls, to make Lord Nicholls' decision on this point the ratio of the majority of the House. b
c
d

[59] As to art 1 of the First Protocol, Mr Tager QC for the landlord mounted a spirited attack on the idea that any right conferred by statute, as opposed to a proprietary or contractual right, could be a possession for the purpose of art 1 of the First Protocol. He resiled somewhat from that position on being pressed in argument but was never able to say by what principle one could discover whether a statutory right could constitute a possession and, in the end, he appeared to revert to his absolute position. e

[60] This is difficult territory. In *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch) at [86], [2004] 3 All ER 184 at [86], [2003] 1 WLR 2064 Neuberger J said that, although the right to apply for a new business tenancy may be characterised as a right to property (and indeed a right of access to the court), it is in fact an extra-contractual privilege conferred on business tenants to obtain a new tenancy if certain steps are taken and unless certain conditions are satisfied. If by the word 'privilege' Neuberger J means something which is less than a right, I would respectfully query that characterisation. It is true that but for the 1954 Act a business tenant would be liable to be given notice to quit, but the 1954 Act is the background against which business tenancies have been granted and taken now for nearly 50 years and the tenant's position is, to my mind, understated if it is described merely as a privilege. Be all that as it may, however, I am quite satisfied that the restrictions on the tenant's statutory right, as I would prefer to call it, to apply for a new tenancy, are conditions provided for by law and are in the public interest. f
g
h

[61] Peter Gibson LJ has already cited Lord Nicholls's speech in *Wilson's* case [2003] 4 All ER 97 at [69]–[70] stating that the assessment of the advantages and disadvantages of various legislative alternatives are primarily a matter for Parliament. j

[62] For the reasons given in *Blunden's* case [2002] 2 EGLR 29 at [28] and the *Beanby Estates* case [2004] 3 All ER 184 at [50], and especially the reason that a clear rule is required for the giving of notice in order to avoid unnecessary disputes and satellite litigation on peripheral issues, I am of the view that the rules laid down by statute as construed by the courts are in the public interest,

a and it is impossible to say that the legislature has attached insufficient importance to the tenant's convention rights. It is therefore unnecessary to read the statute in the manner contended for by Mr Tanney.

[63] I too would dismiss this appeal.

Appeal dismissed.

Melanie Martyn Barrister.

Re Burton Marsden Douglas (a firm) Marsden and another v Guide Dogs for the Blind Association and others

[2004] EWHC 593 (Ch)

CHANCERY DIVISION

LLOYD J

27 FEBRUARY, 25 MARCH 2004

Solicitor – Retainer – Novation of retainer – Executor instructing solicitor in sole practice in administration of estate – Solicitor entering into partnership – Solicitor informing executor beforehand of change – Whether novation of retainer taking place.

Costs – Taxation – Solicitor – Non-contentious business – Executor instructing solicitor in business as sole practitioner – Solicitor transferring costs from client account to office account before rendering bill to executor – Solicitor going into partnership – Partnership rendering bill to executor – Residuary beneficiaries under will applying for detailed assessment of bill – Whether partnership liable for repayment of any overpayment contained in bill – Solicitors Act 1974, s 71(3).

The claimant charities were residuary beneficiaries under a will. The proving executor instructed B, a sole practitioner, to act in the administration of the estate in 1995. During the administration B transferred funds totalling £102,300 from his client account for the estate to his office account without having rendered the executor a bill or any other intimation of the costs claimed. In 1999 B went into partnership with the defendants. B told the executor beforehand that he would be going into partnership, with the practice being expanded to include the defendants, the firm being renamed and stepping into the shoes of his practice, but that he would continue to deal with the estate and that nothing would change in that respect. In January 2000 B produced estate accounts which showed the payment of fees of £102,300. In March 2001 a bill was rendered to the executor, in the firm name, in the same amount. In June 2001 B left the partnership and disappeared. The charities applied to the court for a detailed assessment of the bill. Section 71(3)^a of the Solicitors Act 1974 provided, inter alia, that where an executor had become liable to pay a solicitor's bill, any person interested in the property out of which the executor had paid the bill could apply to the court and the court could order that the bill be taxed and order that such payments, in respect of any amount found to be due by the solicitor be made to the applicant or the executor as it thinks fit. A preliminary issue was ordered, as to whether, if the bill were reduced, the firm should be ordered to repay to the executor any money overpaid in respect of the legal services which were the subject of the bill. The costs judge held: (i) that a new firm was not, in the absence of special circumstances, to be treated as having taken over the debts and obligations of an old one; but (ii) that special circumstances did apply in that B had led the executor to believe that nothing had changed and that the firm had stepped into the shoes

^a Section 71, so far as material, is set out at [9], below

- a of his sole practitioner's business, so that the firm was bound by that representation and payments received by the sole practitioner's business had to be treated as payments received by the firm. The defendants appealed. The charities contended that the firm had become the executor's solicitors by a novation of the retainer which had existed in favour of B or, alternatively, that s 71(3) of the 1974 Act permitted the court to order the firm, which had rendered the bill, to repay any overpayments.
- b

Held – (1) The main example of the special circumstances which could have the result that a new firm would be treated as having taken over the debts and obligations of an old firm, and the only such special circumstances relevant to the instant case, were circumstances that justified a finding that the obligations had been novated. However, so far as the existing liabilities of B were concerned, there had been no representation by B to the executor, whether before or after the change from B acting as a sole practitioner to his going into partnership with the defendants, still less any words or acts on B's part after the change, which could be the basis, if agreed to by the defendants and the executor, for an implied contract by way of novation (see [28], [30]–[33], below).

c

d

(2) Section 71(3) of the 1974 Act governed the process of taxation and the consequence of taxation, but did not by itself create a liability to repay on the part of someone who would not otherwise be subject to that liability. In almost every case the person liable to repay the sums overpaid when the result of a taxation was to reduce the bill below that which had already been paid would be the firm which had rendered the bill. In the instant case, because the payments had been received by B alone before he went into partnership with the defendants, the person liable was B alone. The appeal would accordingly be allowed (see [35], [36], below).

e

f Notes

For novation, see 9(1) *Halsbury's Laws* (4th edn reissue) paras 1036–1042.

For application for taxation by third parties and persons interested, see 44(1) *Halsbury's Laws* (4th edn reissue) para 209.

For the Solicitors Act 1974, s 71, see 41 *Halsbury's Statutes* (4th edn) (2000 reissue) 98.

g

Cases referred to in judgment

Arden v Roy (1883) 1 NZLR (CA) 365, NZ CA.

French v French (1841) 2 Man & G 644.

h *HF Pension Trustees Ltd v Ellison* [1999] PNLR 894.

Appeal

Kim Marsden and Ian Douglas, the partners in the firm of Burton Marsden Douglas (the firm) appealed from the order of Costs Judge Wright on 15 August 2003 on the hearing of a preliminary issue, set out at [4], below, in proceedings under s 71(3) of the Solicitors Act 1974 brought against the firm by the Guide Dogs for the Blind Association, the Royal Society for the Prevention of Cruelty to Animals, Help the Aged, the British Heart Foundation, the Salvation Army, the Royal Hospital for Neuro-Disability, Stoke Mandeville Hospital, Save the Children Fund, the Leukaemia Research Fund and MacMillan Cancer Relief (the

j

charities), being the residuary beneficiaries under the will of Adolphus Henry Siminson (deceased). The facts are set out in the judgment.

Samuel Laughton (instructed by *Marsden Douglas*, Cliftonville) for Mr Marsden and Mr Douglas.

Martin Farber (instructed by *Henmans*, Woodstock) for the charities.

Cur adv vult

25 March 2004. The following judgment was delivered.

LLOYD J.

[1] This appeal is from a decision of Costs Judge Wright in relation to the assessment of costs as between solicitor and client. The decision was given on a preliminary issue, which raises a point of law under the Solicitors Act 1974 and points of partnership law. There is a substantive appeal and also a separate appeal and a cross-appeal from the order for costs.

[2] On 5 March 2001 Burton Marsden Douglas, solicitors, rendered a bill to Mr John Richard Piper, as their client, for some £102,000. Burton Marsden Douglas was then a partnership consisting of three men: the appellants and a Mr Stephen John Burton. Mr Piper was an executor and the work charged for related to the administration of the estate. The charities who are the respondents to the appeal are the residuary beneficiaries of the estate. They seek detailed assessment of that bill. Because sums equal to the full amount of the bill have already been paid, they also seek repayment of any amounts which turn out to have been overpaid. The sums already paid were paid while Mr Burton was retained, and before either of the appellants went into partnership with him. They deny that they are liable to repay sums which he received before he became their partner. Mr Burton has disappeared. Whether there is any real point in going through the assessment depends on whether the charities or the executor can look to them, or only to Mr Burton, for repayment. The costs judge held that all three partners were liable.

THE FACTS

[3] The ten claimant charities are the residuary beneficiaries under the will of Adolphus Henry Siminson, who died on 29 May 1994. He named as his executors Mr Piper, who is a chartered accountant, and Mr Burton. Only Mr Piper proved the will, on 9 February 1995, but he instructed Mr Burton to act as solicitor in the administration of the estate. At that time Mr Burton practised in partnership with Caroline Dilks under the firm name SJ Burton & Co. Miss Dilks seems to have done some of the work in getting probate and in the early administration of the estate. However, she left the firm at some point in 1995, and Mr Burton carried on as a sole practitioner, under the same style, until 31 August 1999. He continued to act in the administration of the estate. As it turns out, during that time he transferred a number of sums out of funds he held on client account on behalf of the estate to his office account, on account of costs. He did so without having rendered to Mr Piper any bill or other intimation of the amount of the costs claimed. Including value added tax, these transfers amounted to £102,300.50.

a [4] On 1 September 1999 Mr Burton went into partnership with Mr Marsden and Mr Douglas, the appellants, under the firm name Burton Marsden Douglas. The administration of the estate was not complete by then, and Mr Burton went on acting as before. By then some of the charities had become concerned at the delays in completing the administration of the estate and were pressing for estate accounts. In January 2000 Mr Burton provided estate accounts which
b showed the payment of fees amounting to £102,300.50. On 5 March 2001 a bill was rendered, in the name of Burton Marsden Douglas, to Mr Piper in the same amount. On 20 June 2001 Mr Burton left the partnership. On 19 October 2001 the charities issued a claim form against Burton Marsden Douglas claiming a detailed assessment of the bill. On 11 February 2002 Costs Judge Wright
c ordered that a detailed assessment of the bill must be made, and he gave directions accordingly. On 22 October 2002 he ordered the hearing of a preliminary issue, as to whether, if the bill were reduced on assessment, the appellants should be ordered to repay to Mr Piper any money overpaid in respect of legal services the subject of the bill, and if so whether there was any
d limit to the amount which might be ordered to be repaid. By the decision under appeal, on 7 October 2003, he decided these preliminary issues in favour of the charities.

[5] The preliminary issue was heard on the basis of written evidence with no cross-examination. Mr Burton was not available to give evidence. There were witness statements from Mr Keith Oliver, who had been Mr Burton's assistant,
e and who continued to work with Burton Marsden Douglas, from Mr Piper, from Mr Marsden, and from Mr Jeffreys and Mr Steer, both of the firm of Henmans, the charities' solicitors. Apart from some documents, there is little in the evidence that takes the matter much further than the essential facts to which I have referred, but I will refer to the evidence on which Mr Farber, for
f the respondents, relies.

[6] Mr Piper gave evidence that he had been unaware that Mr Burton had taken money on account of costs, and had never received any interim bill or other written intimation of the amounts said to be due for costs. He described what Mr Burton had told him in advance of going into partnership with the
g appellants. Mr Burton told him that he would be going into partnership with them, with the practice being expanded to include the appellants, the firm being renamed Burton Marsden Douglas, which would step into the shoes of his practice and take over his clientele, but that he would continue to deal with the estate and nothing would change in that respect. Thus, Mr Oliver having
h written to Mr Piper on 14 August 1999, on SJ Burton & Co paper, to tell him that costs consultants were preparing draft estate accounts and costings, after 1 September 1999 Mr Oliver wrote in the same way but on Burton Marsden Douglas paper, showing the three men as partners. The first such letter is dated 21 September 1999. Mr Piper continued to deal with Mr Burton (and
j Mr Oliver) just as before, and they with him, though under the new firm name. He had no formal notification of the change.

[7] The costs consultants mentioned were called Jennings. They were instructed before 31 August 1999, by SJ Burton & Co, but they did not finish their work until after that date, and they rendered their own bill to Burton Marsden Douglas.

[8] Also on 21 September 1999 another letter on Burton Marsden Douglas paper was written, probably also by Mr Oliver. This one was to the first respondent, which was already expressing concern about delay, saying 'would you please note our change of name from S J Burton & Co'. Correspondence continued between Mr Burton and Mr Oliver, under the firm name Burton Marsden Douglas, on the one hand, and several of the charities, and later Henmans on their behalf, on the other. On 1 August 2000 Mr Burton sent a letter with a schedule of costs incurred to 31 December 1998, in total £82,064.76. The letter concluded: 'Only once the estate is completed will we render a bill.' Eventually the bill was rendered on 5 March 2001. Even at that stage work was said to be continuing as regards collecting in assets of the estate.

THE SOLICITORS ACT 1974

[9] The claimants' right to have the bill assessed arises under s 71(3) of the 1974 Act. This provides as follows:

'(3) Where a trustee, executor or administrator has become liable to pay a bill of a solicitor, then, on the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill, the court may order—(a) that the bill be taxed on such terms, if any, as it thinks fit; and (b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the taxation, be made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit.'

[10] Mr Farber, for the respondents, submits that this provision permits the court to make an order against the solicitor whose bill is in question for the repayment of any sum found to have been overpaid, because such a sum would have been 'found to be due ... by the solicitor'. Here the bill is that of Burton Marsden Douglas, which is a shorthand for the three partners in the firm at the date on which the bill was rendered. He submits that all or any of the three partners may be ordered to repay sums already paid which turn out to have exceeded the amount allowed on assessment, regardless of whether the person ordered to repay received any of the overpayment.

[11] Mr Laughton, on the other hand, submits that the section is only procedural, and does not in itself afford a basis for a finding that any sum is due to be repaid by any given solicitor, as a consequence of a reduction of the bill on assessment. He says that the question whether a sum is due from the solicitor must be answered by reference to general principles of law, and that none relevant on the facts of this case would allow anyone other than Mr Burton to be ordered to repay sums of money received by him before he joined in partnership with the appellants.

[12] The provisions of s 71(3) of the 1974 Act need to be seen in context. The starting point is s 70 which provides for an order for taxation of a solicitor's bill on the application of either the party chargeable or the solicitor. By sub-s (7), every order for taxation is to require the taxing officer, as well as taxing the bill and the costs of taxation, to 'certify what is due to or by the solicitor in respect of the bill' and of the costs. Section 71 relates to taxation on the application of third parties. Subsection (1) is concerned with persons who, though not the party chargeable with the bill, have paid it or are or were liable to pay it either

a to the solicitor or to the party chargeable. The other provision is sub-s (3) already cited. By sub-s (4), when the court is considering an application under sub-s (3) it is to have regard to the provisions of s 70 so far as they are capable of being applied.

b [13] It is convenient at this point also to mention two other regulatory provisions as regards costs which were referred to in argument. The Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616 provides an alternative to taxation, namely requiring the solicitor to obtain a remuneration certificate from the Council of the Law Society. That would not have been available in the present case, because the costs must be less than £50,000. Article 13 deals with refunds. So far as material it is as follows:

c (1) If a solicitor has received payment of all or part of his costs and a remuneration certificate is issued for less than the sum already paid, the solicitor must immediately pay to the entitled person any refund which may be due ...

d (3) The obligation of the solicitor to repay costs under paragraph (1) is without prejudice to any liability of the solicitor to pay interest on the repayment by virtue of any enactment, rule of law or professional rule.'

e [14] Mr Laughton points out that this provision is specific in saying that it is the solicitor who received the costs that must repay them if the remuneration certificate shows that they were too high. He submits that, since this is an alternative procedure, it is likely that the same principle would apply as regards repayment. It is a fair comment so far as it goes, but the order is of course more recent than the Act, and it cannot strictly be regarded as relevant to the interpretation of the Act.

f [15] On a different point, by r 7(a)(iv) of the Solicitors' Accounts Rules 1991, clients' money may be drawn from a client account if it is properly required for payment of the solicitor's costs 'where there has been delivered to the client a bill of costs or other written intimation of the amount of the costs incurred'. Costs Judge Wright proceeded on the basis that no written intimation had been delivered by Mr Burton to Mr Piper before the various sums were taken off the client account and applied in payment of costs. It was not suggested that bills had been delivered. Mr Burton was therefore acting in breach of the 1991 rules when he effected those payments.

THE COSTS JUDGE'S DECISION

h [16] The costs judge delivered a written judgment on 15 August 2003. He based his decision on s 5 of the Partnership Act 1890. He said that the appellants were bound by what Mr Burton had said to Mr Piper, as referred to at [6], above. He said that a solicitor was under a duty to behave openly and honestly with regard to a client's affairs and that Mr Burton should have informed j Mr Piper that he had taken the £102,300 in payment of costs, propositions which no one would dispute. He then said (para 65):

'It seems to me that this was highly relevant information which should have been provided to Mr Piper and that Mr Marsden and Mr Douglas are bound by the consequences of Mr Burton's actions in taking money from

the deceased's estate without delivering bills to Mr Piper and without keeping him informed.'

[17] He then referred to Mr Laughton's submission, by reference to a passage in *Lindley & Banks on Partnership* (18th edn, 2002), to the effect that a new firm is not, in the absence of special circumstances, to be treated as having taken over the debts and obligations of the old firm. He held (para 67) that special circumstances did apply, namely the circumstances that Mr Burton did 'lead Mr Piper to believe that nothing had changed and that Burton Marsden Douglas stepped into the shoes of SJ Burton & Co'. He concluded:

'In my judgment the consequence of that is that Mr Marsden and Mr Douglas are bound by that representation and payments already received by SJ Burton & Co as part of the business of that firm have to be treated as payments received by Burton Marsden Douglas who had stepped into the shoes of SJ Burton & Co.'

[18] He therefore did not decide the case on the basis that Burton Marsden Douglas were liable, as a firm, to make any repayments merely because the bill had been rendered in their name. On his approach it was necessary to find something else that rendered the appellants liable for obligations that would otherwise have been owed only by Mr Burton. He found it in Mr Burton's conduct described by Mr Piper.

[19] Mr Laughton criticises that approach on the basis that the appellants cannot be bound by things said or done (including silence when he ought to have spoken) dating from before Mr Burton became their partner, and also that even if they were bound by a representation that Burton Marsden Douglas would take over from SJ Burton & Co, that by itself would not make them liable for his debts to Mr Piper.

[20] Mr Farber accepts that the respondents cannot rely on arguments based on the actual receipt of the money by the appellants. His submission is that Burton Marsden Douglas became Mr Piper's solicitors, by a novation of the retainer which had existed in favour of Mr Burton alone, and that the effect of the novation was to render the firm liable for matters arising in the course of the prior retainer. He submitted that what was transferred to the firm was the entire retainer, including the right to payment for all work done and, correspondingly, the liability to repay money if and in so far as sums already paid had exceeded the sums due. These submissions raise two questions: was there a novation and, if so, what effect did it have?

NOVATION

[21] According to *Chitty on Contracts* (28th edn, 1999) vol 1, pp 1066–1067 (paras 20-084–20-086), novation takes place when the two parties to a contract agree that a third person, who also agrees, shall stand in the relation of either of them to the other. There is a new contract, so the consent of all parties must be obtained, and consideration must be given. The example given by *Chitty* is that, if A owes money to B and both of them agree with C that C will pay B instead of A doing so, B provides consideration for C's promise to pay him by agreeing to release A, and A provides consideration for B's promise to release him from the contract by providing the new debtor, C. If novation does take place, its effect is to extinguish the original contract and to replace it by the new

a one. For this reason *Chitty* (p 1154–1155 (para 23-031)) discusses novation in the context of the discharge of contracts by agreement. It does not follow, as regards obligations which have already been performed in part but in relation to which more remains to be done, that the new contract governs the past as well as the future.

b [22] The authors note that many of the cases about novation arise out of changes in partnership firms. Specifically in relation to partnership debts (p 257 (para 3-163), in the chapter dealing with consideration) they consider two different situations, neither quite the same as the present but the second close to it. The first is where, starting with a partnership of A and B, A retires and C is admitted. In that case, if there is an agreement between A, B, C and the creditors of the old firm to the effect that A shall cease to be liable for the existing debts and C will undertake that liability, the liabilities are novated and become enforceable against B and C, and no longer against A. The second situation is where A and B are in partnership and A retires without a new partner being admitted. If in that case A, B and the creditors of the partnership agree that A shall cease to be liable for the debts and that B will be solely liable, the authors say: 'It seems that the creditors cannot sue A, but it is hard to see what consideration moves from him.'

e [23] In the present case, the starting point would be, hypothetically, that Mr Burton owed obligations to Mr Piper arising from the retainer, including (though Mr Piper was unaware of it and Mr Burton might not have acknowledged it) a liability to refund moneys taken without authority. If a novation took place, Mr Farber submits, Burton Marsden Douglas would owe Mr Piper such obligations, and for the past as well as the future. Of course Burton Marsden Douglas is just a shorthand for Mr Burton and the appellants, and one of Mr Laughton's points against novation is that Mr Burton is not released, and therefore no consideration could be found. He also takes issue f with the proposition that the appellants were party to any agreement by which the novation could have taken place.

[24] Mr Farber submits that a retainer for non-contentious business is an entire contract. Often it is, and I do not need to consider whether this retainer is an exception. He points out that the task had not been completed by g 31 August 1999, and that work within the scope of the retainer continued after that date and was done either by Mr Burton as a partner in the new firm or by Mr Oliver as an employee of the new firm. He submits that, if a right to payment of fees for work done at that stage had arisen, it would have been a right of the new firm, and that, equally, if some fault or breach of duty had occurred at that stage, the firm would have been liable for it. If that is so, he h submits, the only explanation is a novation of the previous retainer, since there is no evidence of a fresh retainer by Mr Piper of the new firm. Matters simply proceeded as they had done before without attention being given to the consequences of the change from sole proprietor to partnership. He then submits that, if a novation did take place, the former contract of retainer was j extinguished and replaced by a new retainer in favour of the partnership. His contention is that the effect of that operation extended to existing rights and liabilities of Mr Burton in connection with the previous retainer as well as to future rights and liabilities. He points to Burton Marsden Douglas' bill as showing that the firm considered itself entitled to bill for all the work since the beginning. Although of course it would have to give credit for sums already

received on account, and in fact the receipts meant that, on the actual bill, nothing more was payable, the rendering of the bill by the partnership suggests that the partnership was by then retained, rather than just Mr Burton on his own. a

[25] He also points to Jennings having billed the firm for work done both before and after 1 September 1999, which he says was done as agent for Mr Piper. It is not correct to regard that expense as having been incurred as agent for Mr Piper. In any event, I do not think that any conclusion can safely be drawn from the fact that Jennings billed the firm, rather than Mr Burton, as to the liabilities as between Mr Burton, the firm and Mr Piper. b

[26] It is, of course, a very common experience in practice that there is a change in the members of a partnership, often without a change in the name. A matter such as a lengthy administration of an estate may be carried on by several identically named partnerships year by year, with changes in the identity of the partners and therefore of the partnership taking place each year, possibly unknown to the client. If the client does not know of it, there cannot be a novation, because there could be no factual basis on which the necessary agreement to accept the new partnership in place of the old partnership could be founded. Here, however, Mr Piper did know of the change, so that he could have been a party to an agreement by way of novation. c

[27] It seems to me that it is not difficult to find the basis of a novation in relation to a continuing contract where the client knows that there has been a change from a partnership of A and B to one of B and C. Likewise, if the client knows that there has been a change from a sole proprietorship of A to a partnership of A, B and C, it may not be difficult to conclude that there has been a novation, at any rate as regards future rights and obligations. It is not so easy to find the basis for a novation as regards existing liabilities of A, both as a matter of inferring the necessary agreement by B and C, and from the point of view of consideration. Section 17 of the 1890 Act supports this: d

(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner. e

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. f

(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. g

[28] In that context *Lindley & Banks on Partnership*, p 384 (para 13-24) says that 'special circumstances must be shown before that new firm will be treated as having taken over the debts and obligations of the old firm'. It seems to me that the main example of special circumstances which could have that result, and the only one relevant to this case, is circumstances that justify a finding that the obligations had been novated. h

j

[29] In his skeleton argument, Mr Farber said that his case was based on novation of the retainer by conduct or implication or both. Asked to identify the ingredients of the necessary contract by way of novation, between Mr Piper of the first part, Mr Burton of the second part and Mr Marsden and Mr Douglas of the third part, he relied on the statements made by Mr Burton to Mr Piper in advance of the change, which he submitted amounted to an implicit proposal for the transfer of the entire retainer to the partnership, acquiesced in and accepted by Mr Piper by leaving the matter in Mr Burton's hands after the change. He said that Mr Burton represented to Mr Piper, by not telling him otherwise after the change, that the whole retainer had been transferred, and that this silent representation, made in the course of the business of the partnership, was binding on all the partners. He also said that consideration was to be found in the benefit to the partnership of the continuing work for which, in principle, it would be able to charge. That analysis does not identify any conduct on the part of the appellants by which they could be treated as having entered into the agreement by way of novation.

[30] As a general proposition of partnership law, confirmed specifically by s 15 of the 1890 Act, a representation made by a partner concerning the partnership and in the ordinary course of its business, is binding on all the partners. However, what Mr Burton said to Mr Piper in August 1999 does not come within this principle because he was not then a partner. For that reason I am unable to agree with para 60 and the last sentence of para 62 of the judgment of Costs Judge Wright. The evidence does not disclose any express representation made by Mr Burton to Mr Piper after 1 September 1999, which is why Mr Farber has to rely on a representation by silence, submitting that Mr Burton was under a duty to disabuse Mr Piper of a false impression if in truth there was not a transfer of the entire retainer, and that not having done so, he and his partners are bound by the representation that there had been such a transfer.

[31] One of the difficulties about that is that there is no evidence that Mr Piper supposed that there had been such a transfer. There is, of course, no direct evidence as to what Mr Burton in fact thought, and there is no evidence from which his state of mind on the point at this time can be inferred. In those circumstances I am unable to accept that, so far as existing liabilities of Mr Burton are concerned, there was any representation by Mr Burton to Mr Piper whether before or after the change, still less any words or acts on his part after the change which could be the basis, if agreed to both by his partners and by Mr Piper, for an implied contract by way of novation. Merely entering into the new partnership does not suffice (see *Arden v Roy* (1883) 1 NZLR (CA) 365). It makes no difference whether, as between the partners, it has been agreed that the existing debts of one will be treated as debts of the firm. That would not begin to show an agreement with the creditor: see *HF Pension Trustees Ltd v Ellison* [1999] PNLR 894 at 898–899, where Jonathan Parker J cited and approved a passage from Lord Lindley which is quoted in the current (eighteenth) edition of *Lindley & Banks*, p 386 (para 13-29). Moreover, if what is relied on is a representation by one of the partners that his existing debts are to be treated as liabilities of the firm, that is not sufficient to show an agreement on the part of the other partner or partners. *Lindley & Banks*, p 387 (para 13-32), under the heading 'Fraud on new partner', says that—

'it is considered that an incoming partner will not be bound if one of his co-partners states an account, admitting that [a debt dating from before the entry into partnership] is due from the new firm.'

The authorities cited for that proposition at footnote 92 were not cited to me, which I can understand because they are not partnership cases. Nevertheless, one of them, *French v French* (1841) 2 Man & G 644, is based on the uncontroversial proposition that a promise to pay someone else's debt, unsupported by consideration, is not enforceable. Although not concerned, on the facts, with a partnership, but rather with a promise given by a son in respect of debts owed by his father, the principle is equally applicable in a partnership context. Depending on the facts it may be easier in such a situation to infer consideration, but in principle a statement by B that he accepts liability for debts of A, without consideration, is not enforceable, and it makes no difference that A and B are partners at the time of the statement, nor that the debts arise from the business formerly carried on by A, which since the accrual of the debts has come to be carried on by the partnership. It is all the more clear that a statement made by A to the effect that A and B accept liability for A's previous debts does not of itself make B liable, absent both an agreement to that effect by B and by the creditor, and consideration for that agreement.

[32] For the reasons set out above I do not accept Mr Farber's argument that there was a novation of Mr Burton's existing liabilities by which the partners in Burton Marsden Douglas became liable jointly and severally in place of Mr Burton himself alone. There may have been a novation in respect of future matters. Alternatively, it may be that Mr Burton carried on with the retainer without any variation, but because he was doing the work in the ordinary course of his business as a solicitor, and in that respect was now in partnership, his partners took the burden and the benefit of his work under the agency principles of partnership law. Mr Farber placed reliance on the proposition that the retainer was an entire contract but, even if it was, it does not seem to me that this by itself involves the consequence that, if there was a novation at all, it carried with it liability for repayment of moneys previously taken on account of costs in excess of Mr Burton's entitlement and without authority.

[33] The proposition in para 65 of the judgment under appeal, quoted at [16], above, that Mr Marsden and Mr Douglas were 'bound by the consequences of Mr Burton's actions in taking money from the deceased's estate without delivering bills to Mr Piper and without keeping him informed', does not identify the basis on which they are bound. The costs judge mentioned the reference to 'special circumstances' in *Lindley & Banks*, quoted at [28], above, and said that special circumstances did exist in the present case. It is only fair to the costs judge to note that he records Mr Farber as having eschewed reliance on either novation or estoppel (see para 33) in favour of reliance on an 'implied agreement established by the special facts of the case'. It does not seem to me that the circumstances of this case are special circumstances such as are contemplated by the passage in *Lindley & Banks*, nor that they are sufficient to justify the conclusions set out in paras 65 and 67. Of course, if Burton Marsden Douglas had rendered a bill by which Mr Piper was to be charged for further work, the firm would have

- a had to have given credit for the sums already received by Mr Burton. But that is not the same as saying that, if the bill is taxed down below the sum already paid, the firm, rather than only Mr Burton who had the money, is liable to repay the excess.

ESTOPPEL

- b [34] Mr Farber also put his case on a basis of estoppel by convention or by representation, asserting that Burton Marsden Douglas were estopped from denying that there had been a novation of the entire contract of retainer, including existing liabilities. The evidence does not justify a finding that there was either a representation to that effect, binding on the partners, or a common understanding to that effect. Accordingly this alternative formulation of the case
- c does not arise on the facts.

STATUTORY LIABILITY TO REPAY

- d [35] Alternatively, Mr Farber submitted that s 71(3) of the 1974 Act itself permits the court to order the firm which rendered the bill which is in question to repay any moneys overpaid, regardless of when the previous payments were made, and to whom. I do not accept that. So far as an amount found to be due to the solicitor is concerned, that would follow simply from the outcome of the taxation, taken with any payment on account. As for amounts found due by the solicitor, both ss 70 and 71 of the 1974 Act envisage
- e that a taxation may take place after the bill has been paid: see s 70(3)(c) and (4), and s 71(1) and (3), in each of which there are the words 'has paid ... a bill'. In one sense, therefore, the finding that an amount is due by the solicitor results from the outcome of the taxation of the bill and the fact of prior payment of a greater sum than is found to have been due. But it does
- f not seem to me that the section alone governs the question who may be ordered to repay the relevant amount. Of course it would only be in an unusual case that the point would arise. But it seems to me that Mr Laughton is right in his submission that the section governs, first the process of taxation, and secondly the consequence of the taxation, but does not by itself create a liability to repay on the part of someone who would not otherwise be subject
- g to that liability. It does enable the court to decide to whom the payment should be made, that is to say whether to the trustee or executor or to the beneficiary, but that is in itself largely a procedural point. The liability to be ordered to repay a given amount depends, first, on there having been a taxation, secondly, on the result of the taxation being to reduce the bill below
- h what has already been paid and, thirdly, on identifying the person who is liable to repay the sums overpaid. In almost every case the person so liable will be the firm which rendered the bill. In the present case, because the payments were received by Mr Burton before he went into partnership with the appellants, the person liable is Mr Burton alone.

CONCLUSION

j [36] For these reasons I conclude that Mr Marsden and Mr Douglas are not liable to repay to Mr Piper any sum by which the bill is taxed down, and that the only person who would be so liable is Mr Burton. I therefore disagree with the conclusion of the costs judge and allow the appeal.

[37] I will hear submissions on the consequences of allowing the appeal as regards costs before the costs judge and of the appeal. It follows that it is unnecessary to consider the separate appeal and cross-appeal against the costs order which he made. ^a

Appeal allowed.

Pamela Hardisty Barrister (NZ).

Powell v Wiltshire and others

[2004] EWCA Civ 534

COURT OF APPEAL, CIVIL DIVISION

LATHAM, ARDEN LJ AND HOLMAN J

11, 12 MARCH, 7 MAY 2004

Estoppel – Res judicata – Privity of party to proceedings – Sale of goods – Whether estoppel per rem judicatam binding person claiming under person against whom judgment had been given if interest obtained from that person before judgment.

The appellant trustee was associated with E in a trust venture. Its purpose, at least ostensibly, was to enable disabled people to fly. In 1996 E bought a light aircraft which was registered in his name. Subsequently, the trustee obtained possession of the aircraft. In February 1998 E issued a claim against the trustee and the trust for, inter alia, the return of the aircraft. In April 1998 the trustee filed a defence and counterclaim in which he asserted title to the aircraft on behalf of the trust. In July 1998 E sold the aircraft to three men (the intermediate purchasers). They in turn sold the aircraft to another man (the ultimate purchaser) in July 2000. Shortly afterwards, the action between E and the trustee came to trial. In October 2000 the judge dismissed E's claim, gave judgment for the trustee on his counterclaim and made an order declaring that the aircraft had at all material times been the property of the trustee in his capacity as trustee. The trustee then sought to recover possession of the aircraft from the ultimate purchaser, and detained it despite the latter's requests for its return. In response, the ultimate purchaser commenced proceedings against the trustee, claiming, inter alia, a declaration that he was the true owner of the aircraft. In his defence, the trustee asserted his title to the aircraft based on the judgment in the previous proceedings. The ultimate purchaser then amended his claim to add the intermediate purchasers. At trial, the recorder granted the declaration sought. The trustee appealed, contending that the issue as to the ownership of the aircraft had been determined by the judgment in the previous proceedings; that the intermediate purchasers were bound by that judgment and had accordingly been unable to deny his title in the action brought by the ultimate purchaser; and that they were thus unable to pass good title to the ultimate purchaser. In considering that submission, the Court of Appeal was required to determine whether, under the doctrine of estoppel per rem judicatam, the intermediate purchasers and the ultimate purchaser could be bound as privies by the judgment in the previous proceedings even though they had purchased before that judgment had been given.

Held – Estoppel per rem judicatam could not bind a person who claimed under the person against whom a judgment had been obtained, unless he had obtained his interest from that person after the judgment had been given. The principles applicable to disputes relating to interests in land could be applied by analogy to a case in which title to goods was in dispute. In other words, a person claiming title was privy to the interests of those through whom he claimed that title for the purposes of the operation of the doctrine of estoppel per rem judicatam, but only if the title he claimed had been acquired after the date of the judgment. It followed in the instant case that the ultimate purchaser was not precluded by

those principles from claiming good title to the aircraft. Neither he nor the intermediate purchasers were bound as privies in estate with E because their interest had been obtained before the date of the order in the earlier proceedings. Furthermore, justice did not, in the circumstances, require the court to consider the ultimate purchaser to be bound by the judgment in the previous proceedings on the basis of any suggested wider principles. Accordingly, the appeal would be dismissed (see [25]–[28], [31], [33], [38], [46], [52], [56], [61], [62], [64], below).

Doe d Foster v Earl of Derby (1834) 1 Ad and El 783 and *Hodson v Walker* (1872) LR 7 Exch 55 applied.

Notes

For the requirement that a privy's title be acquired subsequent to judgment, see 16(2) *Halsbury's Laws* (4th edn reissue) para 1001.

Cases referred to in judgments

Brotherton v Aseguradora Colseguros SA [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298.

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853, [1966] 3 WLR 125, HL.

De Burgho's Estate, Re [1896] 1 IR 274.

Doe d Foster v Earl of Derby (1834) 1 Ad and El 783, 110 ER 1406.

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54, [1977] 1 WLR 510.

Hodson v Walker (1872) LR 7 Exch 55.

Hornsby v Greece (1997) 24 EHRR 250, [1997] ECHR 18357/91, ECt HR.

House of Spring Gardens Ltd v Waite [1990] 2 All ER 990, [1991] 1 QB 241, [1990] 3 WLR 347, CA.

Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL.

Langton, Re, Langton v Lloyd's Bank Ltd [1964] 1 All ER 749, [1964] P 163, [1964] 2 WLR 585, CA.

Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co [1894] 1 Ch 578.

Nana Ofori Atta II v Nana Abu Bonsra II [1957] 3 All ER 559, [1958] AC 95, [1957] 3 WLR 830, PC.

Pople v Evans [1968] 2 All ER 743, [1969] 2 Ch 255, [1968] 3 WLR 97.

Wenman (Lady) v McKenzie (1855) 5 E & B 447.

Wytcherley v Andrews (1871) LR 2 P & D 327.

Cases referred to in skeleton arguments

Lock v Norborne (1687) 3 Mod Rep 141, 87 ER 91.

North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547.

Appeal

The appellant, Timothy Wiltshire, the first defendant to a claim brought against him by the claimant and first respondent, Michael Powell, appealed with permission of the Court of Appeal (Judge and Sedley LJ) granted on 18 February 2003 from the order of Mr Recorder Maw in the Lincoln County Court on 1 May 2002 declaring that Mr Powell was the owner of a Maurian Saulnier MS 893 Rallye aircraft which he had purchased from the second to fourth respondents, Paul Etherington, Derek Heapy and Peter Storey, the second to fourth

a defendants to Mr Powell's claim. The facts are set out in the judgment of Latham LJ.

Thomas Keith (instructed through the *Bar Pro Bono Unit*, assisted by *Freshfields Bruckhaus Deringer*) for Mr Wiltshire.

Mr Powell appeared in person.

b Jeremy Janes (instructed by *Jones & Co*, Retford) for Mr Etherington, Mr Heapy and Mr Storey.

Cur adv vult

c 7 May 2004. The following judgments were delivered.

LATHAM LJ.

[1] This appeal arises out of a tug of war over a light aircraft, a Morian Saulnier MS 893 Rallye aircraft (the Rallye). The appellant, Mr Wiltshire, claims that it is his. Mr Powell, the first respondent claims that he acquired good title to it having bought it in good faith from Mr Etherington, Mr Heapy and Mr Storey, the second, third, and fourth respondents. They, in turn, say that they bought it in good faith from Christopher Ebbs, who although a central figure in the story, has played no part in this appeal. The unfortunate position which this appeal seeks to resolve is that Mr Wiltshire obtained a judgment on 21 November 2000 before Judge O'Rorke in proceedings simply between him and Mr Ebbs, declaring that he, Mr Wiltshire was the owner of the Rallye; on 1 May 2002, Mr Powell obtained a judgment from Mr Recorder Maw which is the subject matter of the present appeal, declaring that he was the owner of the Rallye. Mr Wiltshire appeals to this court on the basis that the issue as to the ownership of the Rallye was determined by the judgment of Judge O'Rorke, and that Mr Etherington, Mr Heapy and Mr Storey were bound by that judgment and accordingly unable to deny Mr Wiltshire's title before Mr Recorder Maw. As a result, they were not able to pass good title to Mr Powell.

[2] Mr Wiltshire and Mr Ebbs were at one time associated together in a venture known as the Spilsby Soaring Trust (the trust), of which Mr Wiltshire was trustee. Its purpose, at least ostensibly, was to enable disabled people to fly. It was for a time registered as a charity; but it was deregistered by the Charity Commissioners before the events with which we are concerned as a result of irregularities, which Mr Wiltshire ascribed to dishonesty on the part of Mr Ebbs. It would appear to have been common ground in both sets of proceedings that the trust was the owner of a Piper Cub aeroplane (the Piper) which had been originally bought by Mr Ebbs and subsequently transferred to the trust. On 31 July 1996, the Rallye was bought by Mr Ebbs from Shobden Aircraft Leasing, and was registered with the Civil Aviation Authority in Mr Ebbs's name on 4 October 1996. Meanwhile, Mr Ebbs sold the Piper on 25 August 1996 to Mr Trute. What happened thereafter was a matter of dispute between Mr Wiltshire and Mr Ebbs. On 13 February 1998 Mr Ebbs issued a claim against Mr Wiltshire and the trust for money which was said to be owing to him for work done, and an injunction and the return of the Rallye of which Mr Wiltshire had by then obtained possession.

[3] On 17 April 1998, Mr Wiltshire filed a defence and counterclaim in which he asserted title to the Rallye on behalf of the trust. He did not, however, seek to

obtain an injunction to protect his position until 24 August 1998. He considered that his position was protected by an injunction obtained by Mr Ebbs by consent that he, Mr Wiltshire would not deal in any way with the aircraft. He asserts that this was on the basis of an undertaking by Mr Ebbs that he, likewise, would not deal with it. That undertaking was never recorded as part of any court order. a

[4] By then, the Rallye had been sold to Mr Etherington, Mr Heapy and Mr Storey by Mr Ebbs, as evidenced by a document of sale dated 4 July 1998, and had been registered with the Civil Aviation Authority in the name of Mr Etherington, Mr Heapy and Mr Storey on 21 August 1998. They in turn sold the Rallye to Mr Powell on 20 July 2000; and it was registered in his name with the Civil Aviation Authority on 11 August 2000. b

[5] The trial of the proceedings between Mr Ebbs and Mr Wiltshire commenced before Judge O'Rorke on 17 August 2000. The judge heard evidence for two days from Mr Ebbs, Mr Heapy, Mr Wiltshire's wife and two other witnesses called by him. It was adjourned part heard to 23 September. On that day the trial was further adjourned. Mr Ebbs did not appear but had told the court the previous week that he was intending to file his own petition for bankruptcy. The court was further informed on the day of the hearing that Mr Ebbs had been involved in a traffic accident. The final hearing date was fixed for 21 October 2000. Mr Ebbs once again did not attend; and there was confirmation that a bankruptcy order had been made against him on 20 October 2000. The judge decided to conclude the trial. Although Mr Wiltshire had not given evidence, he had set out his account in the questions that he had put to Mr Ebbs and the other witnesses. Accordingly the judge asked him to confirm those matters on oath and treated the questions as his evidence. The judge then gave judgment dismissing Mr Ebbs's claim and giving judgment for Mr Wiltshire on his counterclaim, and in particular his claim to the Rallye. He expressed his findings as follows: c

'Furthermore, the curious transactions in respect of these aeroplanes do not reflect well upon Mr Ebbs and I am entirely satisfied on the evidence that I have heard thus far, even without requiring further evidence from Mr Wiltshire, that at the material time the Piper was sold without the necessary authority of the trust; secondly, that Mr Wiltshire accepted the de facto position and accepted the purchase of the Rallye in substitution of it; and, further, that on or about 24 July 1998, Mr Ebbs again without authority and possibly dishonestly, sold or transferred, or purported to sell or transfer, that Rallye to a syndicate consisting of three persons: Paul Etherington, Derek Heapy, who was a witness in the case, and one Peter Storey. I am quite satisfied that that was done in the full knowledge that injunctive proceedings had already been started, if abortedly, in the county court and had been transferred to the High Court, and that was a sale made to defeat any order freezing its disposal. The order which was made was too late ... I do not see why in these circumstances Mr Wiltshire, as trustee of the trust, should not be able to pursue that aeroplane and take such steps as he may against the current possessor of it for its return, for it seems to me that in the circumstances, no title could have passed to the trio who purported to buy it from Mr Ebbs or to any person to whom that trio purported to pass on that aircraft. I should say here that those gentlemen quite clearly knew the background of the dispute to the ownership of the Rallye.' d
e
f
g
h
i
j

a [6] Accordingly he gave judgment for Mr Wiltshire, as I have said, and made an order declaring that the Rallye was at all material times the property of Mr Wiltshire as trustee of the trust. He further ordered that Mr Ebbs return the Rallye aircraft by noon on 28 November 2000 and in default pay damages assessed at £12,000.

b [7] Armed with this judgment Mr Wiltshire set about trying to recover possession of the Rallye. Knowing that it had been sold to Mr Powell, he answered an advertisement placed by Mr Powell in a magazine offering his and the Rallye's services to tow gliders. As a result Mr Powell flew the Rallye to the airfield designated by Mr Wiltshire. Mr Wiltshire invited Mr Powell to lunch. He had made arrangements that whilst Mr Powell was away from the aircraft, it should be disabled. He then detained the aircraft despite Mr Powell's requests for its return. Mr Powell then commenced the proceedings with which we are concerned which were originally against Mr Wiltshire alone claiming a declaration that he, Mr Powell, was the true owner of the Rallye, and requiring the return of the aircraft or its value, namely £16,000. Mr Powell then managed to retake possession of the Rallye.

d [8] In his defence, Mr Wiltshire asserted his title to the aircraft based upon the judgment of Judge O'Rorke and counterclaimed, in his turn, for the return of the aircraft. Mr Powell then amended his claim to add Mr Etherington, Mr Heapy and Mr Storey. Against them he claimed damages and an indemnity were it to be found that they had no title to the Rallye. Mr Etherington, Mr Heapy and Mr Storey asserted that they had good title on the basis that they had purchased it from Mr Ebbs, who had good title, and in any event had purchased it in good faith in July 1998. In Pt 20 proceedings, Mr Etherington, Mr Heapy and Mr Storey sought a declaration against Mr Wiltshire that they had good and valid title to the aircraft or alternatively, against Mr Ebbs that they were entitled to an indemnity if he had not been in a position to pass good title.

f [9] The recorder heard evidence from all the parties except Mr Ebbs who did not appear, and was not represented. It is clear that he considered that Mr Powell had purchased the Rallye in good faith without any knowledge that there were problems about its ownership. He was satisfied that Mr Etherington, Mr Heapy and Mr Storey had purchased the aircraft in July 1998. He rejected Mr Wiltshire's assertion that the sale was a sham. He was however unconvinced that at the time of that transaction they were unaware of the fact that there was a dispute as to its ownership.

g [10] None the less he was quite satisfied that he could not accept the evidence of Mr Wiltshire. Unlike Judge O'Rorke, he had had the opportunity to see Mr Wiltshire give evidence and be cross-examined. He was not impressed by his evidence.

h [11] There were two particular issues which the recorder considered to be critical. The first, and perhaps most important, was the evidence which Mr Wiltshire put forward in support of the assertion that he, at least as trustee, was the owner of the Rallye. The recorder noted that there was nothing to substantiate any assertion that the purchase of the Rallye by Mr Ebbs had been financed by the sale of the Piper. But perhaps the most significant aspect of the evidence before the recorder was the assertion by Mr Wiltshire that when, as he said, disputes as to the ownership of the Rallye came to a head in 1998, Mr Ebbs had over dinner agreed to transfer the title to the aircraft to Mr Wiltshire. The recorder noted that this had never been part of Mr Wiltshire's case before Judge O'Rorke, had not been part of any of the pleadings in the original action, had not

been part of any of the pleadings in the action with which he was concerned, and had not been either mentioned or even hinted at in Mr Wiltshire's statement. It had certainly not been part of the statement of Mr Wiltshire's wife. She had, in fact, given evidence at the trial before Judge O'Rorke that the only thing said by Mr Ebbs as to the ownership of the Rallye was to offer a half share in the Rallye after the sale of the Piper. a

[12] But the fact that he came to conclusions so different from those of Judge O'Rorke undoubtedly requires this court to look with some care at the validity of the recorder's decision which is the only one with which we are concerned. And essentially that depends upon an apparently simple question, namely should the court hold that the parties to these proceedings are bound by the decision of Judge O'Rorke on the basis that, although his judgment was not given in an action between them, none the less the original decision should bind all those before the court today as an estoppel. Like many apparent simple questions, it is fraught with difficulty. b c

[13] There is no doubt that as between Mr Wiltshire and Mr Ebbs, the matter is *res judicata* by reason of the judgment of Judge O'Rorke. Mr Ebbs would therefore have been precluded from claiming that he had good title to the Rallye. But neither Mr Etherington, Mr Heapy, Mr Storey, nor Mr Powell were party to those proceedings. The question is, therefore, whether they or more particularly Mr Powell, are none the less bound by reason of the fact that their claimed title to the Rallye was derived from Mr Ebbs. It has to be remembered that by virtue of s 21 of the Sale of Goods Act 1979, the seller of goods can pass no better title than he has. The good faith of the purchaser is irrelevant. d e

[14] The legal principles applicable in determining the extent to which third parties are bound by a judgment in personam, which the judgment of Judge O'Rorke was, are not entirely clear, at least so far as claims involving title to goods are concerned. Under the heading 'Parties estopped by Judgment Determining Rights' the editors of 16(2) *Halsbury's Laws* (4th edn reissue) para 999 say: f

'Parties and privies. A judgment in personam or inter partes raises an estoppel only against the parties to the proceedings in which it is given and their privies, for example those claiming or deriving title under them. As against all other persons it does not prejudice the persons before the court, and with certain exceptions, although conclusive of the fact that the judgment was obtained and of its terms, is not admissible evidence of the facts established by it. g

Privies are of three classes:

(1) privies in blood, for example, ancestor and heir; h

(2) privies in law, for example (formerly) tenant by the curtesy or in dower, and others that came in by act in law, for example testator and executor, intestate and administrator, bankrupt and trustee in bankruptcy;

(3) privies in estate or interest, for example testator and devisee, vendor and purchaser, landlord and tenant, a husband and his wife claiming under his title and a wife and husband claiming under hers, successive incumbents of the same benefice, assignor and assignee of a bond, and the employee of a corporation defending a claim of trespass at the cost of his employers and justifying under their title and the corporation itself. j

A judgment of ouster against a corporator would be conclusive evidence against another deriving title under him, for example by his vote. It is not

a easy to detect from the authorities what amounts to a sufficient interest. The question seems to be determined by an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented.'

b [15] As to 'privies', the editor of the third edition of Spencer Bower Turner and Handley *Res Judicata* (1996) pp 119–120 (para 231) says:

c 'The reasons supporting the application of estoppels to privies were explained by Cababe: "... although the estoppel is only a personal matter between the particular parties yet to really give the parties the benefit of it, and subject them to the burden of it, it is essential that not they only, but those of whom it can be predicted that they are their representatives in interest should likewise have the benefit of and be subject to the burden of the admission. Upon any one therefore upon whom all the rights and obligations of any legal entity devolve such as an executor administrator or trustee in bankruptcy, there will devolve, as one of such rights and obligations, the right to exact or the obligation to be subjected to, the admission; and so too upon any one upon whom the right and obligations arising out of the particular transaction that gave rise to the estoppel devolve, as, for example, a purchaser or assignee, that will also devolve this right and this obligation". *Res judicata* estoppels operate for, or against, not only the parties, but those who are privy to them in blood, title or interest. Privies include any person who succeeds to the rights or liabilities of the party upon death or insolvency, or who is otherwise identified in estate or interest. It is essential that the party to be estopped by privity must have some kind of interest, legal or beneficial, in the previous litigation or its subject matter. Privity was described by the US Supreme Court as a mutual or successive relationship to the same right of property, although this cannot be exhaustive. Hence assignees will be bound as privies of the assignor. Privity is not established by proof of curiosity or concern in the litigation, or "some interest in the outcome". Megarry V-C proposed, as the test of privity in cases which did not fall into any recognised category, the existence of "a sufficient degree of identification between the two parties to make it just to hold that the decision to which one was party should be binding in proceedings to which the other was party". This has been criticised as circuitous and not helpful in identifying when the necessary degree of identification is present.'

g [16] The passage cited was from the judgment of Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at 60, [1977] 1 WLR 510 at 515. Although criticised, as noted by *Spencer Bower*, Lord Bingham of Cornhill, in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 at 500, [2002] 2 AC 1 at 32, cited with approval the whole of the relevant passage in Megarry V-C's judgment, which is as follows:

j 'Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him,

unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter in dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest".' a
b

[17] It is surprising to find that there is no authority cited in either of the two texts to which I have referred, or in any of the cases to which we have been referred, which deals with the question of whether or not a person who claims title to goods is to be estopped from asserting that claim on the basis of proceedings between others, one of whom is the person through whom he claims his title. None of the examples of privies in estate or interest set out in *Halsbury's Laws* include such a relationship: the cases referring to a vendor and purchaser, relate to real property, that is interests in land, as to which there is a significant body of authority. c

[18] From this the following principles are clearly established. First, the same title must have come into question in both actions: see *Doe d Foster v Earl of Derby* (1834) 1 Ad and El 783, 110 ER 1406. This is because there must be an identity of interest between the party to the first action and the party to the second. As a result the specific interest in question has been represented in the earlier proceedings. The second, which follows from the first, is that any person deriving whatever interest is claimed from the litigant in the earlier proceedings will be bound by a judgment in the earlier proceedings if the interest which he claims was one which he obtained subsequent to the judgment. Littledale J said in the *Earl of Derby* case (1834) 1 Ad and El 783 at 790, 110 ER 1406 at 1409: d
e

'A passage has been cited from *Com. Dig. Evidence*, A.5., where it is said, that "a verdict in another action for the same cause shall be allowed in evidence between the same parties. So, it shall be evidence, where the verdict was for one under whom any of the present parties claim." But that must mean a claim acquired through such party subsequently to the verdict: if, as it has been now argued, the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might be carried back for a hundred years. None of the cases support such a proposition.' f
g

[19] This statement of principle was approved by Channell B in *Hodson v Walker* (1872) LR 7 Exch 55 at 61. In *Re De Burgho's Estate* [1896] 1 IR 274 at 280 Madden J put it in this way: h

'According to the clear principles of the law of estoppel it is necessary, in order to estop the objector, to show that he derives title under Dwyer by act or operation of law subsequent to the recovery of the judgment. If this is shown it is reasonable that he should be estopped, because his estate was represented at the time of the recovery of the judgment, though not in his person.' j

[20] This clearly has echoes of a judgment in rem. But it none the less provides a logical basis for the operation of the estoppel. For it is trite law that the court should be cautious about applying an estoppel which could produce, in effect, a fiction. As Megarry V-C said in *Gleeson's case* [1977] 3 All ER 54 at 60,

a [1977] 1 WLR 510 at 516: 'Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions.'

b [21] The rationale of the principle stated so succinctly by Madden J is that the person, defending (or claiming) in the first action should be concerned with precisely the same right which is in issue in the second. If he claims that he has passed on whatever title or interest he had to a third party, he is no longer defending or representing that title or interest. He is defending himself against a purely personal liability. Whilst in most cases it may well be necessary for him, in order to do so, to seek to defend the title or interest that he claimed, that will not necessarily always be the case. On the other hand, it is obviously right as
c Cababe said in the passage referred to in *Spencer Bower* in the passage to which I have already referred, that the successful litigant in an action in which title has been in issue should not have the judgment frustrated by the unsuccessful litigant immediately seeking to dispose of the property in question.

d [22] *Halsbury's Laws* (para 1001) and *Spencer Bower* (p 121) suggest that the privy could be bound if his title arose after commencement of the proceedings in which the judgment was given. Both base the suggestion upon a dictum of Ungeod-Thomas J in *Pople v Evans* [1968] 2 All ER 743 at 746, [1969] 2 Ch 255 at 261. The only support for the possible extension of the principle of privity to an interest obtained after commencement of an action would appear to be a dictum of Romer J in *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578 at 595. Neither dictum is based on any authority; and it seems to me more consistent with the general principle set out by
e Megarry V-C to which I have referred to in [20], above that an estoppel by reason of privity should be restricted to those whose claim to title arose after judgment.

f [23] The explanation for the dicta of Romer and Ungeod-Thomas JJ may be that they were considering not the principles applicable to a privy by reason of interest, but the more general principle enunciated by Megarry V-C which I have referred to in [16], above. In other words they may have considered that the existence of an action at the time that the party sought to be estopped obtained whatever title he claimed might in some general sense be said to raise a sufficiency of interest, at least if he had notice of the action, to justify precluding
g him from relitigating the issues decided in those proceedings. In *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559 at 561, [1958] AC 95 at 102, Lord Denning, giving the advice of the Privy Council said:

h "Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by LORD PENZANCE in *Wytcherley v. Andrews* ((1871) LR 2 P & D 327 at 328). The full passage is in these words: "... there is a practice in this court, by which any
j person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case."

[24] That principle has not been developed. Indeed it was doubted by Dankwerts and Diplock LJ in *Re Langton, Langton v Lloyd's Bank Ltd* [1964] 1 All ER 749, [1964] P 163 as being a rule only applicable to a case in the Probate Division. However, it was approved by Stuart Smith LJ in *House of Spring Gardens Ltd v Waite* [1990] 2 All ER 990 at 999, [1991] 1 QB 241 at 253 as being of general application. a

[25] In the light of these authorities, even though there is no direct authority to this effect, I am prepared to accept that where title to goods is in dispute, the same principles can be applied by analogy as those which are applicable to disputes relating to interests in land. In other words a person claiming title is privy to the interests of those through whom he claims that title for the purposes of the operation of the doctrine of estoppel per rem judicatam but only if the title he claims was acquired after the date of the judgment. b

[26] It follows that Mr Powell is not precluded by these principles from claiming good title to the Rallye, which he purchased before the date of the judgment in question. He can only be precluded from asserting good title by reason of the wider principles suggested in the judgment of Megarry V-C in *Gleeson's case* and the approval by Stuart Smith LJ in the *House of Spring Gardens* case of the citation from Lord Denning in the *Nana Ofori* case. Whatever may be said about the position of Mr Etherington, Mr Heapy who gave evidence in the earlier proceedings, and Mr Storey it has never been suggested that Mr Powell stood by in the knowledge of the proceedings, let alone took any part in them. On the other hand, it is clear from the judgment of Judge O'Rorke, that Mr Wiltshire knew full well that by the time his claim came to trial, the Rallye was in the possession of Mr Powell. He took no steps to join Mr Powell in the proceedings nor did he take any steps in relation to Mr Powell to protect his claimed ownership in the aircraft. It is a pity that Judge O'Rorke did not indicate to Mr Wiltshire that it would be necessary to join Mr Powell in the proceedings in order to ensure that the issues could be fully and properly litigated in those proceedings. I can see no reason why, in those circumstances, justice requires the court to consider Mr Powell to be bound by that earlier judgment on any of the principles to which we have been referred. And for the reasons given by Arden LJ in her judgment, a draft of which I have had the opportunity to read, it was inappropriate to give a judgment in the form of a declaration suggesting that it resolved any issue other than that between the parties to that action. c
d
e
f
g

[27] I would accordingly dismiss this appeal.

ARDEN LJ.

[28] I gratefully adopt Latham LJ's recitation of facts. I agree that this appeal should be dismissed. h

[29] Stripped of inessential detail, the material facts of this case and the order in which they occur are as follows: A claims ownership of an aeroplane held by B. B sells the aeroplane to C. C sells the aeroplane to D. In action brought by B against A, A obtains a declaration against B that he owns the aeroplane. C and D are not parties to this litigation. A contends that the judgment which he has obtained against B is binding on D. j

[30] A particular feature of this case is that C and D derive their title from B and that both judgments concern the ownership of the same aircraft. It is common ground that A's contention can only succeed if C and D are 'privies' in respect of the judgment which A obtained against B. It is not suggested that D is liable on any other basis.

a [31] In my judgment, the case of *Hodson v Walker* (1872) LR 7 Exch 55 is authority for the proposition that estoppel per rem judicatam cannot bind a person who claims under the person against whom a judgment was obtained, unless he obtained his interest from that person after the judgment was given. In summary, *Hodson's* case concerned premises known as the Red Lion Inn, Grasmere and certain outbuildings. In February 1852, Walker allowed one b Usher, who owned the Red Lion Inn, to build a shed on his (Walker's) adjoining land in return for a rent of 1s a year. In November 1852, Usher demised the Red Lion Inn to Hodson and the lease included the shed. In 1870 Walker brought proceedings against Usher for possession of the shed. He obtained judgment and a warrant was issued to the bailiff who recovered possession on Walker's behalf. Hodson, who thereby lost possession, brought proceedings for trespass. At trial c Martin B ruled that Hodson had no cause of action on the basis that the order of the county court bound him as well as Usher. An application was made to the Court of Exchequer Chamber to discharge this rule. The Court of Exchequer Chamber is a court of co-ordinate jurisdiction with this court. The first judgment was given by Pigott B. He held that the statutory provisions giving the county d court power to make an order for possession did not bind persons who were not party to the proceedings and that accordingly the rule had to be discharged. Pigott B clearly thought it was arguable that Hodson could bring an action in trespass where the superior landlord had obtained judgment against the intermediate tenant. By implication, therefore, he must have accepted that Hodson was not bound by the judgment against Usher because, if he had been, e that would have been a complete answer to his claim in trespass. The second judgment was given by Channell B. As Latham LJ has said, Channell B approved the statement of Littledale J in *Doe d Foster v Earl of Derby* (1834) 1 Ad and El 783, 110 ER 1406 that a verdict which is evidence against A is not admissible against B on the ground that B claims under A unless B acquired his interest from A's title f subsequent to the verdict. That was the primary basis on which Channell B held that the rule made by Martin B at trial had to be discharged. He also came to the same conclusion as Pigott B on the question of statutory interpretation.

[32] The third judgment was given by Martin B, who, curiously to modern eyes, was sitting on the application to discharge the rule that he had made. Martin B dissented on the question of statutory construction. He did not refer to the question of estoppel per rem judicatam. However, if he had thought it was a good point, it would have been unnecessary for him to deal with the question of statutory construction. g

[33] Accordingly, in my judgment, *Hodson's* case is an authority for the proposition which is necessary for the respondents in this appeal, namely that h they are not bound as privies in estate with Mr Ebbs, because their interest was obtained prior to the date of the order of Judge O'Rorke. As such, it may indeed be binding on this court (see *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ 705 at [19], [2003] 2 All ER (Comm) 298 at [19], footnote 1). I would certainly follow it in any event.

j [34] Estoppel per rem judicatam works mutually. As Lord Chief Baron Gilbert in his treatise on evidence, which is quoted by Coleridge J in *Lady Wenman v McKenzie* (1855) 5 E & B 447 at 458, put it 'nobody can take benefit by a verdict that had not been prejudiced by it, had it gone contrary'. Accordingly, if C and D had acquired their interest from B but after judgment in the action brought by A against B, and in that action B had obtained a declaration that B was the owner of the aircraft, C and D could have claimed that they were privies in

estate with B and that A was, therefore, estopped from starting new proceedings against them to contest their ownership of the aircraft. a

[35] In his skilful argument, Mr Keith, for Mr Wiltshire, contended that Mr Powell was bound by privity of interest. As to the meaning of privity of interest, he relied on the dictum of Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at 60, [1977] 1 WLR 510 at 515, which was approved by Lord Bingham of Cornhill in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 at 500, [2002] 2 AC 1 at 32. Mr Keith submits, therefore, that Mr Powell will be bound even if Mr Ebbs had no proprietary interest in the aircraft at the time of the judgment. Indeed, he submits that privity should not depend on the existence of a proprietary interest because it is that very interest which is in question. For my part, I consider that, if a successor in title to property is not bound by an earlier judgment as a privy in estate, it cannot be just, without further facts, that he should be treated as a privy of interest. This is not a case where the respondents stood by and watched Mr Ebbs and Mr Wiltshire fight out the battle for them. Accordingly, I would reject Mr Keith's submission on privity of interest. b
c

[36] *Res judicata* promotes the important public policy of finality in legal proceedings and thus legal certainty. In addition, a party has a right under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to the proper enforcement of any judgment that he obtains: see *Hornsby v Greece* (1997) 24 EHRR 250. The result in the present case is not to deprive Mr Powell of any property contrary to art 1 of the First Protocol to the convention. If he had acquired title from Messrs Etherington, Heapy and Storey after the judgment obtained by Mr Wiltshire against Mr Ebbs, and had lost his title as a result of estoppel per rem judicatam, the interference with this property would, in my judgment, have been justified by the rule of law in question for the following reason. If there was no estoppel per rem judicatam in this situation, the result would always be that a defendant to an action about the ownership of property could always avoid the result of an adverse judgment by disposing of the property before the judgment was enforced. That could clearly be an intolerable state of affairs and thus the rule is justified under art 1. d
e
f

[37] Mr Keith submits that there is a danger of multiplicity of proceedings as a result of the proposition referred to above. In my judgment, the more compelling interest is that, using the letters given in my summary of the problem above, C and D should not have their right to contest A's claim to ownership of the property taken away without their knowledge or consent save in exceptional circumstances. I have already explained why, in my judgment, those exceptional circumstances, namely that they acquire their title after judgment against B, are justified. g
h

[38] Accordingly, I too would dismiss this appeal.

[39] I wish to conclude with some observations about the form of the declaration made by Judge O'Rorke. j

[40] I do not find it as surprising as Latham LJ that there is little authority on the present point. The precise form of the order made by Judge O'Rorke was as follows:

'2. The aeroplane described as the Rallye G-AVVJ was at all material times the property of Timothy James Wiltshire as trustee of the trust and remained

a such at the time, on or about 4 July 1998, of its purported sale to Messrs Paul Etherington, Derek Heapy and Peter Storey.'

[41] The declaration thus drawn gives rise to the impression that Mr Wiltshire remained the owner of the aircraft notwithstanding its sale by Mr Ebbs to Messrs Etherington, Heapy and Storey. The declaration fails to make it clear that it could only deal with the position as to the ownership of the aircraft so long as no party b other than Mr Ebbs had acquired, or purported to acquire, an interest in it.

[42] Prior to the CPR, declaratory judgments were the subject of RSC Ord 15, r 16 and the commentary under that rule in the *Supreme Court Practice* (1999 edn) vol 1 (para 15/16/1) stated that—

c 'The jurisdiction of the Court to make a declaration of right is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it ...'

[43] On this basis, the form of declaration which Judge O'Rorke should have made was as to the ownership of the aircraft *immediately prior* to the sale by Mr Ebbs to Messrs Etherington, Heapy and Storey.

d [44] RSC Ord 15, r 16 has now been replaced by CPR 40.20. The commentary in the White Book (*Civil Procedure* (Autumn 2003 edn)) vol 1 (para 40.20.1) states that r 40.20 is to the same effect as the former RCS Ord 15, r 16. Accordingly, the declaration which Judge O'Rorke made does not follow the usual practice of the court. Therefore it is perhaps not surprising that the problem that has arisen in e this case has not arisen in any previously reported authority (as far as the researches of counsel show). If the declaration contained in the order of Judge O'Rorke had been in an appropriate form, the problem in this case may well not have arisen.

[45] The commentary formerly contained in the *Supreme Court Practice* as to whether it is appropriate to grant a declaration has been updated in the White f Book. However it has, as a result, now lost the sense that declarations should go no further than declare the rights of the parties before the court. I hope that editors of the commentary on the CPR in the White Book and other works will consider this point for the future.

g **HOLMAN J.**

[46] I also agree that this appeal should be dismissed.

[47] I agree with Latham LJ that it is surprising that there is apparently no authority nor clear statement of principle as to the application of the doctrine of estoppel of privies to the sale of goods.

h [48] To apply the same rules as to estoppel of privies to goods as to land may appear to blur important distinctions between land and goods. But it does not do so, for I agree with the submission of Mr Keith, on behalf of the appellant Mr Wiltshire, that the application of the doctrine of *res judicata* to privies does not depend and is not based upon proprietary rights. Rather, as Lord Reid said in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536 at 550, [1967] j 1 AC 853 at 910, it requires 'that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter'. As Megarry V-C said in *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at 60, [1977] 1 WLR 510 at 515:

'... the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and

the other party to the litigation. This is in the interest both of the successful party and of the public.' a

So the foundation of the doctrine is not proprietary rights but the quite different need for finality in litigation.

[49] Where, however, the actual party sought to be bound was not himself a party to the previous litigation, the principle of finality may conflict with another important principle that— b

'Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence.' (See [1977] 3 All ER 54 at 60, [1977] 1 WLR 510 at 516 per Megarry V-C). c

Accordingly—

'He ought not to be concluded [sic, but perhaps should read 'precluded'] by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him.' d

[50] The importance of the need for finality is not simply that of avoiding a multiplicity of actions. It is also as explained by Cababe in his *Principles of Estoppel* (1888) and cited by Spencer Bower Turner and Handley *Res Judicata* (3rd edn, 1996) p 119 (para 231): e

'... although the estoppel is only a personal matter between the particular parties yet to really give the parties the benefit of it, and subject them to the burden of it, it is essential that not they only, but those of whom it can be predicted that they are their representatives in interest should likewise have the benefit of and be subject to the burden of the admission.' f

[51] In my view this rationale applies with equal force in relation to goods as it does to land. If after A has obtained a final judgment establishing that a chattel belongs to A rather than B, A wishes to sell it, it is essential that the purchaser can rely on the judgment as against B for otherwise A cannot really benefit from his judgment. Any alternative view would lead to uncertainty and commercial chaos. g

[52] So I would hold that the doctrine of privity applies in the same manner to a judgment determining the ownership of goods as it does to one determining the ownership of land. h

[53] The next question is, however, the scope or boundary of that doctrine and, specifically, whether it extends to bind a purchaser (whether of land or goods) when the sale took place before the date of the judgment relied upon.

[54] As a matter of principle it seems to me impossible to hold that privity arises when the sale took place even before the commencement of the proceedings. For if it did, then ex hypothesi the vendor no longer had an interest in the subject matter during the currency of the proceedings. If A has already sold to C then in reality it is C not A who has an interest to defend in the proceedings and a decision against A cannot possibly 'fairly and truly be said to be in substance a decision against' C. j

a [55] In my view the same principle applies to sale during the course of proceedings but before judgment. From the moment that A has sold, he has ceased to have an interest in the subject matter and has not reached the point where he needs 'really' to obtain the benefit of the judgment. The unfairness of binding the purchaser in such circumstances is well illustrated by the facts of the present case. During the course of the proceedings Mr Ebbs purported to sell the aeroplane. He later became bankrupt and neither he nor his trustee in bankruptcy actively maintained their defence to the claim by Mr Wiltshire so that, by the time he gave judgment, Judge O'Rorke was hearing argument from one side, Mr Wiltshire, alone. (I stress, however, that where the doctrine of privity does apply, then it cannot be defeated by examining the sufficiency or quality of the defence to the first action.)

c [56] Turning to authority, I have read in draft the judgment of Arden LJ. I gratefully adopt her analysis of *Hodson v Walker* (1872) LR 7 Exch 55 and agree that it is English authority for the proposition that a person is not bound as a privy unless he acquired his interest after the date of the verdict or judgment relied upon.

d [57] In my view the principle was correctly and most succinctly stated by Madden J in the Irish case of *Re De Burgho's Estate* [1896] 1 IR 274 at 280 where he said:

e 'According to the clear principles of the law of estoppel it is necessary, in order to estop the objector, to show that he derives title ... by act or operation of law subsequent to the recovery of the judgment. If this is shown it is reasonable that he should be estopped, because his estate was represented at the time of the recovery of the judgment, though not in his person.'

f [58] In *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578 at 595, Romer J said: 'A prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase.' However on the facts of that case the question of purchase after commencement of the action but before judgment did not arise for consideration and there is nothing in that dictum or elsewhere in the judgment to indicate that in such a case the purchaser would be bound.

g [59] In *Pople v Evans* [1968] 2 All ER 743 at 746, [1969] 2 Ch 255 at 261, Ungood-Thomas J was quoting a passage from *Halsbury's Laws* when he 'added' that 'the title relied on to establish such privity must arise after the judgment on which the res judicata is based, or at any rate after the commencement of the proceedings in which that judgment was made ...'. But he immediately continued 'and such title as Mrs. Pople might have here arose before relevant proceedings were commenced'. The observation is, accordingly, entirely obiter; and no authority is cited for the proposition 'or at least [subsequent] to the beginning of the proceedings' in the corresponding paragraph (para 1001) in the current edition of *Halsbury's Laws* to that quoted by Ungood-Thomas J.

j [60] In my view neither these dicta of Romer and Ungood-Thomas JJ nor the passage in *Halsbury's Laws* require or justify that we enlarge the scope of the estoppel so as to bind a person who purchased before the date of the judgment relied upon.

[61] I would accordingly hold that a purchaser is only bound as a privy if the purchase took place after the date of the judgment relied upon.

[62] In this case Messrs Etherington, Heapy and Storey and also Mr Powell all purchased the aircraft before the date of the judgment of Judge O'Rorke and in my view none of them is bound by it. a

[63] I appreciate that this leads to the unedifying position that there are two different judgments of Judge O'Rorke and Mr Recorder Maw which conflict in their determination of the same issue. That could and should have been avoided by Judge O'Rorke joining Messrs Etherington, Heapy and Storey and also Mr Powell as parties to the proceedings before him, since he was well aware of the successive purported sales to them. But the fact that the judgments conflict should not be a reason for extending the doctrine of privity so as unfairly to bind those purchasers. b

[64] I would accordingly dismiss this appeal. c

Appeal dismissed. Permission to appeal refused.

Kate O'Hanlon Barrister.

R (on the application of West) v Lloyd's of London

[2004] EWCA Civ 506

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MUMMERY AND DYSON LJJ

1, 2 MARCH, 27 APRIL 2004

Judicial review – Application for permission to apply for judicial review – Applicant seeking to challenge decisions of committee of Lloyd's of London – Whether decisions amenable to judicial review – Whether Lloyd's exercising public function – Human Rights Act 1998, s 6.

The applicant was a member of various underwriting syndicates of the Society of Lloyd's. Membership of a syndicate was purely voluntary and effected by a contract with Lloyd's. Each syndicate was managed by managing agents and the activities of the syndicates were regulated by the Council of Lloyds, which was itself subject to external regulation by the Financial Services Authority (FSA). The applicant sought to bring judicial review proceedings in respect of four decisions of the Business Conduct Committee of Lloyd's (BCC), each of which approved minority buy-outs in four syndicates in which he was a member. The power to enable such buyouts was contained in the Major Syndicate Transactions (MST) Byelaw which was made under the Lloyd's Act 1982. The applicant complained, inter alia, that his share of the syndicate capacity had been purchased at an undervalue and about his lack of access to a right of appeal. He argued that the relevant decisions were amenable to judicial review and were also subject to s 6(1)^a of the Human Rights Act 1998 under which it was unlawful for a public authority to act in a way which was incompatible with certain rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in the 1998 Act). Those avenues of complaint were only open to the applicant if it could be shown that Lloyd's had been exercising 'public functions'. The applicant argued that Lloyd's was performing functions in its exercise of power under the MST Byelaw which formed part of its regulation in the public interest of an important section of the United Kingdom insurance market, and also placed reliance on the fact that Lloyd's derived its powers from an Act of Parliament. The judge refused permission to apply for judicial review on the basis that Lloyd's was not a public authority and that the decisions of one of its committees were not made in the exercise of a public function. The Court of Appeal subsequently granted permission and reserved to itself determination of the question whether Lloyd's was amenable to judicial review.

Held – (1) The decisions under challenge were concerned solely with the commercial relationship between the applicant and the relevant managing agents, governed by the contracts into which he had chosen to enter. The

^a Section 6, so far as material, is set out at [33], below

decisions were of a private and not a public nature. The BCC did not exercise governmental functions in its operation of the MST Byelaw, but was itself subject to external governmental regulation. Further, the fact that Lloyd's corporate arrangements were underpinned by a private Act of Parliament made it in no way unique and was not dispositive of the matter (see [30]–[32], [42], [43], below); *R v Lloyd's of London ex p Briggs* [1993] 1 Lloyd's Rep 176 affirmed.

(2) Section 6 of the 1998 Act did not apply as Lloyd's was not exercising public functions within the meaning of that section. The nature of Lloyd's was not governmental even in the broad sense of that expression. Within the field, it was the FSA which exercised governmental functions and it was that body that was answerable for any breaches of the convention. The fact that Lloyd's regulated its members' activities in the way it did, through a desire to avoid a more intrusive governmental regulatory regime, could not possibly convert it into a body exercising public functions itself. Lloyd's was not therefore amenable to judicial review and the application would be dismissed (see [38]–[40], [42], [43], below); *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604, *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 All ER 1213 applied.

Notes

For the law relating to public bodies and public authorities for the purposes of judicial review see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 6.

For the Human Rights Act 1998, s 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 535.

Cases referred to in judgments

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2003] 3 All ER 1213, [2003] 3 WLR 283.

Doll-Steinberg v Society of Lloyd's [2002] EWHC 419 (Admin).

Hautanemi v Sweden (1996) 22 EHRR CD 155, E Com HR.

Holy Monasteries v Greece (1995) 20 EHRR 1, [1994] ECHR 13029/87, ECt HR.

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.

R v Corporation of Lloyd's, ex p Lorimer (16 December 1992, unreported).

R v Council of Society of Lloyd's, ex p Johnson (16 August 1996, unreported), Admin Ct.

R v Insurance Ombudsman Bureau, ex p Aegon Life Assurance Ltd [1995] LRLR 101, DC.

R v Lloyd's of London, ex p Briggs [1993] 1 Lloyd's Rep 176, DC.

R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening) [1987] 1 All ER 564, [1987] 1 QB 815, [1987] 2 WLR 699, CA.

R (on the application of Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366, [2002] 2 All ER 936.

R (on the application of Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 2, [2003] IRLR 439, [2003] ICR 599.

Society of Lloyd's v Clementson [1995] CLC 117, CA; *rvsg* [1994] ECC 481.

Cases referred to in skeleton arguments

- a** *Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept* [2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] 2 WLR 603.
Colman v Eastern Counties Rly Co (1846) 10 Beav 1.
Interbrew SA v Competition Commission [2001] EWHC Admin 367, [2001] UKCLR 954, Admin Ct.
- b** *James v UK* (1986) 8 EHRR 123, [1986] EHRR 8795/79, ECt HR.
Marcic v Thames Water Utilities Ltd [2002] EWCA Civ 64, [2002] 2 All ER 55, [2002] QB 929, [2002] 2 WLR 932; *rvsd* [2003] UKHL 66, [2004] 1 All ER 135, [2003] 3 WLR 1603.
O'Reilly v Mackman [1982] 3 All ER 680, [1983] 2 AC 237, [1982] 3 WLR 604, CA; *affd* [1982] 3 All ER 1124, [1983] 2 AC 237, [1982] 3 WLR 1096, HL.
R v Derbyshire CC, ex p Noble [1990] IRLR 332, [1990] ICR 808, CA.
R v British Coal Corp, ex p Vardy [1993] ICR 720, DC.
R v Committee of Lloyd's, ex p Posgate (1983) Times, January 12, DC.
R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 2 All ER 853, [1993] 1 WLR 909, CA.
- d** *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207, DC.
R v Legal Aid Board, ex p Donn & Co (a firm) [1996] 3 All ER 1.
R v Regulatory Board of Lloyd's of London, ex p MacMillan [1995] LRLR 485.
R v Secretary of State for the Home Dept, ex p Leech [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.
R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
R v Somerset CC, ex p Fewings [1995] 3 All ER 20, [1995] 1 WLR 1037, CA; *affg on other grounds* [1995] 1 All ER 513.
- f** *R v Visitors to the Inns of Court, ex p Calder, R v Visitors to the Inns of Court, ex p Persaud* [1993] 2 All ER 876, [1994] QB 1, [1993] 3 WLR 287, DC and CA.
R (on the application of Evans) v University of Cambridge [2002] EWHC 1382 (Admin), [2003] ELR 8.
R (on the application of Fleurose) v Securities and Futures Authority Ltd [2001] EWHC Admin 292, [2001] 2 All ER (Comm) 481.
- g** *Tomkinson v South Eastern Rly Co* (1887) 35 Ch D 675.
Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568.

Appeal

- h** Dr Julian West applied, with permission of Ward and Latham LJ granted on 3 October 2003, for judicial review of four decisions of the Business Conduct Committee of Lloyd's of London, made respectively on 3 October 2002, 11 October 2002 and 5 November 2002. The Court of Appeal directed that the question whether decisions of Lloyd's were amenable to judicial review was to be reserved to the Court of Appeal and tried first. The facts are set out in the judgment of Brooke LJ.
- j**

Gordon Nardell (instructed by Bindman & Partners) for Dr West.

Paul Walker QC and Marie Demetriou (instructed by Sean McGovern) for Lloyd's.

Cur adv vult

27 April 2004. The following judgments were delivered.

BROOKE LJ.

INDEX

No	Heading	Para no
1.	Introductory	[1]
2.	Lloyd's: (i) its status, powers and governance arrangements	[4]
3.	Lloyd's: (ii) the external regulatory regimes	[7]
4.	Lloyd's: (iii) its members, syndicates and managing agents: minority buy-outs	[8]
5.	The impugned decisions: Dr West's claims	[12]
6.	The obligations owed by Lloyd's to its members	[15]
7.	Lloyd's and judicial review: the Administrative Court decisions	[17]
8.	Lloyd's: the regulatory regime under the Financial Services and Markets Act 2000	[21]
9.	Lloyd's and the exercise of power under the MST byelaw: amenability to judicial review	[27]
10.	Lloyd's and the exercise of power under the MST byelaw: s 6(1) of the Human Rights Act 1998	[33]
11.	Conclusion	[40]
12.	Transfer, retention in the Administrative Court, or a new start?	[41]

1. INTRODUCTORY

[1] On 23 December 2002 Dr Julian West issued a judicial review claim form in which he sought to impugn four decisions of the Business Conduct Committee (BCC) of Lloyd's of London to approve four minority buy-outs of his memberships—or potential memberships—in four syndicates at Lloyd's. These decisions were made in October and November 2002. On 6 May 2003 Dr West appeared in person before Keith J who refused him permission to apply for judicial review on the grounds that Lloyd's was not a public authority and that the decisions of one of its committees were not made in the exercise of a public function. On 3 October 2003 this court (Ward and Latham LJ) granted him permission to apply for judicial review and

a directed that the question whether Lloyd's was amenable to judicial review, whether by virtue of s 6 of the Human Rights Act 1998 or otherwise, in relation to its functions under scrutiny in this case, be reserved to this court and tried first.

b [2] The reason why the court took this unusual step was that there had been a series of cases in what is now the Administrative Court which upheld the proposition that Lloyd's did not operate in the public sphere, at any rate in relation to those of its functions that were under consideration in those cases, and although the coming into force of the 1998 Act added a new dimension to the debate, it was thought inappropriate to remit the issue back to the Administrative Court in the light of the strong line of earlier authority at that level. This line of authority starts with *R v Lloyd's of London, ex p Briggs* [1993] c 1 Lloyd's Rep 176, and includes a judgment of mine (when sitting as a single judge of the High Court) in *R v Council of Society of Lloyd's, ex p Johnson* (16 August 1996, unreported).

d [3] It needs to be stressed at the outset that this case is concerned only with the functions performed by the Council of Lloyd's (the council) and its committees when they are exercising regulatory powers in relation to the affairs of the members of Lloyd's and of other people, such as members' agents or managing agents of Lloyd's syndicates, who are involved in different aspects of the transaction of business at Lloyd's. It is not concerned with the exercise of disciplinary functions, nor with the exercise of regulatory functions for the protection of policyholders.

e 2. LLOYD'S: (i) ITS STATUS, POWERS AND GOVERNANCE ARRANGEMENTS

f [4] I will start by giving a brief outline of the issues we have to consider in the context of their historical and institutional setting. The Society of Lloyd's is an association of insurance underwriters. As a matter of legal form, it is a statutory corporation incorporated by a private Act of Parliament, the Lloyd's Act 1871. The underwriting of insurance business is carried on at Lloyd's by its members (otherwise known as 'names'). Lloyd's manages and superintends the Lloyd's insurance market.

g [5] Lloyd's powers are derived from a number of private Acts of Parliament (the Lloyd's Acts 1871–1982). Its objects, which are set out in s 10 of the 1871 Act, as amended by s 4 of the 1911 Act, are all of a commercial nature.

h [6] Lloyd's is now governed by the council. By s 6(1) of the Lloyd's Act 1982, the council possesses the powers to regulate and direct the business of insurance at Lloyd's and to exercise all the powers of the Society. The council acts through various committees. At the time of the decisions affecting Dr West these included the Lloyd's Regulatory Board, which acted through the BCC in relation to the matters in issue. Section 6(2)(a) of the 1982 Act gives the council the power to make byelaws, as appropriate.

j 3. LLOYD'S: (ii) THE EXTERNAL REGULATORY REGIMES

[7] Lloyd's has long been subject to external regulation. At EU level Lloyd's is treated as an 'insurance undertaking' for the purposes of insurance regulation, and as an 'association of undertakings' for the purposes of competition law. At national level the principal statute governing the regulation of insurers in recent times was the Insurance Companies Act 1982

(ICA 1982), which gave the Department of Trade and Industry power to regulate the insurance market generally. Special provision was made by s 83 of the ICA 1982 to regulate the conduct of insurance business by each individual member of Lloyd's. In practice, so long as members of Lloyd's complied with the quite limited requirements of that section, they would not be subject to the detailed monitoring requirements for insurance companies that are set out in Pt II of the ICA 1982. Since 1 December 2000, however, Lloyd's has been subjected to a far more extensive regulatory regime in which the prudential regulation of all insurance entities, including Lloyd's, is now exercised by the Financial Services Authority (FSA) under the provisions of the Financial Services and Markets Act 2000.

4. LLOYD'S: (iii) ITS MEMBERS, SYNDICATES AND MANAGING AGENTS

[8] The underwriting syndicates at Lloyd's are composed of members of Lloyd's. They are managed by managing agents. The members can now be corporate or non-corporate. Membership of Lloyd's is entirely voluntary, and every member enters into a contract with Lloyd's which contains the following express obligations: (a) throughout the period of their membership, to comply with the provisions of the Lloyd's Acts 1871–1982, any subordinate legislation made or to be made thereunder, and any direction given or provision or requirement made or imposed by the council or any person or body acting on its behalf; (b) to become a party to, perform and observe all the terms and provisions of any agreements or other instruments as may be prescribed and notified to the member or his underwriting agent by or under the authority of the council. It follows that Lloyd's byelaws are binding on each member in contract.

[9] At the heart of the present dispute is the relationship between the members of a syndicate and the syndicate's managing agent. The extent of a member's right to participate in a syndicate is governed exclusively by the terms of his contract with the managing agent. Before 1994 the managing agent could simply terminate the agreement by notice expiring at the end of an underwriting year, but Lloyd's turbulent experiences in the late 1980s and early 1990s led not only to the introduction of corporate membership but also to the introduction of a new regime with effect from January 1995 whereby if a managing agent proposed to terminate a member's participation in a syndicate it was obliged to obtain the prior consent of the council. The effect of this change was to give a member the right in certain circumstances to participate in the syndicate for the following year of account. A system of 'auctions' of syndicate participations was also introduced by which members could 'sell' that right.

[10] The reforms at Lloyd's included the development of what became known as an integrated Lloyd's vehicle (ILV), being a single corporate member managed by an affiliated managing agent. In order to facilitate the growth of ILVs, Lloyd's created a framework by which a corporate member under common ownership with a syndicate's managing agent, might offer to acquire the participation of members of that syndicate. It also developed rules which obliged a member with more than 75% of a syndicate's capacity to make an offer to buy the capacity of the other members of the syndicate, and other rules which permitted minority buy-outs by managing agents or corporate members who acquired 90% or more of a syndicate's capacity.

- a* [11] The minority buy-out rules are contained in the Major Syndicate Transactions Byelaw (the MST Byelaw), which was approved by the council in May 1997. Under this byelaw, a minority buy-out must be preceded by an offer (whether mandatory or voluntary). Where 50% or more of offerees have accepted the offer and the offeror and his associates hold at least 90% of the syndicate capacity, the MST Byelaw permits an offeror to buy out the remaining minority, subject to the approval of the council.
- b*

5. THE IMPUGNED DECISIONS: DR WEST'S CLAIMS

- c* [12] The decisions which Dr West seeks to impugn in these proceedings were made by the BCC pursuant to the MST Byelaw. By the first decision, made on 3 October 2002, the BCC gave final approval to a proposal by Catlin Underwriting Agencies Ltd, as managing agents of syndicate 1003, to terminate its contracts with syndicate members. By the second decision, made on 11 October 2002, similar approval was given to a proposal by Amlin Underwriting Ltd in relation to syndicate 2001. Dr West was a member of both these syndicates.

- d* [13] The third and fourth decisions, made on 8 November 2002, gave similar approval to a proposal by St Paul Syndicate Management Ltd in relation to syndicate 340 and to a proposal by Faraday Underwriting Ltd in relation to syndicate 435. Dr West had participated in an 'auction' process in which the 'right' to join these syndicates for the 2003 year of account was being 'purchased' subject to the possibility of a minority buy-out. We were told by Mr Nardell, who appeared for Dr West, that his client knew that buy-out applications had been made when he placed his bid in these auctions.
- e*

- f* [14] In these proceedings Dr West complains that his share of syndicate capacity was purchased at an undervalue. He also complains about his lack of access to a right of appeal against the BCC's decisions, and his inability to sue the council for negligence unless it acted in bad faith (see s 14(3) of the 1982 Act). In these circumstances he wishes to invoke the provisions of art 1 of the First Protocol to and arts 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). If Lloyd's was not exercising public functions in relation to these matters, these avenues of complaint will not be available to him. Hence the importance of the present application.
- g*

6. THE OBLIGATIONS OWED BY LLOYD'S TO ITS MEMBERS

- h* [15] In *Society of Lloyd's v Clementson* [1995] CLC 117 this court considered the nature of the obligations owed by Lloyd's to its members in relation to the regulation and direction of insurance business at Lloyd's. It concluded that the contract of membership contained no implied obligations on Lloyd's, although independent of contract a member might assert against Lloyd's obligations not to act unlawfully, ultra vires, for an improper purpose, or in bad faith. Furthermore a member might rely on EU law to impugn a decision of Lloyd's as an association of undertakings if an impugned decision might affect trade between member states and had as its object or effect the prevention, restriction or distortion of competition within the common market.
- j*

- [16] Dr West, however, asserts two more species of obligations: an obligation founded on public law which renders Lloyd's amenable to judicial

review, and an obligation imposed on Lloyd's as a public authority by s 6(1) of the 1998 Act. a

7. LLOYD'S AND JUDICIAL REVIEW: THE ADMINISTRATIVE COURT DECISIONS

[17] There have been, as I have said, a number of decisions of the Administrative Court in which it was said that the decisions impugned in those proceedings were not amenable to judicial review. In *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176 the Divisional Court was concerned with a case in which members of Lloyd's challenged the legal validity of cash calls made on them by the managing agents of their syndicates. The court's conclusions on the issues that are relevant in the present proceedings were set out crisply by Leggatt LJ (at 185): b

'It does not help to refer to the respondents as Regulators or to describe the system administered by the Corporation of Lloyd's as a regulatory regime as is done in the form 86 in these proceedings. The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents ... We do not consider that that involves public law. That is consonant with Mr. Justice Saville's conclusion that a Name was not entitled to disregard a cash call made in good faith by the members' agents. We accordingly endorse [counsel for Lloyd's'] submission that "all of the powers which are the subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf". Lloyd's is not a public law body which regulates the insurance market. As [counsel for Lloyd's] remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in this case suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review.'

c
d
e
f
g
h

[18] That decision was followed by Pill J in *R v Corporation of Lloyd's, ex p Lorimer* (16 December 1992, unreported), a case concerned with a public law challenge to a decision by the Lloyd's Members' Hardship Committee) and by myself in *Ex p Johnson* (see [2], above) which was a public law challenge to certain features of Lloyd's Renewal and Reconstruction Plan. I noted in my judgment that in *R v Insurance Ombudsman Bureau, ex p Aegon Life Assurance Ltd* [1995] LRLR 101, Rose LJ, sitting in the Divisional Court, had said that he could see no basis for counsel's criticism of the judgment in *Ex p Briggs*. I also referred to the fact that Saville and Cresswell JJ (at first instance) ([1994] ECC 481) and Bingham MR, Steyn and Hoffmann LJ (in this court) ([1995] CLC j

a 117) had all been involved in *Society of Lloyd's v Clementson* (see [15], above), and none of them had apparently suggested that that dispute, which concerned the powers of Lloyd's in connection with claims to reimbursement of its central fund, belonged properly to the field of public rather than private law.

b [19] I went on to say (*Ex p Johnson*):

c 'I am certainly willing to accept that in some contexts judicial review may be available even if the relationships in question are founded in contract, if the body whose actions are sought to be reviewed is performing a function that can properly be described as governmental, although the normal rule is that the express or implied terms of the agreement should govern the matter—see [de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn, 1995) p 170]—but I am quite unable to see how this epithet “governmental” can be ascribed to Lloyd's relationships with its members. As [counsel] observed, if the DTI [Department of Trade and Industry] was not satisfied with the Lloyd's system of self-regulation, the upshot would not be a situation in which Lloyd's would become a governmental regulatory authority, or one in which the DTI would regulate the way in which Lloyd's members were obliged to subscribe funds or to embark on reinsurance of old liabilities. The DTI would continue to be the authorising body, and it would be for it to decide what conditions it should impose on former Lloyd's underwriters before granting them authority to carry on insurance business if the blanket exemptions for members of Lloyd's no longer existed.'

f [20] In *Doll-Steinberg v Society of Lloyd's* [2002] EWHC 419 (Admin), a case concerned with a decision of the Lloyd's Settlement Offer Panel, Stanley Burnton J, while regarding himself bound by the decision of the Divisional Court in *Ex p Briggs*, and finding himself unable to distinguish the functions of the panel from the functions considered in *Ex p Briggs* (and even more obviously in *Ex p Lorimer*) said (at [27]):

g 'Indeed, quite apart from these authorities, I should have held that the function of the panel is a private law function, and not a public function. The indebtedness of the claimant is a private law indebtedness: it relates to a reinsurance premium which she has been held liable to pay. The fact that the claimant's liability may have involved the exercise of powers conferred by statute does not affect the intrinsic nature of that liability. The function of the panel is to consider the acceptance by Lloyd's of a lesser sum in settlement of that private law liability. I see no public law function involved in its decisions.'

j

8. LLOYD'S: THE REGULATORY SCHEME UNDER THE FINANCIAL SERVICES AND MARKETS ACT 2000

[21] The 2000 Act introduced a new regulatory regime, so far as Lloyd's was concerned. By s 19(1) of the 2000 Act, no person may carry on a regulated activity in the United Kingdom unless he is an 'authorised person' or 'an

exempt person' (a concept which can be disregarded in the present context). It was not in issue that underwriting business conducted at Lloyd's is a regulated activity, as is apparent from s 315 of the 2000 Act, which provides, so far as is material:

'(1) The Society is an authorised person.

(2) The Society has permission to carry on a regulated activity of any of the following kinds—(a) arranging deals in contracts of insurance written at Lloyd's ("the basic market activity"); (b) arranging deals in participation in Lloyd's syndicates ("the secondary market activity"); (c) an activity carried on in connection with, or for the purposes of, the basic or secondary market activity.'

[22] Section 315(4) has the effect of giving the FSA power to vary or cancel any of Lloyd's permissions, and by s 318(1) the FSA may give a direction to Lloyd's in order to achieve any objective specified by the FSA. Sections 316 and 317 give the FSA the power to give directions to a member or the members of Lloyd's collectively of the types described in those provisions. We were told that an insurance market direction has been given pursuant to s 316 which has the effect of providing that each member of Lloyd's is individually subject to the rules contained in a FSA *Handbook* which relates to firms' complaint-handling processes.

[23] We were also referred to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 which by reg 56 identifies the relevant regulated function for a member's agent at Lloyd's ('advising a person to become, or continue or cease to be, a member of a particular Lloyd's syndicate') and by reg 57 performs the same role in relation to a managing agent at Lloyd's ('managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's'). It is therefore apparent that as authorised persons within the meaning of the 2000 Act Lloyd's underwriting agents are subject to the full scope of the supervisory and enforcement powers of the FSA which are set out in that statute, even if the FSA may leave it, at any rate for the time being, to the council to regulate Lloyd's underwriting agents.

[24] It is unnecessary for the purposes of this judgment to describe in any greater detail other facets of the evolving relationship between the FSA and Lloyd's which are set out in paras 54–67 of the witness statement of Mr Sean McGovern, who is a director and general counsel (legal services) at Lloyd's. A FSA Consultation Paper, issued in April 2003, explained the way in which the FSA proposed at that time to develop prudential requirements which would apply directly both to the Society of Lloyd's as a corporate entity and to Lloyd's managing agents.

[25] The FSA has issued a document known as the 'Lloyd's Sourcebook' which forms part of the FSA *Handbook*. This *Sourcebook* contains a number of material rules and requirements. They include solvency requirements at member level and the maintenance by Lloyd's of a prescribed level of 'net central assets'. The FSA and Lloyd's have also agreed a memorandum of understanding which relates to the operation of certain of their respective supervisory and enforcement functions. The purpose of this memorandum is to avoid duplication of effort, to ensure that there is efficient and effective supervision of underwriting agents, and to achieve close, co-operative and

a effective working relationships between the FSA and Lloyd's in their respective enforcement roles. A document published by the FSA and Lloyd's sets out in detail the arrangements that have been agreed for these purposes. It states in unequivocal terms (in para 3):

b 'Under the Financial Services and Markets Act 2000 ("the Act"), the FSA is the primary regulator for all financial services business in the UK. Its general duties and regulatory objectives are set out in sections 2 to 6 of the Act. It also has a general duty under section 314 of the Act with respect to the market at Lloyd's. It has concluded these arrangements for the reasons set out in paragraph 1 above. However, nothing in these arrangements can fetter its discretion with respect to carrying out its statutory duties and function.'

[26] All this evidence clearly shows that the FSA is now the statutory regulatory authority clothed with governmental powers in the area of Lloyd's business which is under scrutiny in this case.

9. LLOYD'S AND THE EXERCISE OF POWER UNDER THE MST BYELAW: AMENABILITY TO JUDICIAL REVIEW

e [27] Mr Nordell, who has appeared for Dr West in this court, submits, however, that notwithstanding the FSA's role, Lloyd's is itself performing a governmental function in these matters. It is therefore, he says, to be regarded as susceptible to judicial review in relation to the exercise of its functions under the MST Byelaw, and in the same context it must be regarded as a public authority within the meaning of s 6(1) of the 1998 Act.

f [28] As is customary on these occasions, he took us back to *R v Panel on Take-overs and Mergers, ex p Datafin plc* (Norton Opax plc intervening) [1987] 1 All ER 564, [1987] 1 QB 815. He argued that this case established that a body like Lloyd's, which is essentially private or non-governmental, will nevertheless be amenable to judicial review in respect of functions with a 'public' element. In the same way that government had in effect devolved on the Takeover Panel powers which it could ordinarily have been expected to retain for itself, so, he argued, Lloyd's were performing functions under its powers contained in the MST Byelaw which formed part of its regulation in the public interest of an important section of the United Kingdom insurance market.

g [29] It was an important, but not an essential, part of his submissions that Lloyd's derived its powers from an Act of Parliament. He encouraged us to read parts of the seminal reports by Sir Henry Fisher and Sir Patrick Neill QC which formed some of the catalysts for change in Lloyd's regulatory arrangements over the last 25 years. And while he referred us back in history to the enactment of the 1982 Act and the ICA 1982 (which largely excluded Lloyd's from the statutory regulatory regime it created), he submitted that the 2000 Act preserved the same regulatory pattern. While the FSA now possessed extensive reserve powers, Lloyd's was itself exercising regulatory powers for the protection of its members qua consumers of financial services which government would be exercising itself if Lloyd's fell short in the way it exercised its powers.

h [30] I cannot accept these submissions. The fact that Lloyd's corporate arrangements are underpinned by a private Act of Parliament and not by the

Companies Acts makes it in no way unique and is certainly not dispositive of the matter. Mr Walker QC, who appeared for Lloyd's, told us that a number of insurance companies were incorporated by private Act of Parliament, and he showed us one such example. I am entirely satisfied that the line of cases at Divisional Court level which related to the private law status of Lloyd's in relation to functions such as are in issue in this case were correctly decided. The logic behind Leggatt LJ's approach in *Ex p Briggs* (see [17], above) is in my judgment unassailable. The coming into force of the 2000 Act, with its altogether more intrusive regulatory regime (so far as Lloyd's is concerned) makes the position even clearer, if greater clarity were required.

[31] The decisions under challenge were concerned solely with the commercial relationship between Dr West and the relevant managing agents, and this was governed by the contracts into which he had chosen to enter. Those decisions were of a private, not a public, nature. They have consequences for Dr West in private, not public, law. For these tests, see *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 2, [2003] IRLR 439, [2003] ICR 599.

[32] I intend no discourtesy to Mr Nardell if I do not refer to any more of his detailed submissions, all of which I have considered with care. It seems to me that the functions of Lloyd's which are under review in this case are totally different from the functions of the Takeover Panel that were under consideration in *Ex p Datafin*. The panel exercised regulatory control in a public sphere where governmental regulatory control was absent. This case is concerned with the working out of private contractual arrangements at Lloyd's which is itself subject to external governmental regulation.

10. LLOYD'S AND THE EXERCISE OF POWER UNDER THE MST BYELAW: SECTION 6(1) OF THE HUMAN RIGHTS ACT 1998

[33] I turn therefore to Mr Nardell's submissions about the effect of s 6 of the 1998 Act. That section provides, so far as is material, that:

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

(3) In this section "public authority" includes ... (b) any person certain of whose functions are functions of a public nature ...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.'

[34] There have been two recent decisions of the Court of Appeal and one of the House of Lords which have shone light on the meaning of these provisions. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48 a local authority had transferred to the defendant housing association a substantial proportion of its housing stock, and the question arose whether the defendants were performing functions of a public and not a private, nature for the purposes of s 6 of the 1998 Act. It is possible to derive the following principles from the judgment of the court (at [65], [66]), given by Lord Woolf CJ: (i) while s 6 of the 1998 Act requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review;

a (ii) the emphasis on public functions reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal (the judgment of Lloyd LJ) in *Ex p Datafin plc* (see [28], above); (iii) what can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act; (iv) statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority; (v) the more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public; (vi) the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature (this is analogous to the position in judicial review, where a regulatory body may be deemed public, but the activities of the body which is regulated may be categorised private); (vii) after identifying the most important factors in any given case, it is desirable to step back and look at the situation as a whole; (viii) as is the position on applications for judicial review, there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case the decision is very much one of fact and degree.

[35] In *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936 this court was concerned with a case involving claimants to whom the local authority owed a duty to provide accommodation under s 21 of the National Assistance Act 1948. The authority performed that duty by making arrangements at public expense for the accommodation to be provided at a Leonard Cheshire home by the defendants, a private charitable foundation. When the foundation decided to close the home, the claimants maintained that it had been exercising functions 'of a public nature' (see s 6(3)(b) of the 1998 Act, above) and was therefore amenable to a challenge on convention grounds. The effect of para [35] of the judgment of the court, given by Lord Woolf CJ, is accurately distilled in the summary contained in the headnote of the case: (i) the role that the foundation was performing manifestly did not involve the performance of public functions; (ii) the fact that it was a large and flourishing organisation did not change the nature of its activities from private to public; (iii) while the degree of public funding of the activities of an otherwise private body was relevant to the nature of the functions performed, it was not by itself determinative of whether the functions were public or private; (iv) the foundation was not standing in the shoes of the local authority. (Section 26 of the 1948 Act provided statutory authority for the actions of the local authority, but provided the foundation with no powers); (v) the foundation was not exercising statutory powers in performing functions for the claimants; (vi) the fact that if the foundation were not performing a public function, the claimants would not be able to rely on art 8 of the convention as against it could not change the appropriate classification of the foundation's function.

[36] Finally, in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 All ER 1213 the House of Lords interpreted s 6 of the 1998 Act for the first time. I take its main conclusions from the speeches of Lord Nicholls of Birkenhead (at [6], [7]), Lord Hope of Craighead (at [52]), Lord Hobhouse of Woodborough (at [88]) and Lord Rodger of Earlsferry (at [171]): (i) the purpose of s 6(1) of the 1998 Act is that those bodies

for whose acts the state is answerable before the European Court of Human Rights (ECHR) shall in future be subject to a domestic law obligation not to act incompatibly with convention rights ([6]); (ii) conformably with this purpose, the phrase 'a public authority' in s 6(1) is essentially a reference to a body whose nature is governmental in the broad sense of that expression ([7], [88], [117]); (iii) although the domestic case law on judicial review may provide some helpful assistance as to what does and what does not constitute a 'function of a public authority' within the meaning of s 6(3)(b), this case law must be examined in the light of the jurisprudence of the Strasbourg court as to those bodies which engage the responsibility of the state for the purposes of the convention ([52]).

[37] In that case the House drew support from the opinion of the European Commission on Human Rights in *Hautanemi v Sweden* (1996) 22 EHRR CD 155, and, more particularly, from the judgment of the ECHR in *Holy Monasteries v Greece* (1995) 20 EHRR 1 at 41 (para 49) where the court said that the objectives of the monasteries—essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases—were not such as to enable them to be classed with governmental organisations established for public administration purposes.

[38] The objectives of Lloyd's are wholly commercial. The nature of Lloyd's is not governmental, even in the broad sense of that expression. If any question arises as to the performance of any obligation on the part of the state to protect investors, it is the FSA which is the governmental organisation which will be answerable to the Strasbourg court, and not Lloyd's. The sixth of the principles identified by Lord Woolf CJ in the *Poplar Housing* case (see [34], above) is particularly in point.

[39] Although, as Lord Hope observed in the *Aston Cantlow* case, the case law on judicial review does not provide a conclusive answer to the applicability of s 6 of the 1998 Act, there is nothing for Mr Nardell's comfort in any of the three decisions on the effect of that section to which I have referred in [34]–[36], above. It is the FSA which performs governmental functions in these matters, not Lloyd's. The fact that Lloyd's regulates its members' activities in the way it does as a result, in part, of its desire to avoid a more intrusive governmental regulatory regime cannot possibly convert it into a body exercising public functions itself within the meaning of Strasbourg case law.

11. CONCLUSION

[40] For these reasons I have reached the same conclusion as Keith J (see [1], above) and would make a declaration that Lloyd's is not amenable to judicial review, whether by virtue of s 6 of the 1998 Act or otherwise, in relation to those of its functions that are under scrutiny in this case.

12. TRANSFER, RETENTION IN THE ADMINISTRATIVE COURT, OR A NEW START?

[41] Finally, while I would usually be keen to transfer proceedings wrongly started as CPR Pt 54 proceedings to the division of the court which handles private law actions of the relevant type, or to retain in the Administrative Court cases that might appropriately be retained there, I do not consider it to be practicable to take either of these courses in the present case. If Dr West wished to pursue a private law remedy against Lloyd's, those proceedings properly belong to the Chancery Division, and he must entirely reshape his case so as to identify the private law causes of action on which he

- a* intends to rely. Amendment simply is not practical here: he will have to begin again, if so advised.

MUMMERY LJ.

[42] I agree.

- b* **DYSON LJ.**

[43] I also agree.

Order accordingly.

Kate O'Hanlon Barrister.

McPherson v BNP Paribas

[2004] EWCA Civ 569

COURT OF APPEAL, CIVIL DIVISION

THORPE, MUMMERY LJJ AND BENNETT J

21 APRIL, 13 MAY 2004

Costs – Employment tribunal – Unreasonable conduct of proceedings – Employee withdrawing complaint for medical reasons having previously obtained adjournment of hearing – Whether unreasonable conduct – Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 r 14.

In October 2000 an employee made claims to an employment tribunal that he had been unfairly dismissed and that his former employer was in breach of contract. His complaint was listed for hearing in September 2001. In August he notified the employer that he was receiving specialist medical advice and in early September successfully applied for an adjournment on medical grounds. In December 2001 the employee discussed withdrawing from the action with his doctor as his health was being seriously affected by cardiac problems caused by stress. A fresh hearing date was fixed in late May 2002. The employee did not comply with an order for directions and did not provide information about his medical condition requested by the employer. In early May 2002 the employee withdrew his claim on medical grounds. The employer applied for costs which the tribunal had power to order the employee to pay by virtue of r 14^a of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 which provided, inter alia, that where, in the opinion of the tribunal a party had acted unreasonably in conducting the proceedings, the tribunal 'shall consider making, and if it so decides, may make' a costs order against that party. The tribunal awarded the employer the costs of the whole proceedings. That order was affirmed on appeal to the Employment Appeal Tribunal. The employee appealed.

Held – On the proper construction of r 14 of the 2001 regulations, and applying the rule sensibly, the crucial question was whether, in all the circumstances of the case, a claimant who withdrew a claim had conducted the proceedings unreasonably, not whether the withdrawal of the claim was in itself unreasonable. It would be wrong for employment tribunals to take the line that it was unreasonable conduct for claimants to withdraw claims and unfortunate if claimants were deterred from withdrawing by the prospect of an order for costs which might well have not been made against them had they failed in their claim after a full hearing. Equally, tribunals should not follow a practice on costs which might encourage speculative claims, by allowing claimants to start cases in the hope of receiving an offer to settle, failing which, they could drop the case without any risk of a costs sanction. In the exercise of a tribunal's discretion under r 14 there was no requirement that the costs awarded should be caused by, or proportionate to, the particular conduct which had been identified as unreasonable. The principle of relevance meant that the tribunal had to have regard to the nature, gravity and effect of the unreasonable conduct, but that was

^a Rule 14, so far as material, is set out at [24], below

- a not the same as requiring one party to prove that specific unreasonable conduct by the other party caused particular costs to be incurred. It was not impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. In the instant case, there had been ample evidence to justify the tribunal's overall conclusion that there had been unreasonable conduct by the employee in the proceedings and its ruling
- b that it had jurisdiction to make a costs order against him was not perverse or otherwise wrong in law. However, the tribunal had erred in law in ordering the employee to pay the costs of the whole of the proceedings. There was no evidence that there had been any unreasonable conduct on the employee's part until his application for an adjournment on medical grounds. Accordingly the appeal would be allowed to the extent of varying the costs order so that the
- c employee was liable to pay only the costs of the proceedings incurred after the date of that application (see [28]–[31], [37], [40]–[46], below).

Notes

- For costs in employment tribunals see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 708.
- d For the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171, r 14, see 7 *Halsbury's Statutory Instruments* (2003 issue) 404.

Cases referred to in judgments

- e *Gee v Shell UK Ltd* [2002] EWCA Civ 1479, [2003] IRLR 82.
Health Development Agency v Parish (24 October 2003, unreported), EAT.
Kovacs v Queen Mary & Westfield College [2002] EWCA Civ 352, [2002] IRLR 414, [2002] ICR 919.
Lodwick v Southwark London BC [2004] EWCA Civ 306, [2004] All ER (D) 349
- f (Mar).

Appeal

- Alasdair McPherson appealed with permission granted by Latham LJ from the decision of the Employment Appeal Tribunal on 22 July 2003 (Judge Birtles, P Gammon and PRA Jacques) dismissing his appeal from the decision of the
- g employment tribunal released on 15 July 2002 that Mr McPherson pay the costs of BNP Paribas of the proceedings brought by him against BNP Paribas where he had withdrawn his claim before a full hearing on the merits. The facts are set out in the judgment of Mummery LJ.
- h *Jane McCafferty* (instructed by *Taylor Wessing*) for Mr McPherson.
Daniel Tatton-Brown (instructed by *Clyde & Co*) for BNP Paribas.

Cur adv vult

13 May 2004. The following judgments were delivered.

- j **MUMMERY LJ** (giving the first judgment at the invitation of Thorpe LJ).

INTRODUCTION

[1] This appeal is about an order for costs made by the employment tribunal and affirmed by the Employment Appeal Tribunal, when the appellant, Mr Alasdair McPherson, withdrew his claims for unfair dismissal and breach of

contract against his former employer, BNP Paribas, an investment bank. He was employed in the high yield sales team between 15 January 1999 and 29 September 2000 at a basic annual salary of £100,000, plus almost as much again in bonuses and other benefits. Mr McPherson claimed that he was constructively dismissed on 29 September; BNP Paribas alleged that he was dismissed on 11 October for gross misconduct. Not long after his departure from BNP Paribas, Mr McPherson obtained employment with another bank, Société Générale, and he has continued to work for them throughout these proceedings. a
b

[2] The costs order is unusual in three respects: first, in the majority of cases employment tribunals do not make costs orders at all (see, for example, the comments in the recent Court of Appeal cases of *Gee v Shell UK Ltd* [2002] EWCA Civ 1479 at [22], [35], [2003] IRLR 82 at [22], [35] and *Lodwick v Southwark London BC* [2004] EWCA Civ 306 at [23]–[27], [2004] All ER (D) 349 (Mar) at [23]–[27]); secondly, when a costs order is made by an employment tribunal, it is normally after a full hearing of the case on the merits, whereas the costs order in this case was made against an applicant, who withdrew his application several weeks before the full hearing was due to take place, so that there was never any decision on the substantive merits of his claims; and, thirdly, the amount of costs involved is, for a case that never had a full hearing, very large by tribunal standards, the bill presented by BNP Paribas for detailed assessment totalling £90,747.82. c
d

[3] It is in those circumstances that the appeal raises a number of legal and practice points, which have not been considered in the authorities, on the exercise of the employment tribunal's discretion to make a costs order against an applicant who withdraws his claim. e

THE EMPLOYMENT TRIBUNAL PROCEEDINGS

[4] As the key question is whether Mr McPherson conducted the proceedings unreasonably, it is necessary to examine in detail the course of the proceedings. Mr McPherson presented his complaint to the employment tribunal on 17 October 2000. It was originally listed for hearing from 24–28 September 2001. On 21 August 2001 Mr McPherson's solicitors (Taylor Joynson Garrett, now Taylor Wessing), wrote to the solicitors for BNP Paribas (Clyde & Co) to notify them that their client was receiving specialist medical advice regarding a potentially serious heart complaint and that he had been advised that he might require heart surgery, but they did not intend at that stage to apply for an adjournment. A late application by Mr McPherson to postpone the hearing was in fact made and granted a month later. By an order dated 4 October 2001 the tribunal informed the parties that the case had been relisted for hearing from 27–31 May 2002. f
g
h

[5] Neither the decision of the employment tribunal under appeal nor the other papers before this court reveal much about the conduct of the proceedings by Mr McPherson and his solicitors in the 11 months between their institution and the grant of the adjournment. This is relevant because the costs order ultimately made in favour of BNP Paribas was in respect of the whole of the tribunal proceedings and it was said to be justified by Mr McPherson's unreasonable conduct of them. j

[6] Mr McPherson's successful application for the adjournment of the hearing fixed for the end of September 2001 was supported by medical opinion contained in two letters dated 21 September, which had the effect of introducing Mr McPherson's state of health as a factor affecting the conduct of the

a proceedings. The letters were written by Mr McPherson's consultant cardiologist, Dr Laura Corr, to whom he had been referred by his GP, Dr Ruth Marchant, after a period in intensive care in hospital following an alarming cardiac incident earlier in 2001. Dr Corr explained that Mr McPherson was under her care with Wolf-Parkinson White Syndrome, a cardiac condition associated with disturbance of the rhythm of the heart due to a congenital abnormality in the electrical conducting system. His symptoms (chest pain and heart palpitations) had worsened, partly because of the stress of the forthcoming tribunal, but she thought that they would settle if the tribunal could be postponed and time allowed for reassessment and curative treatment.

b [7] Dr Corr said that the condition was unlikely to be life-threatening, that the pattern of the recent symptoms strongly suggested that they were significantly affected by stress and would be likely to be brought on during the tribunal; that the condition could be managed relatively easily and simply using a technique called radio frequency ablation, which does not require surgery, and that this would have a greater than 95% chance of success, abolishing his symptoms in the future and allowing him to be symptom-free, despite the stress of a tribunal.

c [8] In a letter enclosing a copy of Dr Corr's letter, Taylor Joynson Garrett wrote:

‘... we would hope that the case would be re-listed to be heard for a later[date] after our client has the operation that is necessary to remedy his condition.’

e [9] Clyde & Co strongly opposed the adjournment, pointing out that the application was made at a very late stage on the basis of a medical condition that was not life-threatening, that the postponement would prejudice their client and that there was no mention in Dr Corr's letter of the need for an operation. In another letter they made it clear that, if the hearing was postponed, they would make an application for costs, due to the considerable prejudice incurred by BNP Paribas. For example, six witness orders had been issued by the tribunal at Mr McPherson's request on 12 September 2001 in relation to the forthcoming hearing.

f [10] In commenting on the objections to the postponement, Taylor Joynson Garrett again mentioned the question of treatment, saying the refusal of BNP Paribas to accede to the postponement of the hearing was an attempt to force him to withdraw his claim at a late stage and that that—

g ‘was wholly unnecessary as our client's condition is curable and our client will be fit and able to attend an Employment Tribunal hearing once he has received the necessary treatment.’

h [11] That exchange of letters is important, as, when Taylor Joynson Garrett gave notice to the employment tribunal on 9 May 2002 of the withdrawal of his claims, the only reason given for his decision to withdraw was the effect of the stress of the litigation on his health. There was no evidence that between September 2001 and May 2002 he had undergone any operation or received any of the curative treatment foreshadowed in the solicitor's letters and Dr Corr's reports of September 2001.

j [12] After the adjournment was granted there was correspondence between the solicitors about requests for more information concerning his state of health, his claims and the disclosure of documents. Orders for disclosure were made, but not all of them were complied with. Issues were raised by BNP Paribas about

Mr McPherson's health difficulties and their impact on the level of compensation which might be awarded, if his claim were successful. a

[13] Unknown to BNP Paribas and to the tribunal until the production of a letter from Dr Ruth Marchant dated 23 May 2002 for the purposes of the costs hearing on 27 May, Mr McPherson saw Dr Marchant in December 2001, as he was experiencing more symptoms from the syndrome, which were directly related to 'instances around the case'. At the consultation there was discussion about the option of withdrawing from the case, as his health was being severely affected by cardiac problems caused by stress. b

[14] There was a directions hearing before the tribunal chairman on 31 January 2002. It was agreed and ordered, with reference to an earlier order of 1 November 2001 for the disclosure of details of remuneration with his new employer, that Mr McPherson must disclose details of all past, current and future entitlements. Mr McPherson never complied with that order, despite a further directions order on 15 February 2002 and subsequent reminders from Clyde & Co (letters of 15 March and 4 April 2002). As regards further requests for particulars and information, the chairman stated that he expected the parties to deal with them reasonably and promptly in the spirit of co-operation. He reminded the parties of their duty to assist in the furtherance of the overriding objective to deal with cases justly, as set out in reg 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 (which imposes a duty on the parties to assist the tribunal to further that objective) and reminded them of the costs consequences that could follow from a refusal to act in accordance with the overriding objective. A notice relating to non-compliance with tribunal orders was attached to the order of 31 January 2002. c
d
e

[15] As regards the medical information, which Mr McPherson had not supplied in response to the request in Clyde & Co's letter of 11 October 2001 arising from reports obtained from Dr Corr to obtain the postponement of the September hearing, the chairman declined to make an order. He considered that, should an application be made for the costs thrown away, there would be adequate information available to the tribunal, upon which such an application could be determined. He did, however, make an order that Mr McPherson 'should confirm to BNP Paribas and the tribunal 14 days before the full merits hearing that there is at that time no medical reason why he will be unable to attend the hearing'. The chairman confirmed that the six witness orders were still effective in relation to the hearing fixed for the end of May. f
g

[16] Preparations for the hearing continued. On 6 and 20 February 2002, Clyde & Co repeated their request for information about Mr McPherson's illness, including information about medication and whether he had received surgery on his heart. They reserved the right to make an application for costs due to the postponement of the hearing and for that purpose wished to clarify the issues concerning his health. None of the information requested was supplied, Taylor Joynson Garrett taking the position that, in view of the order made at the directions hearing, it was unnecessary to respond to the questions on his medical condition. h

[17] On 6 March 2002 Clyde & Co notified the tribunal and Mr McPherson's solicitors that they wished to make an application for costs under r 14(1) and (4) of the Employment Tribunals Rules of Procedure 2001 (as set out in Sch 1 to the 2001 regulations), as a result of the postponement of the September hearing. They alleged unreasonable conduct by Mr McPherson with regard to the medical condition and making misleading statements to the tribunal and to them in j

a regard to the application for postponement ie on the question of surgery and treatment for the condition. On 27 March the tribunal chairman directed that the application be made to the tribunal dealing with the full merits hearing at the end of May.

b [18] On 3 May 2002 Taylor Joynson Garrett wrote to Clyde & Co referring to their client's primary wish to clear his name, to his health problems and to the legal costs. They suggested that it would make sense for both parties to attempt mediation. They even suggested the name of a mediator. BNP Paribas disagreed with the merits of the suggestion.

c [19] On 9 May 2002 Taylor Joynson Garrett wrote to the tribunal giving notice of their client's decision reluctantly to withdraw his claims on medical grounds. Reference was made to his medical condition being exacerbated by stress, to the deterioration of his health in recent weeks, to the fact that he did not feel that he could face the inevitable pressures of the hearing and to the refusal of BNP Paribas to consider mediation as a less stressful and acrimonious forum. A later letter made it clear that his withdrawal was not an admission that his purported dismissal was fair.

d [20] The reaction of Clyde & Co was that their client now wished to make a costs application for the whole claim, not just for the postponement of the hearing, on the grounds of unreasonable conduct of the originating application in general, including misleading the tribunal and themselves. They suggested that one day's hearing was appropriate later than 27 May 2002, after evidence had been obtained of Mr McPherson's actual state of health and the stress suffered by him.

e [21] On 23 May 2002 the tribunal made an order dismissing the application on withdrawal. The hearing of the costs application went ahead on 27 May. No application was made by either side for an adjournment, though, with the benefit of hindsight, it would probably have been better all round if the hearing had taken place at a later date and more time had been allowed for preparation.

f Mr McPherson did not attend the hearing, but he gave evidence in a signed witness statement dated 24 May 2002. He explained his wish to clear his name of allegations made by BNP Paribas, the stressful effect of the proceedings, the medical reasons for his decision to withdraw the claims, family pressures, his decision not to have surgery and his various criticisms of BNP Paribas as employer and as litigant. He also produced the letter from Dr Marchant dated 23 May 2002 mentioned earlier.

g

THE COSTS ORDER

h [22] The tribunal gave extended reasons on 15 July 2002 for making its order that Mr McPherson pay BNP Paribas's costs of the proceedings (including the costs hearing) on the standard basis to be assessed by way of detailed assessment, if not agreed.

j [23] Mr McPherson appealed. The Employment Appeal Tribunal dismissed the appeal on 22 July 2003. Keene LJ refused permission to appeal on the ground that there was no error of law in the tribunal's exercise of its discretion, but Latham LJ granted permission on the hearing of the renewed application.

THE LAW

[24] An employment tribunal has power to order an applicant to pay the costs of proceedings under r 14 of the 2001 rules:

(1) Where, in the opinion of the tribunal, a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived, the tribunal shall consider making, and if it so decides, may make—(a) an order containing an award against that party in respect of the costs incurred by another party ...

(3) An order containing an award against a party ("the first party") in respect of the costs incurred by another party ("the second party") shall be ...
 (c) in any other case, an order that the first party pay to the second party the whole or a specified part of the costs incurred by the second party as assessed by way of detailed assessment (if not otherwise agreed).

(4) Where the tribunal has on the application of a party postponed the day or time fixed for or adjourned the hearing, the tribunal may make orders, of the kinds mentioned in paragraphs (1)(a) and (1)(b), against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.'

[25] Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in r 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of employment tribunals. It is, therefore, not surprising that the 2001 rules do not replicate the general rule laid down in CPR 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The tribunal rules of procedure make provision for the withdrawal of claims in r 15(2)(a), but the costs consequences are governed by the general power in r 14.

[26] When a costs order made by an employment tribunal is appealed to the Employment Appeal Tribunal or to this court the prospects of success are substantially reduced by the restriction of the right of appeal to questions of law and by the respect properly paid by appellate courts to the exercise of discretion by lower courts and tribunals in accordance with legal principle and relevant considerations. Unless the discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against a tribunal's costs order will fail. If, however, the appeal succeeds, the appellate body may substitute a different order or, if it is necessary to find further facts, the matter may be remitted to the tribunal for a fresh hearing of the costs application.

A. *Unreasonable conduct of proceedings*

[27] The tribunal correctly directed itself that the first question was whether, in all the circumstances, Mr McPherson had conducted the proceedings unreasonably (paras 6 and 7 of the extended reasons). The tribunal appreciated that the issue was not whether the action of withdrawing the complaint was itself unreasonable. As it observed: 'There are many genuine issues and matters which might lead an applicant to that course.'

[28] In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct

a for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as b Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.

[29] On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue c them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

[30] The solution lies in the proper construction and sensible application of r 14. The crucial question is whether, in all the circumstances of the case, the d claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable, as appeared to be suggested at some points in argument and as might be thought was the approach of the tribunal from reading some passages of the extended reasons out of context (see the opening of para 6: 'We turn next to consider whether e withdrawing one's complaint in these circumstances is unreasonable.') When read as a whole it is clear from the extended reasons that the tribunal adopted the correct approach to determining whether Mr McPherson had conducted the proceedings unreasonably. The tribunal considered all the circumstances f relevant to his conduct. The question was not, as was submitted by Ms McCafferty, whether BNP Paribas had proved that his conduct was so unreasonable that no reasonable applicant could reasonably decide to withdraw the proceedings in the circumstances.

[31] In my judgment the tribunal was entitled to conclude that there was unreasonable conduct of the proceedings on the part of Mr McPherson. Indeed, Ms McCafferty accepted that that was a correct description of some aspects of her g client's conduct of the proceedings: he had not, for example, complied with orders of the tribunal. There were other circumstances, which were properly regarded by the tribunal as unreasonable conduct of the proceedings: Mr McPherson had been asked for documentation which he was obviously h loathe to supply; and he had given the impression right up to 9 May 2002 that he was pursuing the complaint and allowed BNP Paribas to incur considerable expense in preparing the case on that basis, while, on his own evidence and unknown to the tribunal and BNP Paribas, he had been seriously considering with his GP in December 2001 the question of abandoning the proceedings on health grounds. There was no hint to the tribunal or BNP Paribas of this possibility before notice of withdrawal was given on 9 May 2002.

j [32] Ms McCafferty concentrated her attack on the tribunal's finding, which was relied on as unreasonable conduct, that the reason advanced by Mr McPherson for withdrawing the application was not the sole reason for withdrawal. She agreed that the reason for withdrawal was a relevant circumstance in deciding whether there had been unreasonable conduct of the proceedings, but she contended that the tribunal erred in law in rejecting the reason given by Mr McPherson and submitted that it was not for the tribunal to

adjudicate on the desirability of medical treatment of a competent individual, such as Mr McPherson. He relied on his health as the sole reason for his decision to withdraw. While the tribunal did not doubt that he suffers from Wolf-Parkinson White Syndrome, it was not satisfied on the evidence that the condition was sufficiently serious to prevent him from attending the tribunal and conducting his case. The tribunal concluded (para 5): a

‘It is the applicant’s claim that his health was the sole reason for withdrawing his complaint. We have found that this claim is not justified. It follows that there must be some other reason for his withdrawing his proceedings which was unconnected with his health.’ b

[33] The tribunal was particularly critical of the lack of up-to-date medical evidence that he would be unfit to attend a hearing of the case. He was not certified as unfit to attend or to conduct the proceedings. There was no medical evidence that he had been advised to withdraw the proceedings in May 2002. c

[34] The tribunal went on (para 8) to express ‘concern as to his probity in relation to the whole of the proceedings’ and to express the view that— d

‘he has been prolonging this case in the hope of obtaining an offer, which never in fact came ... The applicant’s sudden withdrawal of these proceedings without good reason is part and parcel of that same conduct.’

[35] Ms McCafferty criticised the reference to concern about Mr McPherson’s probity, the rejection of health as the sole reason for withdrawal and the finding of a hope that there would be an offer, as being extravagant inferences unsupported by necessary findings of primary fact which were therefore legally erroneous. She contended that the tribunal’s criticisms of the lack of medical evidence were misplaced, as it was not his case that he would be unfit to attend, but that the stress of the ongoing proceedings was damaging to his health. e
f

[36] In my judgment, there is force in some of Ms McCafferty’s criticisms. In particular, the mention of ‘concern as to his probity’ went considerably further than the tribunal’s rejection of health as the sole reason for withdrawal and further than was justified by the evidence of his conduct. It was not, I think, a finding of fact at all and it should not have been expressed as a passing comment. Although there were grounds for criticising Mr McPherson for lack of co-operation with the tribunal and with BNP Paribas on the health issue, the tribunal was probably too critical about the shortcomings of the medical evidence. That said, however, I am aware that an appeal court should read the reasoning of the tribunal as a whole and not scrutinise it for error line by line. On that approach I am satisfied that the tribunal was entitled to infer that Mr McPherson’s health was not the sole reason for leaving the decision to withdraw so close to the date when the full hearing was due to take place and without any earlier warning of that possibility, which had been considered by him with his GP over five months previously. g
h
j

[37] I am left in no real doubt that there was ample evidence to justify the tribunal’s overall conclusion that there was unreasonable conduct by Mr McPherson in the proceedings and that the tribunal’s ruling that it had jurisdiction to make a costs order against Mr McPherson was not perverse or otherwise wrong in law.

a B. *Exercise of discretion*

[38] As to the exercise of the discretion, most of the argument naturally focused on the issue whether, on the basis of the unreasonable conduct found, the tribunal properly exercised its discretion in ordering Mr McPherson to pay the costs of the whole of the proceedings, having regard to the inaccuracy of statements about his medical condition, to concerns about his probity in relation to the whole of the proceedings, to his real reason for withdrawing the claims and to the history of procrastination, delay and non-compliance with orders of the tribunal.

[39] Ms McCafferty submitted that her client's liability for the costs was limited, as a matter of the construction of r 14, by a requirement that the costs in issue were 'attributable to' specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were 'attributable to' the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.

[40] In my judgment, r 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of r 14(1), which deals with costs generally, and the language of r 14(4), which deals with an order in respect of the costs incurred 'as a result of the postponement or adjournment'. Further, the passages in the cases relied on by Ms McCafferty (*Kovacs v Queen Mary & Westfield College* [2002] EWCA Civ 352 at [35], [2002] IRLR 414 at [35], [2002] ICR 919, *Lodwick v Southwark London BC* [2004] All ER (D) 349 (Mar) at [23]–[27] and *Health Development Agency v Parish* (24 October 2003, unreported) at paras 26–27) are not authority for the proposition that r 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.

[41] In a related submission Ms McCafferty argued that the discretion could not be properly exercised to punish Mr McPherson for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken in to account in deciding whether to make an order for costs and the form of the order.

[42] I am, however, persuaded that there was an error of law by the tribunal in ordering Mr McPherson to pay the costs of the whole of the proceedings. As I mentioned earlier, there is no evidence that there was any unreasonable conduct on the part of Mr McPherson before his health was introduced as an issue affecting the conduct of the proceedings. The error was in the tribunal's conclusion (in para 8) that—

'... the conduct by the applicant of the whole of this case has been unreasonable and [that] the respondents are accordingly entitled to their costs of the whole of the proceedings.'

[43] There was no evidence of unreasonable conduct of the proceedings before the health issue was first raised with the tribunal in August 2001. No reasonable tribunal, properly directing itself under r 14, would have ordered Mr McPherson to pay the costs of the whole of these proceedings without some evidence of the unreasonable conduct of them during the first 11 months that the proceedings had been in existence. The unreasonable conduct by Mr McPherson only began, on the findings of the employment tribunal, with the application for an adjournment in September 2001 on medical grounds, which did not justify the request for an adjournment, and continued as a history of procrastination, delay and lack of co-operation down to the notice of withdrawal.

CONCLUSION

[44] I would allow the appeal to the extent of varying the costs order so that Mr McPherson is liable to pay the costs of the proceedings incurred after the date of the application to the tribunal to adjourn, on medical grounds, the hearing fixed for 24 September 2001.

BENNETT J.

[45] I agree with the judgment of Mummery LJ.

THORPE LJ.

[46] I have had the advantage of reading in draft the judgment of Mummery LJ and, save on a point of detail, gratefully adopt his conclusion and reasoning. For my part I would fix the commencement of Mr McPherson's liability to pay the costs of the proceedings to the date of the bank's application for information as to the terms of his subsequent employment. In my opinion Mr McPherson's failure to provide this information marks the commencement of his unreasonable conduct. I would not censure him for the application to adjourn the hearing of 24 September 2001 on medical grounds since, although the letters from his solicitors of 23 and 28 September were plainly misleading, the first at least enclosed the report from Dr Corr upon which the adjournment application rested. In my judgment the enclosure rescues the misleading solicitors' letters from the effects and consequences for which Mr Tatton-Brown contended.

Appeal allowed in part.

Kate O'Hanlon Barrister.

Re F

[2004] EWHC 725 (Ch)

CHANCERY DIVISION

PATTEN J

15 MARCH, 2 APRIL 2004

Power of attorney – Enduring power of attorney – Registration – Objection – Unsuitability of attorney – Hostility between attorney and relative – Whether attorney unsuitable – Whether hostility impeding proper administration of estate or causing distress to donor of power – Enduring Powers of Attorney Act 1985, s 6(5)(e).

In 2000 F executed an enduring power of attorney in favour of her son. By 2002 she had become unable to cope with the maintenance and upkeep of her house and garden and moved into a nursing home. In 2003 F's daughter applied to be appointed her mother's receiver under the Mental Health Act 1983. Her principal concern was expressed to be that her brother would seek to use the power of attorney to sell F's home. The daughter's application led to the son applying for registration of the enduring power. Section 6(5)(e)^a of the Enduring Powers of Attorney Act 1985 provided that a notice of objection to a registration was valid if the objection were made on the ground that, having regard to all the circumstances and in particular to the attorney's relationship to or connection with the donor, the attorney was unsuitable to be the donor's attorney. The daughter objected on the ground of the son's unsuitability, specifying, inter alia, his desire to sell the family home and the distress thus caused to F, and his failure to secure and maintain the house, following F's admission to the nursing home. At the hearing before the Master of the Court of Protection the daughter raised a concern which led to the hearing being adjourned to allow the Lord Chancellor's medical visitor to report. At the same time the master agreed that the family home would be placed on the market for sale, to avoid further deterioration in its condition. The duties of an attorney or receiver were thus confined to the investment of the proceeds of sale of the house in approved securities and the use of the income to pay for F's nursing home fees and to meet her other needs. During the course of her interview with the medical visitor F expressed concern that her son and daughter were having disagreements, saying that she would prefer them to live together and agree. She went on to say that if they could not agree, it would be better for an independent receiver to be appointed. At the resumed hearing the master held that the continued operation of the enduring power of attorney was likely to be a stumbling block that prevented any prospect of reconciliation between the son and the daughter and that an independent receiver should therefore be appointed as F wished. He accordingly upheld the daughter's objection to registration on grounds of unsuitability. The son appealed.

^a Section 6, so far as material, provides: '(5) ... a notice of objection to the registration of an instrument is valid if the objection is made on ... the following grounds, namely ... (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.'

Held – To remove a chosen attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, required clear evidence either that the continuing hostility would impede the proper administration of the estate or would cause significant distress to the donor which would be avoided by the appointment of a receiver. In the instant case neither of those conditions were satisfied. The appointment of an independent receiver would not diminish the hostility between the son and the daughter but would simply increase it and there was no evidence that supported the conclusion that that hostility would make the administration of the estate difficult. Accordingly the appeal would be allowed and the court would order registration of the power (see [15], [18]–[21], below).

Re E, X v Y [2000] 3 All ER 1004 and *Re W* [2000] 1 All ER 175 applied.

Notes

For the function of the court on the application for registration of an enduring power of attorney, see 1(2) *Halsbury's Laws* (4th edn reissue) para 38.

For the Enduring Powers of Attorney Act 1985, s 6, see 1 *Halsbury's Statutes* (4th edn) (2004 reissue) 124.

Cases referred to in judgment

E, Re, X v Y [2000] 3 All ER 1004, [2001] Ch 364, [2000] 3 WLR 1974.

W, Re [2000] 1 All ER 175, [2000] Ch 343, [2000] 3 WLR 45; *affd* [2001] 4 All ER 88, [2001] Ch 609, [2001] 2 WLR 957, CA.

Cases referred to in skeleton argument

D(J), Re [1982] 2 All ER 37, [1982] Ch 237, [1982] 2 WLR 373.

Appeal

Mr A, the donee of an enduring power of attorney granted by his mother, Mrs F on 10 July 2000, appealed from the decision of the Court of Protection (Master Lush) upholding an objection to registration of the power on grounds of the unsuitability of A to be the donor's attorney within the meaning of s 6(5)(e) of the Enduring Powers of Attorney Act 1985, lodged by his sister, Mrs B by letter dated 23 April 2003. The facts are set out in the judgment.

Mr A appeared in person.

Leon Sartin (instructed by *Harding Evans*, Newport) for Mrs B.

Cur adv vult

2 April 2004. The following judgment was delivered.

PATTEN J.

[1] This is an appeal from the refusal of Master Lush, the Master of the Court of Protection, to register an enduring power of attorney dated 10 July 2000 which was made by the donor (Mrs F) in favour of her son (Mr A). The master upheld an objection to registration on grounds of the unsuitability of Mr A to be the donor's attorney, which was lodged by his sister (Mrs B).

[2] Mrs F was born in 1917. Her husband died in 1987. There were two children of the marriage (Mr A and Mrs B). Until 2002 Mrs F continued to live in

a a large house which she and her husband had purchased after the Second World War. The evidence before the master was that Mrs F was extremely attached to her home and was very reluctant to leave it. She had told her friends and family that she wished to remain there for the rest of her life. But by 2002 she had become unable to cope with the maintenance and upkeep of the property and its garden and was persuaded by her children to move into a nursing home. Even then she was unwilling to sell the house and had hoped that it might be let to provide her with an income.

[3] Mr A is a retired solicitor who was born in 1946 and continues to live close to his mother. His sister, Mrs B, who was born in 1950, lives abroad in Ireland. She has a family of her own and is obviously unable to visit her mother with the same regularity as Mr A, but between her visits she maintains frequent contact with her mother by telephone. Both children are clearly concerned to do the best for their mother, but the difficulty which has arisen in this case is that Mr A and Mrs B have been at odds with each other for some time and the disagreements and animosity between them have spilled over into the question of whether effect should be given to the power of attorney executed in Mr A's favour.

d [4] It is clear that the donor has in the past chosen to place her affairs in the hands of Mr A. The power of attorney was executed in July 2000, and in October 2001 Mrs F executed a will under which her son was appointed to be the sole executor. He is also, I believe, the executor of his father's will. One of the complications of this matter is that the family home was held by Mrs F and her late husband as joint tenants. On the advice of Mr A as part of what I am told was a scheme to minimise inheritance tax, his father served notice of severance on Mrs F, with the result that at his death the property was held by Mrs F as the surviving joint tenant on trust for herself and her husband as tenants in common in equal shares. Under their father's will Mr A and Mrs B are entitled to pecuniary legacies of £45,000 each, with the residue being held upon trust for Mrs F absolutely. In order to make title to the family home on a sale, it will be necessary for Mr A to appoint an additional trustee in order to give a good receipt. It seems to be common ground that the power of appointment would vest in him as Mrs F's attorney and that he could exercise the power on her behalf: see s 36(6A)–(6B) of the Trustee Act 1925. It would then be for him to arrange for the investment of his mother's share of the proceeds of sale, including the share of residue due to her under her late husband's will.

[5] The difficulties which have arisen are due to Mrs F's declining state of health. The medical evidence contained in a report by Dr X, the Lord Chancellor's medical visitor, based on a visit to Mrs F in October last year, is that she is suffering from arteriosclerotic dementia, which has led to some memory loss. She has also suffered a stroke, but her residence in the nursing home seems to have stabilised her condition and she is able to hold rational conversations. She is, however, disorientated in relation to dates and other historic details, and her mental condition will deteriorate with the passage of time. It is also clear that she can become confused. At one point in the interview Mrs F asked Dr X why she had come and became distressed during the examination when she was asked to carry out a counting exercise.

j [6] The importance of the evidence from the Lord Chancellor's medical visitor is that it forms the basis, and indeed the only evidence, upon which Mrs B's objection to registration is now sought to be maintained. During the course of her interview with Dr X, Mrs F expressed concern that her son and daughter were having disagreements. She would prefer them 'to live together and agree'.

She also wanted Mr A to discuss things with his sister. She then went on to say that if they could not agree, it would be better for an independent receiver to be appointed. a

[7] The master, in his judgment, interpreted Mrs F's wishes and feelings to be that—

'if the continued operation of the enduring power of attorney is likely to be a festering sore or a stumbling block that prevents her children from behaving in a civil manner towards one another, then she would rather an independent receiver be appointed. It is clear to me that the continued operation of the power is likely to be a stumbling block that prevents any prospect of reconciliation between her son and daughter. [Mr A] contends that his mother's views do not reflect an informed decision on the matter, that there would be considerable cost implications in appointing a receiver, and that there would be practical day-to-day difficulties over being reimbursed for small items of expenditure, such as purchasing items of clothing, giving Christmas or birthday presents, and treats such as going out for lunch. I agree that there are cost implications, but when [the house] is finally sold and the net proceeds are properly invested, there should be relatively little for the receiver to do, and it is unlikely that the costs would be substantial. In any event, [Mrs F] has a fairly substantial estate, and the costs should not be disproportionate, or cause any hardship or adversely impact on her standard of living. The practical day-to-day problems to which [Mr A] referred can be easily overcome.' b
c
d
e

He therefore upheld the objection to registration on grounds of unsuitability.

[8] Before me Mr A has repeated his submission that his mother's expressed views are unreliable as an accurate account of her true wishes and feelings. To support this he has produced an undated letter in Mrs F's handwriting, in which she says that she wants Mr A to act for her in all her affairs and that she does not want anybody else. She says in the letter that he has acted as she has wished and that she wants this to continue. There is no evidence as to when and in what circumstances this letter came to be written and there is therefore little weight which I can attach to it. If Mr A is right and his mother's statement to Dr X is unreliable as an accurate statement of her wishes, it must also follow that this letter is subject to the same reservations. f
g

[9] The master upheld Mrs B's objection to the registration of the power of attorney on the ground that Mr A was unsuitable by accepting at face value Mrs F's statement to Dr X that she would prefer an independent receiver to be appointed if her son and daughter could not agree. The likely continuation of bad relations between them due to the attorneyship was, in the master's judgment, the cause of her concern. She did not suggest that she regarded her son as unsuitable to be her attorney for any other reason, nor is there any evidence that he would fail to carry out his duties as attorney otherwise than in accordance with the law and in the best interests of his mother. In this connection some reference needs to be made to the history of these proceedings. h
j

[10] On 21 January 2003 Mrs B applied to be appointed her mother's receiver under s 99 of the Mental Health Act 1983. In a letter to the Court of Protection enclosing the receiver's declaration and other documents, her solicitors referred to her concerns that Mr A would seek to use the power of attorney to sell Mrs F's property. The letter also states that Mrs B has had grave reservations about his

a conduct of her mother's affairs and that any communications between them are 'confrontational'. The solicitors refer to Mr A failing to provide information about investments and complain about losses incurred on the stock market. However, the principal cause of concern appears to have been the family house. Any sale of this was, they said, likely to cause Mrs F considerable distress.

b [11] Mrs B's application to be appointed her mother's receiver led to Mr A applying for the registration of the power of attorney. In a letter of 3 April 2003 Mrs B's solicitors lodged her objection to this. This was made on the grounds of Mr A's unsuitability within the meaning of s 6(5)(e) of the Enduring Powers of Attorney Act 1985 and was based on a number of matters which can be summarised as follows: (i) Mr A's desire to sell the family home and the distress this has caused to Mrs F; (ii) Mr A's failure properly to secure and maintain the property following Mrs F's entry into a nursing home; (iii) the lack of information provided about Mr A's management of his mother's and father's affairs; and (iv) Mr A's own possible financial difficulties. There was then further lengthy correspondence between Mr A and Mrs B's solicitors, in which allegations and counter-allegations of various kinds were made and rebutted, but c d on 18 August 2003 the objection to registration was listed for hearing on 25 September.

[12] This led to discussions about a possible compromise. Mr A said that he was informed by the Public Guardianship Office (PGO) of the Court of Protection that his sister was willing to withdraw her objection, provided that Mr A produced an inventory of the current assets and liabilities of Mrs F's estate; e f agreed to produce annual accounts; and gave her written notice in advance of any steps taken in connection with the sale of the family home. He told the PGO that the conditions were acceptable. The conditions had been set out in a letter written by Mrs B's solicitors to the PGO on 19 September 2003, indicating that she had decided to withdraw her objections, but inviting the master to embody the three conditions in directions under s 8(2)(b) of the 1985 Act. A copy of the letter was then sent to Mr A.

[13] Despite having indicated earlier his consent to the conditions, this provoked a hostile reaction. Mr A wrote to the Court of Protection stating that he objected to each of the directions sought. He told me that he was put out when he saw the terms of the letter sent to the PGO and that as an attorney he g had no legal duty to keep relations informed, although it was common to do so. However, the objection seems to have been more one of form than of substance, because at the hearing on 25 September in front of the master, he indicated that he was willing to provide the information which his sister required. This caused events to take a new turn. Mr Sartin, who has appeared for Mrs B on this appeal h and in front of the master, raised a new query about the circumstances in which the power of attorney came to be executed. Mr A had revealed that he had drawn it up himself, and Mr Sartin expressed concern about the possibility that undue pressure or influence had been used to obtain it. The hearing was therefore adjourned to 2 December 2003 to allow the Lord Chancellor's medical visitor to report. At the same time the master agreed that the family home would be placed j on the market for sale, to avoid further deterioration in its condition.

[14] I have already referred to the principal finding set out in the medical visitor's report, which formed the basis of the master's decision that Mr A was not suitable to be Mrs F's attorney. The provision of this report put an end, however, to the suggestions of undue influence in connection with the execution of the power of attorney. On 17 October 2003 Mrs B's solicitors had written to the PGO

indicating that, subject to the outcome of Dr X's visit and to an order being made under which Mr A would provide a schedule of Mrs F's estate and thereafter file accounts on a quarterly basis, Mrs B would not continue with her objections to Mr A's application for registration of the enduring power. On 12 November Mr A wrote to his sister's solicitors referring to that letter and confirming that he now had no objection to the suggested conditions. The letter also invited her agreement to the sale of the family home at a price of some £365,000, as advised by the selling agents. However, in a subsequent letter of 28 November to the PGO, Mrs B's solicitors stated that, following receipt of the medical visitor's report and in the light of Mrs F's expressed desire for the appointment of an independent receiver, Mrs B had confirmed that she did wish to maintain her objection, on grounds of suitability, to the registration of enduring power of attorney. a
b
c

[15] It is important to bear in mind that the only question which I have to consider is whether Mr A is to be regarded as unsuitable to be his mother's attorney, in the light of her expressed preference for an independent receiver as a possible means of avoiding future strife between her children. There was no evidence before the master, nor is there any before me, to suggest that Mr A is unsuitable on any other grounds. Although complaints have in the past been made by Mrs B about his management of the property and his failure to communicate, none of these matters was pressed at the hearing before the master. Although this appeal takes the form of a rehearing, that does not entitle me to step outside the grounds of objection which have been pursued. Mrs B chose to put no evidence before the master or before me, but instead relied on the contents of the medical visitor's report. It is also relevant to restate that, in order to refuse registration of the power under s 6(5)(e) of the 1985 Act, the court has to be satisfied not of the chosen attorney's suitability, but rather that he is unsuitable to be the attorney: see *Re E, X v Y* [2000] 3 All ER 1004 at 1016, [2001] Ch 364 at 376. d
e
f

[16] The hearing on 2 December 2003 added nothing in terms of evidence to the medical visitor's report and was largely confined to argument as to how to interpret Dr X's conclusions and whether they supported an objection to registration on grounds of unsuitability. The master in his decision cited two references to the meaning of the expression 'unsuitable to be the donor's attorney' in s 6(5)(e). The first was para 4.49 of the Law Commission's report, *The Incapacitated Principal* (Law Com no 122) published in 1983, which explains the policy behind the 1985 Act. Paragraph 4.49, so far as material, states as follows: g
h

'This needs some explanation. It would amount in effect to a criticism of the donor's choice of attorney. But we would not wish this ground to be sustained merely because the attorney was not the sort of person that a particular relative would have chosen. It is our wish that the donor's choice of attorney should carry considerable weight. Thus, for example, a mother might be content to appoint her son as her EPA attorney despite being aware of a conviction for theft. We would not want her choice of attorney to be upset simply because a particular relative would not want the son to be his attorney. The question should be whether the particular attorney is suitable to act as attorney for the particular donor. In short, the Court should j

- a examine carefully all the circumstances—particularly the relationship between donor and attorney.’

[17] The second reference is to the judgment of Mr Jules Sher QC (sitting as a deputy judge of this Division) in the case of *Re W* [2000] 1 All ER 175, [2000] Ch 343, which was also a case in which there was hostility between the donor’s children. The deputy judge said ([2000] 1 All ER 175 at 181–182, [2000] Ch 343 at 350–351):

- c ‘The second ground of unsuitability is the hostility between the three children. The master considered that that fact alone rendered any one of them unsuitable to be Mrs W’s attorney. In my judgment such hostility may well have such consequences but it all depends upon the circumstances. For example, had the estate of Mrs W been complex and had it required strategic decisions in relation to its administration, one would expect the attorney to have had to consult and work with her siblings in relation to the administration. In such circumstances the evident hostility between them
- d would impact adversely on the stewardship of the attorney, no matter who was at fault in creating the hostility in the first place. But in this case the estate is simple. I asked counsel what the position was and was told that there are the following assets: (1) a portfolio of investments of a value (as at 23 December 1998) of £211,189; (2) £20,000 in premium bonds; (3) a life policy (written in trust) of £30,000. As to the outgoings there is the cost of
- e the nursing home at some £2,000 a month, and then, simply, the need for a modest amount to cover a regular hairdo, telephone bills and the like. And, of course, on the income side there is the old age pension. In other words there is nothing of any significance left to be done. The assets are under proper control. The income simply needs to be fed through to the nursing home. The evidence is that this has been done by Mrs X very efficiently. She
- f has indicated more than once that she has never intended to charge for her services under the power of attorney and she does not intend to do so. Against this, if the Public Trustee were to come in, there would be an appointment fee and an annual fee of between £2,350 and £3,600 per annum. If a solicitor were appointed the total cost would be likely to be somewhat
- g less than that. It seems to me that it is not right to say that (irrespective of the background) hostility of the kind we have seen in this case between the children renders any one of them unsuitable to be Mrs W’s attorney. In this case the hostility will not impact adversely on the administration. It would, in my judgment, be quite wrong to frustrate Mrs W’s choice of attorney in this way. Whether it is or is not a good idea for a parent in Mrs W’s position,
- h when such hostility exists, to appoint one child alone as attorney is another question. But Mrs W did so and, on the evidence, did so knowing of the hostility. That is her prerogative and in my judgment, when the hostility does not interfere with the smooth running of the administration, the court
- j should not interfere on the ground of unsuitability.’

[18] The master did not uphold Mrs B’s objection to the registration of the power on the ground that the hostility between her and her brother would make the administration of the estate difficult, if not impossible, and there is no evidence that, in my judgment, would support that conclusion. Now that the family house is to be sold using agents and solicitors, Mr A’s duties will be

confined to the investment of the proceeds in approved securities and the use of the income to pay for Mrs F's nursing home fees and to meet her other needs. Section 3 of the 1985 Act imposes restrictions on the power of the attorney to use the donor's estates so as to provide gifts or to meet the needs of anyone other than the donor herself: see s 3(4) and (5). The power is also fiduciary in nature and has to be exercised in good faith for the benefit and in the interests of the donor. If there is any reason, following registration, to suppose that the attorney has or is likely to act otherwise than in accordance with this duty, the court has power to give directions under s 8(2) and may, in appropriate cases, cancel the registration under s 8(4) and appoint an independent receiver. No evidence was presented to the court to show that this was likely to be the consequence of registering the power of attorney in favour of Mr A.

[19] The sole objection to registration is Mrs F's apparent preference for the appointment of an independent receiver, if (as the master put it) the continued operation of the enduring power of attorney was likely to be a bar to her children behaving in a civilised manner to each other and hopefully becoming reconciled. It goes without saying that one hopes that an improvement in relations between Mr A and Mrs B will occur, but from what I have seen, it seems to me unlikely that the appointment of an independent receiver will actually heal the rift. If anything, it is just as (if not more) likely to add to Mr A's feelings that he has been unfairly criticised by his sister in relation to the management of his mother's affairs, which he has now carried out for many years. Unlike his sister, who lives in Ireland, he remains close to where his mother lives, visits her frequently and is trusted by her. He says that he is concerned about the possible effect on her of interposing a stranger to manage her affairs and considers that there is no necessity for it. It will only add expense and diminish his mother's assets and income unnecessarily.

[20] I am not satisfied that the appointment of an independent receiver would be justified in this case at this time. I accept from Dr X's report that Mrs F remains conscious of the disagreements between her children and would prefer them to cease. But she has lived with them for some time and it has not led to any apparent deterioration in her relationship with either of her children individually or in the trust she reposes in her son to manage her property and affairs. He may well have been chosen as the attorney because he lives close by and is in regular physical contact with her. There is no evidence that he has abused that trust or is likely in the future to do so. Unlike the master, I consider that the appointment of an independent receiver will not diminish the hostility between Mr A and Mrs B, but will simply increase it. In this case it will not achieve any useful purpose, but will merely add to expense. If, as the master found, Mrs F's acceptance of an independent receiver is only justified on the basis that it would heal the rift, then there can be no justification for departing from her earlier expressed desire to appoint Mr A as her attorney, and his lack of suitability is not made out. I do not read Dr X's report as indicating a preference by Mrs F for an independent receiver in any event, but rather as a reluctant acceptance of such, if no other way can be found of resolving her children's differences. It seems to me that to remove a chosen attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, should require clear evidence either that the continuing hostility will impede the proper administration of the estate or will cause significant distress to the donor which would be avoided by the appointment of a receiver. Neither of these conditions is satisfied by the evidence in this case.

- a* [21] I will therefore allow the appeal and order registration of the power of attorney. There will be no order as to the costs of the appeal. I will leave the master's order for costs undisturbed. As things stand, there are no grounds for making a s 8 direction in relation to the provision of an inventory and accounts. It is, however, very much in Mr A's interests to provide this information and to furnish accounts to Mrs B on a regular basis. If this is done, it will, one hopes,
- b* remove much of the ill-feeling between them and restore the position to what it would have been, had Mrs B adhered to the position she had reached prior to the medical visitor's report.

Appeal allowed.

Celia Fox Barrister.

R (on the application of G) v Immigration Appeal Tribunal a

R (on the application of M) v Immigration Appeal Tribunal b

[2004] EWHC 588 (Admin)

QUEENS BENCH DIVISION (ADMINISTRATIVE COURT)

COLLINS J

11, 12, 25 MARCH 2004 c

Immigration – Appeal – Immigration Appeal Tribunal – Judicial review – Failed asylum seekers unsuccessfully applying for statutory review of Immigration Appeal Tribunal’s refusal of permission to appeal – Asylum seekers applying for judicial review – Whether availability of judicial review ousted by provision of statutory review – Whether refusal of judicial review breach of right to fair and public hearing – Human Rights Act 1998, Sch 1, Pt I, art 6 – Nationality, Immigration and Asylum Act 2002, s 101. d

The claims of G and M for asylum were refused and they applied to the Immigration Appeal Tribunal for permission to appeal, which was refused. Under s 101^a of the Nationality, Immigration and Asylum Act 2002 a person applying to the tribunal for permission to appeal could apply to the High Court for a review of the tribunal’s decision on a paper application. The claimants both applied for a statutory review under s 101 of the 2002 Act. Both applications were rejected. The claimants applied for judicial review of the decision of the tribunal. The issue before the court was in what circumstances, if at all, a claim for judicial review could survive s 101 of the 2002 Act. The Secretary of State for the Home Department contended that the provision of statutory review meant that the court had no jurisdiction to permit judicial review, or if it had jurisdiction, should never allow a claim to proceed. The claimants contended that refusal of judicial review breached, inter alia, their right to a fair and public hearing provided by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). e
f
g

Held – (1) The court’s jurisdiction to subject a decision to judicial review had not been removed by s 101 of the 2002 Act. However, it was clear that it had been the intention of Parliament that statutory review should take the place of judicial review, and thus judicial review should not be permitted unless there were exceptional circumstances. A claim for judicial review based on grounds which were or could have been raised in statutory review could never be regarded as one to which exceptional circumstances applied and a failure to use statutory review would certainly prevent any attempt to use judicial review. To seek judicial review where it was not possible to show exceptional circumstances, would be regarded as an abuse of process and be summarily dismissed (see [10], [11], [20], [21], below); *R (on the application of Sivasubramaniam) v Wandsworth* h
j

^a Section 101 is set out at [5], below

- a* County Court, R (on the application of Sivasubramaniam) v Kingston upon Thames County Court [2003] 2 All ER 160 applied.

(2) Article 6 of the convention did not apply to procedures for the expulsion of aliens. The claims in the instant cases, which were based on the same grounds as the unsuccessful statutory reviews would, accordingly, be dismissed (see [17], [22], below); *Maaouia v France* (2001) 9 BHRC 205 considered.

b **Notes**

For the power of the court to determine the ambit of its own authority, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 21, and for the right to a fair trial, see 8(2) *Halsbury's Laws* (4th edn reissue) para 134.

- c* For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 57 *Halsbury's Statutes* (4th edn) (2002 reissue) 54.

For the Nationality, Immigration and Asylum Act 2002, s 101, see 31 *Halsbury's Statutes* (4th edn) (2003 reissue) 512.

Cases referred to in judgment

- d* *Agee v UK* (1976) 7 DR 164, E Com HR.
Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147, [1969] 2 WLR 163, HL.
Boddington v British Transport Police [1998] 2 All ER 203, [1999] 2 AC 143, [1998] 2 WLR 639, HL.
Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, [1987] 2 WLR 606, HL.
- e* *Gilmore's Application, Re* [1957] 1 All ER 796, sub nom *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, [1957] 2 WLR 498, CA.
Hindawi v Secretary of State for the Home Dept [2004] EWHC 78 (Admin), (2004) Times, 5 February.
- f* *Leech v Parkhurst Prison Deputy Governor, Prevot v Long Lorton Prison Deputy Governor* [1988] 1 All ER 485, [1988] AC 533, [1988] 2 WLR 290, HL.
Maaouia v France (2001) 9 BHRC 205, ECt HR.
Preston v IRC [1985] 2 All ER 327, [1985] AC 835, [1985] 2 WLR 836, HL.
R v Birmingham City Council, ex p Ferrero Ltd [1993] 1 All ER 530, CA.
R v Secretary of State for the Home Dept, ex p Saleem [2000] 4 All ER 814, [2001] 1 WLR 443, CA.
- g* *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), [2003] All ER (D) 128 (Nov).
R (on the application of Sivasubramaniam) v Wandsworth County Court, R (on the application of Sivasubramaniam) v Kingston upon Thames County Court [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475.
- h* *Racal Communications Ltd, Re* [1980] 2 All ER 634, [1981] AC 374, [1980] 3 WLR 181, HL.
United Australia Ltd v Barclays Bank Ltd [1940] 4 All ER 20, [1941] AC 1, HL.
Westminster City Council v O'Reilly [2003] EWCA Civ 1007, [2004] 1 WLR 195.
- j* **Applications for judicial review**

R (on the application of G) v Immigration Appeal Tribunal

G applied for judicial review of the decision of a High Court judge rejecting G's application under s 101(3) of the Nationality, Immigration and Asylum Act 2002 for a review of the decision of the Immigration Appeal Tribunal to refuse

permission to appeal against the determination of an adjudicator under the 2002 Act. a

R (on the application of M) v Immigration Appeal Tribunal

M applied for permission to apply for, and judicial review of, the decision of a High Court judge rejecting M's application under s 101(3) of the Nationality, Immigration and Asylum Act 2002 for a review of the decision of the Immigration Appeal Tribunal to refuse permission to appeal against the determination of an adjudicator under the 2002 Act. b

Raza Husain (instructed by TRP, Birmingham) for G.

Michael Fordham (instructed by *Sonal Ghelani*) for M.

Elisabeth Laing (instructed by the *Treasury Solicitor*) for the Immigration Appeal Tribunal. c

Cur adv vult

25 March 2004. The following judgment was delivered. d

COLLINS J.

[1] Both these claims constitute attempts to pursue a judicial review against decisions of the Immigration Appeal Tribunal (IAT) refusing permission to appeal notwithstanding that a High Court judge has in each case rejected an application under s 101(3) of the Nationality, Immigration and Asylum Act 2002. I had given permission for the claim to be made in G's case but had rejected that in M's case. M's case was therefore listed before me as an oral renewal of the application for permission. In the course of the hearing without objection from Miss Laing I granted permission and dispensed with all procedural requirements so that each claim could be considered on the same footing. e

[2] I have only been concerned with the question in what circumstances, if at all, a claim for judicial review can survive s 101 of the 2002 Act. Miss Laing submits that the provision of statutory review means that the court now has no jurisdiction to permit judicial review or, if it has, it should never allow a claim to proceed. Mr Husain and Mr Fordham submit that the jurisdiction has not been removed; indeed, it could not be in the absence of the clearest possible words and there are none here. They go on to submit that the court should, notwithstanding the rejection of statutory review, be prepared to consider a claim and, if persuaded, perhaps after oral argument, that the IAT had erred in law, grant relief. They recognise that considerable weight should be attached to the rejection of the application for statutory review and that practitioners should act responsibly and with great circumspection before making any such claim. Nevertheless, since the jurisdiction continues to exist, and particularly since in this jurisdiction an error can be literally fatal and the most anxious scrutiny is required (see *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940, [1987] AC 514 and observations to the same effect in many subsequent cases), judicial review should be permitted. f

[3] The problem of increasing numbers of asylum seekers has exercised the government over the past ten years or more and has led to a number of Acts of Parliament which have set up various systems, whether administrative or concerning appeals, to try to deal with the problem. There are among the genuine asylum seekers a very large number of economic migrants whose goal is g

h

j

a to better themselves in this country. Thus a very large percentage of those who claim asylum are anxious to achieve as much delay as possible before their claims are finally disposed of. So long as appeals are pending, they can remain here and, since they are forbidden to work (a prohibition which is often disregarded) they are usually entitled to at least minimum support at public expense. Furthermore, appeals and judicial reviews are usually conducted on legal aid and all too frequently by legal advisors who pay insufficient regard to whether any claim in truth has merit. Practitioners are too ready, so it is said, to provide advice which obtains legal aid in circumstances where the claims are in reality without merit. Thus any delay in the appellate system costs the country a great deal of money.

b [4] The government clearly believed that one of the significant causes of delay was judicial review. The process could take months since a claim, if unmeritorious, would be refused on paper and then could be renewed orally. If that renewal was rejected, there was a right to go to the Court of Appeal. In the White Paper published before the 2002 Act, under the title *Secure Borders, Safe Haven* (Cm 5387) (February 2002), delay was identified as a real problem and measures were to be introduced (as they were) to reduce such delay and to streamline both the administrative and the appellate processes. A measure then identified to seek to avoid judicial review was to make the IAT a superior court of record. For a number of reasons, not least of which was a concern that such a provision would not work, that proposal was abandoned and, by an amendment tabled when the 2002 Act was going through Parliament, statutory review was introduced. There was to be a short time limit and the opportunity for any significant delay was to be removed by making the decision of the High Court judge, who would deal with the application on paper, final. It was anticipated that the whole statutory review process would normally take no more than four weeks, that is to say, two weeks to apply and a decision by the court within two weeks of the application being made. That anticipation has been fulfilled. It would, as must be obvious, be frustrated if claims such as these are permitted to proceed. But that is, of course, not necessarily a good answer to the claims if judicial review can and, in the interests of justice, should be allowed.

[5] Section 101 of the 2002 Act reads:

g ‘*Appeal to Tribunal*.—(1) A party to an appeal to an adjudicator under section 82 or 83 may, with the permission of the Immigration Appeal Tribunal, appeal to the Tribunal against the adjudicator’s determination on a point of law.

h (2) A party to an application to the Tribunal for permission to appeal under subsection (1) may apply to the High Court or, in Scotland, to the Court of Session for a review of the Tribunal’s decision on the ground that the Tribunal made an error of law.

j (3) Where an application is made under subsection (2)—(a) it shall be determined by a single judge by reference only to written submissions, (b) the judge may affirm or reverse the Tribunal’s decision, (c) the judge’s decision shall be final, and (d) if, in an application to the High Court, the judge thinks the application had no merit he shall issue a certificate under this paragraph (which shall be dealt with in accordance with Civil Procedure Rules).

(4) The Lord Chancellor may by order repeal subsections (2) and (3).’

CPR Pt 54 has been amended to cover statutory reviews which are dealt with by judges of the Administrative Court: see rr 54.21–54.27. Review applies not only

to refusals but also to grants by the IAT of permission to appeal, although in practice it seems that grants are only likely to be attacked where the defendant has been granted permission to appeal and the appellant believes that that grant was erroneous in law. I am bound to say that the circumstances in which such grants could be tainted must be exceedingly rare since it would have to be shown that the IAT should not have regarded the appeal as arguable and so that appeal would have no real prospect of success: see r 54.25(5). The test to be applied by the court in the more usual application in relation to a refusal by the IAT of permissions is set out in r 54.25(4), which provides that the court may only reverse the decision if satisfied that—

‘(a) the Tribunal may have made an error of law; and (b) either—(i) the appeal would have a real prospect of success; or (ii) there is some other compelling reason why the appeal should be heard.’

If the court reverses the IAT’s decision, its decision operates as a grant of leave to appeal, which the court may limit to specific grounds.

[6] As will perhaps be apparent, statutory review has some advantages over judicial review. The other party is not heard and so there is no formal opposition to the application. This means that the exercise of the duty of candour is all the more important and, if it transpires that the court was misled by a failure to disclose a material matter and so is persuaded to reverse the IAT’s decision, I have no doubt that action, whether by way of contempt proceedings or imposition of costs or a report to the relevant disciplinary body, should and would be taken. Further, the test is whether the IAT ‘may have made an error of law’. Judicial review will not succeed unless the court is persuaded in due course that the IAT has made an error of law. But there are disadvantages. There can be no oral renewal and there is no right to pursue the application to the Court of Appeal. Mr Husain has pointed out that in a significant number of cases, refusal on the papers has been overturned on an oral renewal and that there are examples in the books of claims which have had to be taken to the Court of Appeal before permission has been granted and success ultimately achieved.

[7] No system set up and operated by human beings can ever achieve perfection. Even the House of Lords, the ‘voices of infallibility’ as they have been called, have recognised that they may err and sometimes that recognition has come very soon after the decision which has turned out to be wrong. The question must be whether the system which is in operation is sufficiently fair to enable it to be said that errors are unlikely to occur. The present system involves an appeal to an independent adjudicator who normally hears evidence and will reach his or her own conclusion based on the evidence which is put before him or her. There are now some 600 or more full or part-time adjudicators and the large numbers of cases mean that they work under considerable pressure. Mistakes can be made and the fact that more than 25% of the 900 or so applications for permission to appeal made to the IAT each week are successful shows how necessary it is to have a review based on error of law. These numbers place a great burden on the members of the IAT who have to deal with these applications. In order to process them within a short time, an individual member has to deal with 120 applications in the course of a week or 24 each day. It must be obvious that there is a real prospect that errors will occasionally be made. It is a tribute to those members, who have the equivalent status to circuit judges and who have a considerable expertise in dealing with immigration claims, that there are only a relatively small number of statutory reviews and that a very small

a percentage of those are successful. At present, the Administrative Court is receiving about 35–40 applications each week and no more than 20% are successful. The numbers are very small in the context of immigration claims as a whole, but, since most relate to asylum, any error can have disastrous results. In fact, the volume of statutory reviews is, despite the increase in numbers, below that of judicial reviews being received before statutory review took over.

b [8] Section 101 of the 2002 Act does not expressly seek to oust judicial review by providing, as Parliament has done in other cases where a limited right of appeal has been introduced where judicial review was available, that the decision in question cannot otherwise be questioned in any proceedings. Access by a citizen or a person, who is entitled while in this country to the protection of its laws, to the court is a right of the highest constitutional importance. Legislation c which removes that right is inimical to the rule of law. In *Boddington v British Transport Police* [1998] 2 All ER 203 at 216, [1999] 2 AC 143 at 161, Lord Irvine of Lairg LC said:

d '... in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not e legislate to prevent individuals from doing so ...'

This principle applies to decisions of tribunals (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147), but the fact that there already exists an appeal to an independent tribunal is relevant in f considering whether in any given set of circumstances judicial review is still needed.

[9] The importance attached to the right of access to the court for judicial review has meant that express words must be used by Parliament to achieve its removal and even apparently express words will not necessarily achieve the g object. This is because what have often been described as 'no certiorari clauses' will always be construed as ineffective to prevent review of decisions which are in law regarded as nullities. Judicial review cannot be excluded by implication. That in my view is clearly established by authorities which are encapsulated in the words of Denning LJ in *Re Gilmore's Application* [1957] 1 All ER 796 at 801, h [1957] 1 QB 574 at 583:

'... the remedy of certiorari [now infelicitously called a quashing order] is never to be taken away by any statute except by the most clear and explicit words.'

j This approach was recently confirmed by the Court of Appeal in an important decision to which I shall have to return, *R (on the application of Sivasubramaniam) v Wandsworth County Court*, *R (on the application of Sivasubramaniam) v Kingston upon Thames County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475. Lord Phillips of Worth Matravers MR, giving the judgment of the court, after citing Denning LJ's dictum, said (at [44]):

‘The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication.’ a

Miss Laing sought to distinguish *Sivasubramaniam*’s case on the ground that in the circumstances of that case, which concerned an attempt to pursue judicial review in relation to a county court where Parliament has established a detailed appeal process, there was no appeal to the High Court, whereas here Parliament had specifically made provision for access to the High Court. I am satisfied that the Court of Appeal was laying and was intending to lay down a proposition of general application which, as the authorities upon which it relied show, was not circumscribed by the facts of the particular case. That that proposition is of general application is entirely consistent with observations of Lord Oliver of Aylmerton in *Leech v Parkhurst Prison Deputy Governor, Prevot v Long Lorton Prison Deputy Governor* [1988] 1 All ER 485 at 511, [1988] AC 533 at 581. The precise provisions in a given case will be highly material in considering whether the court should exercise its discretion in favour of permitting judicial review but will not remove the courts’ jurisdiction to entertain a claim for judicial review. b

[10] I am entirely satisfied that the court’s jurisdiction is not removed. However, it is clear that it was Parliament’s intention that statutory review should take the place of judicial review. There is a consistent line of authority which establishes that judicial review is a remedy of last resort and that an alternative remedy must be pursued if it exists. Whether judicial review may then be permitted will depend on the circumstances. In *R v Birmingham City Council, ex p Ferrero Ltd* [1993] 1 All ER 530, the Court of Appeal was concerned with a power in the interests of public safety to prohibit the sale of particular goods, which carried a right of appeal to a magistrates’ court. The case concerned the prohibition in respect of chocolate eggs containing plastic toys one of which had been swallowed by and choked to death a small boy. Judicial review was sought. It was denied because of the existence of the alternative remedy. Taylor LJ (at 537), giving the only reasoned judgment, said: c

‘These are very strong dicta, both in this court and in the House of Lords as cited, emphasising that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted.’ d

Lords Scarman and Templeman in *Preston v IRC* [1985] 2 All ER 327 at 330, 337, [1985] AC 835 at 852, 862 respectively had made the same point but in more emphatic language. In *Sivasubramaniam*’s case [2003] 2 All ER 160 at [47], the court dealt with counsel’s submission that permission to claim judicial review should not be granted when a suitable alternative remedy is available thus: e

‘There is indeed an abundance of authority, which supports Mr Sales’ submission. [A number of authorities including *Ex p Ferrero* and *Preston v IRC* are then referred to]. What these authorities show is that judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused.’ f

a [11] Mr Fordham drew particular attention to the penultimate sentence in support of his submission that statutory review was less satisfactory because it did not include the right of renewal and in particular did not provide for the possibility of oral argument in a public hearing, nor any access to the appellate courts. It seems to me that where Parliament has introduced a new procedure to deal with a particular problem which it perceives to exist, the court should b hesitate long before considering that procedure to be less satisfactory. Parliament was aware of the existence of judicial review and quite clearly intended, as I have said, that statutory review should take its place. It clearly regarded the new procedure as satisfactory. In the light of the two-tier appeal system which exists, it was in my view entitled so to regard it. It is proportionate to recognise the need for consideration by a High Court judge but, because of the very real problems c created by delay and the pursuit of unmeritorious claims, to limit that consideration in the way which s 101 of the 2002 Act and CPR Pt 54 has ordained. The court in *Sivasubramaniam*'s case (at [48]), having referred to the scheme set up which governs appeals at all levels of courts, said that to permit an applicant to bypass the scheme by pursuing a claim for judicial review was to defeat the d object of the exercise. Lord Phillips MR continued:

'We believe that this should not be permitted unless there are exceptional circumstances—and we find it hard to envisage what these could be.'

Precisely the same approach should be adopted here.

e [12] In *Sivasubramaniam*'s case the court expressly considered claims for judicial review of refusals of permission to appeal by the IAT. Lord Phillips MR said (at [52]):

f 'There are, in our judgment, special factors which fully justify the practice of entertaining applications for permission to claim judicial review of refusals of leave to appeal by the tribunal. In asylum cases, and most cases are asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture. The number of applications for asylum is enormous, the pressure on the tribunals immense and the consequences of error considerable. The most anxious scrutiny of individual cases is called for and review by a High Court judge is a reasonable, if not an g essential, ingredient in that scrutiny.'

h It is to be noted that review by a High Court judge is referred to, not the need for the whole panoply of judicial review. When *Sivasubramaniam*'s case was decided, the 2002 Act was about to be passed but the relevant provisions were not in force so that judicial review was still the only route available. Statutory review does involve review by a High Court judge and there is no reason to believe that the court's observations which I have just cited were intended to require more than that.

j [13] An important feature of statutory review is that it permits recourse to a High Court judge whose decision is final. This means, it is submitted, no more than that there is no appeal. I have been referred to cases where, notwithstanding an alternative remedy and even one which provides that the High Court judge's decision is final, judicial review has been permitted. In *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), [2003] All ER (D) 128 (Nov) Sullivan J was concerned with a claim for judicial review of a decision of the council to amend the Register of Town and Village Greens. Section 14 of the Commons Registration Act 1965 gives the High Court

power to rectify the register and an objection was taken to the claim for judicial review on the ground that the s 14 route should have been used. Sullivan J made the point that the procedures did not enable precisely the same relief to be granted in that judicial review would enable the registration itself to be quashed. Sullivan J referred to *Sivasubramaniam*'s case and made the point that judicial review was still available. There was no question of bypassing the statutory scheme; s 14 did not require permission to be obtained and there were no specific time limits. He unsurprisingly felt able to reach a just conclusion by permitting the claim for judicial review and that under s 14 to run in parallel. In the circumstances of that case, to have allowed the objection to judicial review to have prevailed would have allowed procedural obstacles to defeat justice, there being no conceivable prejudice to the defendants and no purpose in erecting the obstacle. The ghosts clanking their mediaeval chains referred to by Lord Atkin would indeed have been abroad to defeat justice: see *United Australia Ltd v Barclays Bank Ltd* [1940] 4 All ER 20 at 37, [1941] AC 1 at 29.

[14] Miss Laing submitted that the decision of the judge on statutory review created an estoppel. Since both these claims sought to reargue the points which the judges had rejected, they were an abuse of the process. Estoppel is said to have no place in public law, but that relates to the doctrine as it applies to the acts of bodies other than courts of law. I was pressed with *Westminster City Council v O'Reilly* [2003] EWCA Civ 1007, [2004] 1 WLR 195. Section 28A of the Supreme Court Act 1981 provides that a decision of the High Court on an appeal by way of case stated which is not in any criminal cause or matter shall be final. The case concerned a licensing appeal. Mackay J had clearly found the point at issue a difficult one and he granted permission to appeal, his attention not having been drawn to s 28A. When the appeal came before the Court of Appeal, it inevitably declined jurisdiction, following the decision of the House of Lords in *Re Racal Communications Ltd* [1980] 2 All ER 634, [1981] AC 374. Lord Woolf CJ ([2004] 1 WLR 195) said:

'[19] In his submissions Mr Saunders indicated that if the outcome of that fresh application was a decision which was adverse to his clients because of the judgment of Mackay J, it would be his clients' present intention to make an application for permission to apply for judicial review. That application for permission to apply for judicial review would be made with a view to achieving a decision by this court which would not be available on an appeal by way of case stated. It would obviously be a matter for the court before whom the application for permission to apply for judicial review came to decide the appropriate action in the circumstances for the court to take.

[20] Mr Rankin, who appears on behalf of Westminster City Council, courteously indicated to this court that his present instructions would then be to argue that to grant permission for an application for judicial review would be wrong because the application for judicial review would constitute an abuse of process. If any such argument is advanced, it will be for the judge dealing with the question of the grant or refusal of permission to apply for judicial review to determine. It appears to us that there would be two matters for that judge to take into account: (1) the fact that the decision of Mackay J is treated by the legislation as final; and (2) the fact that Mackay J was of the opinion that there should be an appeal (subject to there being jurisdiction for that appeal to be heard). The object which Mackay J had in mind could be achieved on an application for judicial review, namely that

a there should be consideration by this court, whereas it could not be achieved on an appeal by way of case stated.

[21] Accordingly, an alternative course to that which may be urged on behalf of the council would be for the judge hearing the application for permission, to grant that permission but to dismiss the application so that an appeal to this court would be available to the licensees. But it is for the decision of the judge hearing the application for permission to apply for judicial review to determine what is the appropriate course to take.

[15] It is to be noted that Lord Woolf CJ and the court (since the other two members agreed with the order he proposed based on these observations) did not decide that judicial review would be appropriate when or if the magistrates made a fresh decision. Furthermore, what seems to have moved Lord Woolf CJ was concern that Mackay J obviously felt that a decision of a higher court on the point was needed and there was no other way of obtaining such a decision. With the greatest respect, that is not entirely so since any subsequent case stated could and no doubt would have been put before a Divisional Court which would have contained at least one Lord Justice. While judicial review was not excluded, it is difficult to see that exceptional circumstances such as *Sivasubramaniam's* case regarded as necessary existed. However, in statutory review, if the judge lights on a point which he regards as difficult, he will no doubt reverse the IAT's refusal of permission to appeal. The point will then be considered by the IAT, whose substantive decision is appealable to the Court of Appeal. In the circumstances, O'Reilly's case is clearly distinguishable and does not in my judgment assist the claimants.

[16] The claimants submitted that to deny their right to seek judicial review would breach arts 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). It is said that art 6 guarantees a fair and public hearing and that statutory review does not provide for that. Even if art 6 did apply, that submission is based on a misunderstanding of what art 6 requires. It is necessary to look at what is provided to enable a decision to be challenged as a whole and it is clearly wrong to focus on one stage of the process. A fair and public hearing is provided by the right of appeal to an adjudicator. Article 6 does not require a right of appeal or review, let alone an oral hearing. There would thus be no breach of art 6.

[17] However, in my judgment art 6 does not apply at all. That follows from the decision of the European Court of Human Rights in *Maaouia v France* (2001) 9 BHRC 205. That case concerned a deportation order made against a Tunisian which was eventually quashed by the French Administrative Court and the art 6 complaints related to the length of time taken in the proceedings. The court's reasoning why art 6 does not apply to procedures for the expulsion of aliens is to be found in the judgment of the court (at 212–213). These read:

'35. The court has not previously examined the issue of the applicability of art 6(1) to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of art 6(1) of the convention ...

36. The court points out that the provisions of the convention must be construed in the light of the entire convention system, including the protocols. In that connection, the court notes that art 1 of protocol no 7 ... an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention". Taken together, those provisions show that the states were aware that art 6(1) did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on protocol no 7 in the section dealing with art 1, the relevant passages of which read as follows:

"(6) In line with the general remark made in the introduction ... it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ... as interpreted by the European Commission and Court of Human Rights ... (7) Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the ... Convention ... (16) The European Commission of Human Rights has held in the case of Application No 7729/76 [*Agee v UK* (1976) 7 DR 164] that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."

37. The court therefore considers that by adopting art 1 of protocol no 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the states clearly intimated their intention not to include such proceedings within the scope of art 6(1) of the convention.

38. In the light of the foregoing, the court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a "civil right" for the purposes of art 6(1). The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by art 6(1) of the convention ...

Mr Fordham sought to distinguish that case on the basis that what is in issue here is an alleged breach of art 3 and that does concern civil rights. However, art 6 does not apply to the procedure for the removal of aliens whatever may be the grounds for that removal and, as the court makes clear in para 36 in its citation

a from the explanatory report on Protocol No 7, the protection is supplied by the applicability of arts 3 or 8.

[18] In support of the argument that art 6 applies, reliance is placed on observations of Hale LJ in *R v Secretary of State for the Home Dept, ex p Saleem* [2000] 4 All ER 814, [2001] 1 WLR 443. That case ruled that a procedure rule (which provided that service of documents must be deemed to have occurred even if it could be proved that it had not) was ultra vires. Hale LJ ([2000] 4 All ER 814 at 829, [2001] 1 WLR 443 at 458) said:

c 'There is an analogy here with the principles established under art 6 of the European Convention on Human Rights. Immigration and asylum cases have not been held by the European Court of Human Rights to be "the determination of his civil rights and obligations" for the purpose of art 6. Furthermore, art 6 does not guarantee a right of appeal. But if the state establishes such a right it must ensure that people within its jurisdiction enjoy the fundamental guarantees in art 6.'

d I confess that I have considerable difficulty with this passage, in particular with the last sentence. Hale LJ cannot have intended to say that the establishment of a right of appeal in immigration cases means that art 6 applies to the appeal process even though it does not otherwise apply. Such a conclusion would be contrary to all the jurisprudence on art 6. If she did mean what she appears to be saying, I must respectfully disagree. If, as I suspect, all she is saying is that there is an analogy and that any appeal process must be fair, there is no difficulty. But I am satisfied that these observations cannot found a claim that, despite *Maaouia v France*, art 6 applies to one part of the system.

[19] It is said that the fetter on judicial review unlawfully discriminates against non-nationals on the ground of their nationality. The claimants pray in aid a decision of McCombe J in *Hindawi v Secretary of State for the Home Dept* [2004] f EWHC 78 (Admin), (2004) Times, 5 February. That case concerned a provision that long-term prisoners who were subject to a recommendation for or liable to deportation could not be granted parole. This was unlawful because there was a different and more beneficial regime for nationals and so discrimination was based on nationality. The differential treatment related to long-term prisoners and depended entirely on their nationality. In the present cases, we are concerned with a particular regime which deals with the process of removal or refusal of leave to enter. By its very nature that regime can only apply to non-nationals. Thus the only question is whether that regime is fair. For the reasons I have given, in my view it is. Article 14 has no application in the circumstances.

h [20] It is an abuse of process for a claim for judicial review to be pursued (after a statutory review has failed) on grounds which were or could have been relied on in the statutory review claim. The decision of a High Court judge cannot be judicially reviewed and this is an attempt to get round that prohibition. The claimants maintain that the court's discretion should not be exercised so that an ouster is established in fact if not in law. However, it would clearly be contrary to Parliament's purpose in enacting s 101 of the 2002 Act to permit judicial review unless there are exceptional circumstances and by no stretch of the imagination can a claim based on grounds which were or could have been raised in the statutory review be regarded as one to which exceptional circumstances apply. I recognise that it is dangerous to say 'never', but the above permits me to do so. Otherwise where new material comes to light the circumstances will have to be

considered, but it is difficult to envisage any situation which would make judicial review appropriate short, perhaps, of evidence of fraud or bias or similar matters. a

[21] A failure to use statutory review will certainly prevent any attempt to use judicial review. Equally, a failure to obtain statutory review is almost inevitably a bar to subsequent judicial review. An attempt to pursue judicial review will be regarded as an abuse of process unless capable of showing the necessary very exceptional circumstances and will be summarily dismissed. b

[22] It follows that these claims, which, although I have not considered their merits, are based on the same grounds as were relied on in the unsuccessful statutory review, must be dismissed.

Permission for judicial review given, and application refused in M's case. Application refused in G's case.

Rebecca Lewis Barrister.

a **Barros Mattos Jnr and others v MacDaniels Ltd**

b **Barros Mattos Jnr and others v General Securities and Finance Co Ltd and another**
[2004] EWHC 1188 (Ch)

CHANCERY DIVISION

LADDIE J

c 17, 18, 25 MAY 2004

Restitution – Unjust enrichment — Defence — Change of position – Illegality – Whether innocent recipient precluded from relying on change of position defence if change illegal.

- d A large fraud was perpetrated on a bank by a group of individuals based largely in Nigeria. As part of the fraud, a sum of \$US 8.05m was transferred from the bank to the defendant transferees. Most of that sum was converted into the Nigerian currency, naira, and all of it (less commission) was distributed on the instructions of one of the fraudsters. Those dealings were alleged to be in breach of Nigerian law. The claimants, who were the assignees of the bank's right to sue in respect of its losses, subsequently brought proceedings in England against the transferees for, inter alia, restitution. The transferees accepted that the \$US 8.05m was to be treated as having been stolen from the bank, but claimed to have had no knowledge that the money had been siphoned off from the bank, and to have believed instead that it had been acquired legitimately by the fraudster. The claimants applied for summary judgment on their claim for restitution. At the hearing, the transferees relied on the defence of change of position, namely the conversion of most of the \$US 8.05m to naira and the distribution of virtually all of it in accordance with the fraudster's instructions. In response, the claimants contended that the change of position relied upon was illegal and that the illegality precluded the transferees from relying on the defence. The transferees contended that the courts had to decide on a case-by-case basis whether the wrongdoing was of sufficient significance to deprive a recipient of the change of position defence, and that in each case the court needed to decide whether the recipient's actions were so heinous that it would be equitable to require restitution in full.

- h **Held** – Where the recipient's actions in changing position were treated as illegal, the court could not take them into account, and accordingly the recipient could not rely on the defence of change of position. There was no room for the exercise of any discretion by the court in favour of one party or the other. The recipient could not put up a tainted claim to retention against the victim's untainted claim for restitution. Although it might be that in some cases the illegality would be so minor as to be ignored on the de minimis principle, the instant case was not such a case. Save for the retention of the commission, all of the transactions entered into by the transferees in relation to the \$US 8.05m were illegal and any contracts entered into to effect such transactions were also illegal. As for the commission, it constituted money retained by the transferees for no consideration, and would
- j

also have to be returned to the claimants. It followed that there was no defence to the claim, and accordingly the claimants were entitled to recover all of the \$US 8.05m (see [38], [40], [43], [44], below).

Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 and *Tinsley v Milligan* [1993] 3 All ER 65 applied.

Notes

For the defence of change of position, see 40(2) *Halsbury's Laws* (4th edn reissue) paras 1466–1467.

Cases referred to in judgment

Foster v Driscoll, *Lindsay v Attfield*, *Lindsay v Driscoll* [1929] 1 KB 470, [1928] All ER Rep 130, CA.

Holman v Johnson (1775) 1 Cowp 341, 98 ER 1120, [1775–1802] All ER Rep 98.

Kahler v Midland Bank Ltd [1949] 2 All ER 621, [1950] AC 24, HL.

Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.

Ralli Bros v Cia Naviera Sota y Aznar [1920] 2 KB 287, [1920] All ER Rep 427, CA.

Regazzoni v KC Sethia (1944) Ltd [1957] 3 All ER 286, [1958] AC 301, [1957] 3 WLR 752, HL.

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

Applications for summary judgment

In two related actions arising from a fraud perpetrated against Banco Noroeste SA (the bank), the claimants, Luiz Vicente Barros Mattos Junior, Leo Wallace Cochrane Junior, Jorge Wallace Simonsen Junior and Ronald Wallace Simonsen suing on behalf of themselves and all other assignees of the bank, applied for summary judgment in the sum of \$US8.05m on its claims for restitution against (i) MacDaniels Ltd (an English company) and Chief Ezugo Dan Nwandu, two of the 40 or so defendants to the first action, and (ii) General Securities and Finance Co Ltd and MacDaniels Ltd (a company incorporated in Nigeria), the defendants to the second action. The facts are set out in the judgment.

Michael Briggs QC and *Kathryn Purkis* (instructed by *Peters & Peters*) for the claimants.

Catherine Roberts (instructed by *IBB Solicitors*, Uxbridge) for the defendants.

Cur adv vult

25 May 2004. The following judgment was delivered.

LADDIE J.

[1] This is the judgment in Pt 24 applications brought by the claimants in two related actions. The litigation arises out of a large fraud perpetrated on a Brazilian bank, Banco Noroeste SA (the bank) in the mid-1990s. The perpetrators of the fraud were a group of individuals based largely in Nigeria. One of, or the leading light in that dishonest activity was a Chief Anajemba. He has since been murdered. The total loss inflicted on the bank was \$US242.5m, of which some \$US190.3m was transferred from the bank to third parties by means of electronic SWIFT transfers.

a [2] The fraud came to light in the course of a due diligence search undertaken in connection with the proposed sale of the bank. Eventually that sale proceeded, but on terms which required the current claimants to take an assignment of the right to sue in respect of the losses. No point is taken on the assignment and, during the course of argument, counsel treated the claimants as if they were the bank. In this judgment I will do likewise.

b [3] There are four defendants to this application. One is Chief Ezugo Dan Nwandu. The other three are companies of which he is the moving spirit. Those companies are an English company called MacDaniels Ltd (MacDaniels England), General Securities and Finance Co Ltd (General) and another company called MacDaniels Ltd which is incorporated in Nigeria (MacDaniels Nigeria). As
c Chief Nwandu explains in evidence he has filed, MacDaniels England was incorporated for the purpose of acting as an English 'adjunct' or nominee for General. Mr Michael Briggs QC who, with Miss Kathryn Purkis, appears for the claimants argues that, in substance, MacDaniels England is little more than a post box for General. I do not understand Miss Catherine Roberts, who appears on behalf of the defendants, to dispute that. The reason that there are two separate
d actions is that the claimants' decision to bring claims against General and MacDaniels Nigeria was made after the proceedings against Chief Nwandu, MacDaniels England and 40 or so other defendants had been commenced. It was thought that a limitation defence might be available to General and MacDaniels Nigeria which would complicate any attempt to join them to the first action.
e Nothing turns on this now because Miss Roberts accepts, having heard Mr Briggs' submissions, that there is no valid limitation point which these defendants can take.

[4] On these applications there is no dispute that a serious fraud was perpetrated on the bank by Chief Anajemba and his colleagues. For the purpose
f of this judgment I will only refer to Chief Anajemba, but it should be taken as a reference both to him and other defendants implicated in the fraud other than the defendants the subject of these applications. Sir Andrew Morritt V-C gave judgment against Chief Anajemba in the sum of \$US190.3m or so on 1 May 2003 ([2003] All ER (D) 06 (May)). There is also no dispute that a sum of \$US8.05m was transferred from the bank to the defendants in these applications pursuant
g to fraudulent SWIFT transfers in March and May 1997. There is no dispute that that money is to be treated as stolen from the bank. The money was transferred to these defendants with a view to it being changed into Nigerian currency (naira). In fact the money was received by MacDaniels England and was then transferred as to \$US4,228,680.90 to General and as to \$US1,720,032 to MacDaniels Nigeria
h and then distributed to Chief Anajemba's instructions. The latter sums were changed into naira. \$US2,085,528 of the remainder was paid out directly in dollars to third party creditors, the rest, some \$US50,000, was retained as commission by these defendants.

[5] In their pleadings against these defendants, the claimants make
j wide-ranging allegations of wrongdoing and they seek against them personal and proprietary relief in the principal sum of \$US8.05m together with interest. They have already obtained freezing orders in support of these claims. Mr Briggs will be inviting me to continue those orders or to make post-judgment orders in the same terms while Miss Roberts will be inviting me to remove them or reduce their scope. However they both agree that consideration of those issues should be deferred pending my judgment on the Pt 24 applications.

[6] Although the claim form in the first action against, amongst others, MacDaniels England and Chief Nwandu was served some three years ago, and that against the other defendants was served in November of last year, no defences have been served. This is due, at least in large part, to a moratorium agreed between the parties. Nevertheless, it has been apparent throughout that these defendants assert that they were entirely innocent of any wrongdoing. They say they had no knowledge that their money had been siphoned off from the bank. They believed that Chief Anajemba had acquired these sums legitimately as a result of trading in oil. This claim of innocence is not accepted by the claimants. a
b

[7] The Pt 24 applications were issued in fairly standard form. They asserted that the defendants had no real prospect of successfully defending the claims against them and that there was no other reason why such claims should be disposed of at a trial. The claimants' original intention was to seek relief based on the causes of action for restitution, knowing receipt and dishonest assistance. Evidence in support, particularly the twenty-fifth affidavit of Keith Oliver, went to these issues. Much of it was designed to show, to a sufficient level of confidence to meet the requirements of a Pt 24 application, that the defendants were aware that these funds were stolen. In October 2003, Chief Nwandu served evidence in response, protesting his, and his companies', innocence. c
d

[8] However the claimants' evidence was not restricted to the issue of knowing receipt and dishonest assistance. Mr Oliver's affidavit also said that the transactions undertaken by these defendants were themselves illegal. Furthermore in January of this year the claimants served a witness statement from Professor Paul Collier which contained expert evidence as to the alleged illegality of the defendants' handling of the \$US8.05m. The latter evidence was answered by a statement of Dr EEJ Okereke served on behalf of the defendants a few weeks ago. e

[9] Mr Briggs tells me that when Chief Nwandu and MacDaniels England served their evidence, the claimants concluded they would pursue only the claim based on the restitutionary cause of action at the summary judgment stage. They did not feel it was appropriate to advance arguments on a Pt 24 application which were dependent for their success on showing dishonesty on the part of the defendants. The hearing before me has been limited accordingly. f

[10] Mr Briggs summarises his clients' case as follows. The bank's money has been passed to these defendants. It has a right to recover it as money had and received. This restitutionary claim is not dependent upon showing that the recipient was a wrongdoer. He says that only two defences to that claim are possible, namely that the recipient was a bona fide purchaser from the bank of a legal estate in or title to the money for value without notice of the bank's title or that the defendants had changed their position on the basis of their belief that the funds they obtained were honestly held by Chief Anajemba. Miss Roberts does not rely on the first of these potential defences. Although there is no pleading from her clients, Miss Roberts confirms what is apparent from their evidence, namely that they are running a defence of change of position. Mr Briggs accepts that such a defence might be arguable in respect of sums which the defendants did not retain (ie all of the \$US8.05m save the \$US 50,000 commission) unless the change of position was itself illegal. It follows that, according to him, the outcome of these applications turn on whether the defendants have a triable answer to the allegation that their handling of the \$US8.05m and the contracts under which they received them, were illegal. g
h
j

a [11] It appears that Miss Roberts was only informed that the claimants were abandoning the grounds of knowing receipt and dishonest assistance during a telephone conversation with Mr Briggs at the end of last week. She protests forcefully at this late change in position. She says she should have been notified earlier. I think she is right. She also points out that much of the evidence goes to these issues. She is right on that. It may well be that, depending on the outcome of the remaining issue, an order for costs will need to be made which takes account of the claimants' abandonment of part of the case they were advancing. But Miss Roberts goes further. She suggests that, in all the circumstances, it would be appropriate not to entertain these applications at all. Besides her objection to the lateness of the notification that the claimants were restricting their arguments to a much narrower point, she also objects that the point to be advanced by the claimants, namely that the defendants' dealing in the \$8.05m was illegal, has not been pleaded. It is therefore not appropriate or fair to deal with it at this stage. The matter should be pleaded properly and then the issue should go to trial.

d [12] As I have pointed out above, only particulars of claim have been served. The fact that the illegality point has not been pleaded is no surprise. It would need to be raised in response to a plea by the defendants of change of position. In other words, one would expect to find it in the claimants' reply. The pleadings have not got to that stage yet. On the other hand, there can be no doubt that both sides were well aware both that the defendants would be running a change of position defence and that the claimants' response would be one based on illegality. Any doubts as to that were put to rest by the contents of Professor Collier's witness statement and the defendants' response to it in the form of the statement of Dr Okereke. I do not understand Miss Roberts to argue that she is taken by surprise by Mr Briggs' reliance on this point. She does not ask for an adjournment—for example to prepare her arguments or to serve further evidence (in the light of Dr Okereke's evidence it is difficult to see what other evidence could have been served)—nor does she ask for the plea of illegality to be reduced to writing. Her substantive point is that such a radical restriction of the scope of the applications should not be allowed. The only alternative is to allow the issues go to trial.

g [13] I do not accept Miss Roberts' objection. Each side is aware, and has been for some months, of the nature of the arguments being advanced by its opponents and the material relied on in support of it. It is not suggested that the parties' positions would be made any clearer by further pleadings or evidence.

h [14] I can therefore turn to consider the substantive issues before me. In doing so I shall assume, as Mr Briggs concedes I must, that the defendants were wholly innocent of the illicit source of the funds supplied to them by Chief Anajemba and remained innocent until well after they had disposed of them (save for the commission) in accordance with Chief Anajemba's instructions.

j [15] The starting point of the claim is the principle that someone who receives stolen money is placed under a legal obligation to hand it, or an equivalent sum, back to the rightful owner. If he does not, he will be unjustly enriched. The obligation on the recipient is personal. It is not dependent on the stolen money being still in the recipient's hands. As Lord Goff of Chieveley pointed out in *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 534, [1991] 2 AC 548 at 580:

‘... the mere fact that the [recipient] has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.’ a

[16] In such a case, the recipient is still as enriched by the receipt of the stolen money as if he had retained the original coinage in his hands. In a simple case where the recipient has received the money and has done nothing with it, or has merely used it to pay for things which he would have had to pay for out of other resources, there is no reason why the victim of the theft should not recover what is stolen and no reason why the recipient should continue to be enriched. Any such enrichment would be unjust. It should be emphasised that this restitutionary claim can be made against an entirely innocent recipient. b

[17] However, as the *Lipkin Gorman* case demonstrates, there may be cases where the victim loses his right to recover the stolen property. First, he may have given good and full consideration for the money. For example the thief might use the funds to buy an article (in the *Lipkin Gorman* case, Lord Templeman gave the example of the thief buying a motor car for £20,000—see [1992] 4 All ER 512 at 517, [1991] 2 AC 548 at 560). In such a case, the recipient has not been enriched at all even though the money passed to him by the thief was stolen. In such a case, the recipient may have made a profit on the transaction but he can retain that. He might have made the same profit had he sold the article to someone else. c

[18] Mr Briggs argues that no case of consideration can be raised here on behalf of these defendants. Miss Roberts agrees. The consequence is that these defendants do not seek to assert that any part of the claim for \$US8.05m can be defeated on this ground. In particular, Miss Roberts does not suggest that there is a case of consideration which could be run to justify the retention of the \$US50,000 ‘commission’ kept back by these defendants. d

[19] The second basis upon which the victim may lose his right to force the recipient to return the value of the stolen money is where, in the light of his belief that the money was not tainted, the recipient changes his position to his detriment. That such a defence to a restitutionary claim exists was confirmed in the *Lipkin Gorman* case (see [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578 per Lord Goff) and the reason was explained as follows ([1992] 4 All ER 512 at 533, [1991] 2 AC 548 at 579): e

‘In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.’ f

[20] The principle was well illustrated by the *Lipkin Gorman* case itself. In substance the facts there were that Mr Cass, a solicitor in the claimant firm of solicitors, had stolen from it just over £222,000. He used it to gamble at the defendant’s casino. Because it was not aware of the illicit provenance of the money Mr Cass was using, the defendant allowed him to play. By so doing, it changed position. It exposed itself to the risk of losing money to Mr Cass. In fact Mr Cass did win some money and the defendant honoured those winnings. The fact that it had changed position meant that it did not have to repay the total sum which Mr Cass had taken and used at the casino. On the other hand, although g

a Mr Cass won some money, he lost more. The net result was that, overall, the defendant had net winnings from Mr Cass of just under £155,000. Although it would have been unjust to make the defendant repay all the money used by Mr Cass in the casino it was not unjust to make it repay the balance which it still held.

b [21] In the present case, I understand Mr Briggs to accept, at least for the purpose of this application, that there is an arguable case that these defendants were both innocent and changed position based on that innocence. The conversion of \$US4,228,680.90 into naira and its transmission to General, the conversion of \$US1,720,032 into naira and its transmission to MacDaniels Nigeria, the onward transmission of both those sums and the payment out of \$US2,085,528 in dollars to third party creditors all took place because these
c defendants thought it was Chief Anajemba's funds and therefore he had authority to do with them what he liked.

[22] Mr Briggs argues that this does not get the defendants home. He says that an innocent recipient cannot rely upon a plea of change of position where that change would be regarded by our courts as wrongful. This submission is based
d on the following passage in the speech of Lord Goff in the *Lipkin Gorman* case [1992] 4 All ER 512 at 534, [1991] 2 AC 548 at 580 (my emphasis):

e 'I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence
f should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration. They do not arise in the present case.'

[23] In this passage Lord Goff is considering two different classes of case. The first consists of those where the recipient has acted in bad faith or with knowledge of the claimant's entitlement to recovery of the funds. Those are cases where the defendant is not innocent of the claimant's rights. They are cases of knowing
g receipt or dishonest assistance. The second class consists of cases where the defendant is ignorant of the misappropriation from the claimant and, in respect of that part of the transaction, is innocent, but where his change of position is wrongful.

[24] Mr Briggs does not rely on any other authority for his proposition. It
h should be noted, and made clear by Lord Goff, that the principle had no application to the facts of *Lipkin Gorman*'s case itself since it was accepted that gambling was not illegal, even if gambling contracts are not enforceable. For that reason, the defendant could not be regarded as a wrongdoer.

[25] Mr Briggs explains this brief passage in the *Lipkin Gorman* case as follows.
j A court will not allow a party to plead or rely on activity which it regards as illegal or wrongful. Thus, if the change of position is wrongful, the court will decline to allow the recipient to rely on it. If, as he submits, the transactions entered into by these defendants were illegal under Nigerian law, they would be treated as illegal here as well. To adopt the approach of Lord Goff set out at [19], above, on the one hand there is the injustice inflicted on the victim in having his money taken from him and against that is the position of the defendant who has engaged in

illegal activities which the courts here will not recognise. In such a case, there is no injustice in letting the victim's claim prevail. a

[26] He argues that this is consistent with the decision of the House of Lords in *Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340 which cited with approval ([1993] 3 All ER 65 at 72, [1994] 1 AC 340 at 354–355) the following passage from *Holman v Johnson* (1775) 1 Cowp 341 at 343, 98 ER 1120 at 1121:

‘The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has not right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault *potior est conditio defendentis*.’ b
c
d

[27] As Lord Goff explained in *Tinsley v Milligan* [1993] 3 All ER 65 at 72, [1994] 1 AC 340 at 355: e

‘It is important to observe that, as Lord Mansfield CJ made clear, the principle is not a principle of justice: it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.’ f

[28] This principle applies as between conspirators in a wrongdoing. Neither can be heard to base his claim or his defence upon the wrongdoing. The court will not take notice of illegal activity. The result is indiscriminate in the sense that the party which benefits from the application of the principle does so not because of any merits on his side but simply because the other party is debarred from relying on the illegal activity for his claim or defence, as the case may be. Mr Briggs says that the same principle must apply not only as between parties to the wrongdoing but also, as here, where the claimant is not a party to the wrongdoing but the recipient of the stolen funds is. On public policy grounds, the court will not allow the recipient to hold onto the claimant's money if, to do so, he has to rely on a change of position which the court considers illegal. g
h

[29] Mr Briggs says that the change of position relied on by the defendants here consists of the conversion of most of the \$8.05m into naira and the distribution of all of it (less commission) to Chief Anajemba's order. All of that was done under and by reference to a foreign exchange contract which was illegal in Nigeria by virtue of that country's Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree 1995 (the Decree). Since it was illegal in Nigeria, it is unenforceable and will not be recognised by the courts here. The latter submission is put in two ways. j

- a [30] First, our common law requires the English courts to take notice of the illegality of a contract in each of the following circumstances: (a) contracts *the object of which* involves committing a legal wrong or carrying out conduct otherwise contrary to public policy; (b) contracts entered into *for the purposes of* doing the above; or (c) contracts *performed in such a way* that one party (or both parties) commits a legal wrong or carries out such conduct. Contracts directly
- b unenforceable under a *foreign* statute/law, or which are by dint of their object contrary to the terms thereof, are affected by public policy. The rationale is that the principle of international comity prevents the courts of country X enforcing a contract governed by the law of country Y, if it is expressly prohibited by, or in light of its terms impliedly contrary to, the law of country Y. Furthermore, separately from the illegality of the forex contracts under Nigerian law, the
- c dealings in the \$8.05m were illegal in Nigeria because of the provisions of the Decree and that illegality will be recognised in England.

[31] Second, the illegality of the Nigeria forex contracts between these defendants and Chief Anajemba has to be recognised here pursuant to the Bretton Woods Agreements Order in Council 1946, SR & O 1946/36 (the Order).

d THE DECREE

- [32] The Decree sets in place a regime to control dealing in foreign currency in Nigeria. To that end an Autonomous Foreign Exchange Market (AFEM) is created where transactions 'in foreign exchange shall be conducted' in accordance the provisions of the Decree (s 1(1)). The operation of the AFEM is
- e to be conducted through two classes of intermediaries; Authorised Dealers and Authorised Buyers who have to be appointed by the Central Bank of Nigeria. They have to operate in accordance with the provisions of the Decree. Members of the public (which would include Chief Anajemba) could only carry out relevant transactions in foreign currency with any of these defendants if the latter
- f had been Authorised Dealers at the time. Section 29 creates a number of offences. In particular it provides:

'(1) ... a person who ... (b) converts any foreign currency to a use for which it is not intended under this Decree; or (c) negotiates any draft, foreign bank note, other foreign exchange or any other trading instrument otherwise than as permitted by this Decree ... is guilty of an offence under this Decree.'

- g [33] The penalties which can be imposed on conviction are severe, including, in the case of an individual, imprisonment for up to five years.

- h [34] Professor Collier's evidence, served in January of this year, considers both the terms of the Decree and the transactions conducted by these defendants. He summarised (at para 7) his conclusions as follows:

'One important issue with which the claimants are concerned is whether the transactions carried out through General, which is a substantial bureau de change and stockbroking operation, and MacDaniels Nigeria were lawful in Nigeria. The short answer is that they were not.'

- j [35] He explains how he arrives at this conclusion based on the provisions of the Decree and confirms that there were and are no other relevant legal provisions which would have the effect of rendering the transactions lawful (para 11).

[36] The defendants answer this in three ways. First they alleged that the Decree had been repealed. Shortly before the hearing they gave notice by letter

that they no longer pursued this suggestion. The second answer is to say that the Nigerian authorities have neither prosecuted any of the actors in this particular fraud for breaches of the Decree and that, to date, no one has been prosecuted under it for any other wrongful forex activities. The suggestion is that this legislation is being ignored by the Nigerian authorities and, for that reason, should be ignored by me. I reject that submission. I do not know how far, if at all, the Nigerian authorities have got with their inquiries into the activities of Chief Anajemba. I have no idea how many other breaches, if any, of this forex legislation are alleged to have occurred in Nigeria, how strong the proof of wrongdoing is and how far the Nigerian authorities have got with any inquiries they may have made. Therefore it is impossible to conclude that the legislation is ignored in Nigeria. Furthermore even if the Nigerian authorities have, to use Mr Briggs' terminology, 'underprioritised' the pursuit of breaches of the Decree, that does not alter the fact that it is existing criminal legislation in that country. There is no material before me which suggests that any Nigerian court in a similar position to me would turn a blind eye to it.

[37] The third point was raised by Miss Roberts for the first time in the course of her submissions. She says that it might be that one of the parties to the challenged transactions might have been appointed an Authorised Dealer at the relevant time. She does not know whether that is so, nor does she have instructions that it was so, but she says it might turn out to be the case on further investigation. This will not do. In para 9 of Professor Collier's witness statement it is stated that the claimants are not aware of any relevant authorisation. Although this evidence was responded to some three months later, this point was neither challenged or addressed. It is no answer to a Pt 24 allegation to say that some defence might turn up in the future.

[38] In my view, even at this stage, all the evidence points one way. All of the transactions entered into by these defendants in relation to the claimants' \$US8.05m were illegal and any contracts entered into to effect such transactions were also illegal. There is no real or substantial case to the contrary.

[39] I should mention that during the course of argument I suggested to Mr Briggs that the conversion of the dollars to naira was covered by the Decree but that, perhaps, that was not so in respect of the \$US2,085,528 which was passed on to Chief Anajemba's creditors without conversion. Mr Briggs said that even that sort of transaction would be caught by the provisions of s 29(1)(c) of the Decree, set out above. That is probably so. But in any event this point, if it is a point at all, was not taken by the defendants and it must be remembered in this context that Professor Collier's evidence was that 'the transactions' were illegal. By that he clearly meant all the relevant transactions. In their evidence in reply to this, the defendants did not seek to draw any distinction between the \$US2,085,528 and the rest of the \$US8.05m.

[40] It follows that I accept the submission that the transactions, save for the retention of the commission, were illegal as were the contracts providing for them and no real case to the contrary has been put forward.

IS THE NIGERIAN ILLEGALITY RECOGNISED AT COMMON LAW?

[41] Although Mr Briggs puts his case both at common law and under the Order, I did not understand Miss Roberts to dispute that, were he to succeed on the former, little point would be served by examining the strength of the latter. The nature of Mr Briggs' submissions are set out at [30], above. In support of them he relies on *Foster v Driscoll*, *Lindsay v Attfield*, *Lindsay v Driscoll* [1929] 1 KB

a 470, [1928] All ER Rep 130, *Regazzoni v KC Sethia (1944) Ltd* [1957] 3 All ER 286, [1958] AC 301, *Kahler v Midland Bank Ltd* [1949] 2 All ER 621, [1950] AC 24 and *Ralli Bros v Cia Naviera Sota y Aznar* [1920] 2 KB 287, [1920] All ER Rep 427.

b [42] I do not understand Miss Roberts to dispute Mr Briggs' general proposition. Her point is that this was an undeveloped area of law and that the courts have to decide on a case-by-case basis whether the wrongdoing is of sufficient significance to deprive the recipient of his defence of change of position. In each case the court needs to decide whether the recipient's actions are so heinous that it would be equitable to require restitution in full.

c [43] I do not accept that submission. It would represent a return to the principle of the length of the Lord Chancellor's foot (or the foot of whosoever takes the Lord Chancellor's place). It seems to me that the approach of Lord Goff in *Tinsley v Milligan*, set out at [27], above, applies to this sort of case. There is no room for the exercise of any discretion by the court in favour of one party or the other. If the recipient's actions of changing position are treated here as illegal, the court cannot take them into account. The recipient cannot put up a tainted claim to retention against the victim's untainted claim for restitution. It may be, as d Mr Briggs suggests, that in some cases the illegality will be so minor as to be ignored on the de minimis principle. This is not such a case.

e [44] It follows that there is no defence to the claim. The claimants are entitled to recover all of the \$US8.05m. I should add that, even were the commission of \$US50,000 not illegal as being payment for carrying out illegal forex operations, it would be money retained by the defendants for no consideration (for none was asserted). It would have to be returned to the claimants for the same reasons as the \$US155,000 had to be returned by the defendant in the *Lipkin Gorman* case.

Order accordingly.

Neneh Munu Barrister.

R (on the application of Pharis) v Secretary of State for the Home Department a

[2004] EWCA Civ 654

COURT OF APPEAL, CIVIL DIVISION

BROOKE, TUCKEY AND LAWS LJJ b

21 APRIL, 25 MAY 2004

Court of Appeal – Practice – New practice and procedure – Civil Division – Express application for stay of deportation process necessary in asylum and immigration cases where notice of appeal lodged against refusal of permission to apply for judicial review. c

In future, the lodging of a notice of appeal in the Court of Appeal in an immigration or asylum case when the refusal of a High Court judge to grant permission to apply for judicial review is under challenge should not be interpreted as giving rise to an automatic stay of deportation process. If the appellant wishes to seek a stay, he or she must make an express application for this purpose which the staff of the Civil Appeals Office must place before a judge of the Court of Appeal for a ruling on paper, as already happens when a stay is sought in connection with possession proceedings when the execution of a warrant of possession is imminent (see [19], below). d

Notes e

For judicial review in the immigration context see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue) para 195.

Case referred to in judgment f

R (on the application of Nine Nepalese Asylum Seekers) v Immigration Appeal Tribunal [2003] EWCA Civ 1892, [2004] All ER (D) 94 (Jan).

Application for judicial review

By notice of appeal sealed on 22 September 2003, Ben Pharis applied to the Court of Appeal for permission to appeal against the order of Maurice Kay J on 19 June 2003 ([2003] EWHC 2933 (Admin)) refusing his application for judicial review of a decision of the Secretary of State for the Home Department to remove him to Nigeria. The notice of appeal was served on 6 October 2002. The claimant was deported on 10 November 2002. The facts are set out in the judgment. g

The claimant did not appear.

Lisa Giovannetti (instructed by the *Treasury Solicitor*) for the Secretary of State. h

Cur adv vult j

25 May 2004. The following judgment of the court was delivered.

BROOKE LJ.

[1] This is an application by Ben Pharis for permission to appeal against an order by Maurice Kay J sitting in the Administrative Court on 19 June 2003

a ([2003] EWHC 2933 (Admin)) when he dismissed his application for judicial review of a decision by the Secretary of State to remove him to Nigeria. The grounds for his application were that this decision was wrong in law because he was not from Nigeria. He had told the Secretary of State that he was from Sierra Leone. He did not have a family in Nigeria, and he had not lived in Nigeria because he had lived in Sierra Leone all his life.

b [2] Maurice Kay J was shown an emergency travel certificate which certified a travel facility valid only for a journey from London to Nigeria. It described the claimant as having been born in Port Harcourt in Nigeria on 10 October 1972 (his agreed date of birth) and certified that the passport officer in the Nigerian High Commission in London had no reason to doubt the claimant who had told him that he was Nigerian. The claimant for his part asserted that this officer had misunderstood what he said. He placed before the judge what purported to be a certified true copy of a Sierra Leone birth certificate, showing him to have been born in that country of Nigerian parents. The claimant's story was that he had left Sierra Leone after his parents had died and had gone to live with his brother in Gambia for a number of years where he claimed to have been persecuted. Nobody was seeking to return him to Gambia.

c [3] Paragraph 4(1) of the Immigration (Removal Directions) Regulations 2000, SI 2000/2243, sets out the requirements that may be imposed by removal directions. Paragraph 4(2) provides that:

e 'Paragraph (1) only applies if the directions specify that the relevant person is to be removed to a country ... being—(i) a country of which he is a national or citizen; or (ii) a country ... to which there is reason to believe that he will be admitted.'

f [4] The judge dismissed the claimant's application on the grounds that the removal direction in issue satisfied the second of these criteria even if it did not satisfy the first.

g [5] The claimant was present in court on 19 June 2003 and his time for seeking permission to appeal expired on 26 June (see CPR 52.15(2)). On 4 July the Civil Appeals Office received a notice of appeal, but they returned it to him on the grounds that it had been filed out of time and he had not applied for an extension of time, nor stated the evidence on which he sought to rely in support of such an application.

h [6] He was later to contend that he had faxed a further copy of the notice of appeal to the Civil Appeals Office on 24 July (four weeks out of time). On 8 September the Civil Appeals Office, having heard nothing since they returned the original notice, inquired of him whether he wished to proceed with his application. By this time he had been moved to a different detention centre. On 22 September the office received and sealed a notice of appeal in the proper form.

j [7] On 6 October the claimant served his notice of appeal on the Treasury Solicitor, who notified the Judicial Review Unit of the United Kingdom Immigration Service that this notice had been issued.

[8] The application was first listed for hearing before Buxton LJ on 13 January 2004. Shortly before that hearing it had become apparent that the claimant had in fact been deported to Nigeria on 10 November. On 19 December Laws LJ directed that the Home Office should explain what had happened.

[9] The Home Office's first attempt to explain what had happened was signed by a caseworker who accepted that the Treasury Solicitor had requested the Home Office to defer removal pending the hearing of the application, but said that it appeared that this notification had not been attached to the Home Office file, and that three sections of the file were missing. Buxton LJ directed that a clearer explanation should be given. This elicited a statement by an assistant director of the relevant unit at Leeds who asserted that there was no evidence of the Treasury Solicitor's request on the Port file, or in the other paperwork held by her unit, or in the available Home Office files. She repeated that there were several files missing.

[10] Unhappily it was not until the court made on 15 April 2004 what was a third request for an explanation of what had happened that the Home Office furnished the information the court was seeking. This came in the form of a very clear witness statement by Mr Brian Finegan, the assistant director of the service's Judicial Review Unit (the unit).

[11] He said that the unit had no record of receiving the Treasury Solicitor's request, although he accepted that there was evidence that the relevant fax had been sent. He explained what an administrative assistant in the unit ought to have done on receipt of such a fax. In particular, he/she should have passed it to another official for entry on the directorate's case information database. This was not done in this case. Mr Finegan described the steps that had now been taken to make this data recording machinery more efficient. He could only speculate that the Treasury Solicitor's fax had been sent off to be linked with one of the four sub-files which the unit was still unable to locate. This was the only occasion in the 18 months in which Mr Finegan had been concerned with these matters that such a request had gone astray and not been acted upon, and it had occurred within the first six weeks of the unit's operation. The unit had now in place a more formal supervision structure and more developed training. The case was nevertheless an incident which was embarrassing for it, and for which he offered a sincere apology both to the court and to Mr Pharis.

[12] So far as the law is concerned, CPR 52.7 provides, so far as is material, that:

'Unless—(a) the appeal court or the lower court orders otherwise; or (b) the appeal is from the Immigration Appeal Tribunal, an appeal shall not operate as a stay of any order or decision of the lower court.'

[13] CPR 52.7 reflects the statutory bar on removal pending appeal that is now contained in s 78 of the Nationality Immigration and Asylum Act 2002: see s 104 of that Act for the meaning of the words 'pending appeal'.

[14] Under the regime introduced by s 101 of that Act, the decision of a judge of the High Court on written submissions for a review of the Immigration Appeal Tribunal's (IAT) refusal of permission to appeal is final (see s 101(3)(c)), so that no appeals in future will lie to this court in those cases. There is still a trickle of cases coming to this court, however, under the previous regime, and the new appellate regime is not concerned with cases like that of Mr Pharis who made a freestanding application for judicial review and did not come within the appeal regime at all. Mr Finegan states that it is the usual but not the invariable practice of the Secretary of State not to remove such a claimant while an appeal to this court is pending.

[15] It appears that for a number of years the Treasury Solicitor and the Immigration and Nationality Directorate have operated an arrangement

- a (known as 'the Concordat') with the High Court in respect of judicial review proceedings relating to immigration matters where the claimant is subject to removal directions. Provided that an application for judicial review is lodged and an Administrative Court Office number is obtained within three working days (where the claimant is detained) or five working days (where the claimant is not detained) of the relevant decision, removal directions will not be implemented pending the decision of the High Court as to whether, on the papers, to grant permission. In practice, if a claimant renews the application within seven days after the refusal, the Secretary of State does not usually remove him until after the judicial review process has been exhausted.
- b

- [16] No such arrangement has ever been made with the Civil Appeals Office but once the Secretary of State has been notified that notice of appeal has been filed, Mr Finegan says that in practice the same arrangements are followed, with removal being deferred until after the appeal has been finally disposed of.
- c

- [17] This practice need not be continued. Experience has shown that the practice of pursuing a further appeal to this court in a judicial review matter in the immigration and asylum field has given rise to very serious abuse, with appellants pursuing wholly unmeritorious appeals simply to delay the time when they are to be deported. In relation to cases involving Nepalese appellants Brooke LJ described the scale of the abuse in his judgment in *R (on the application of Nine Nepalese Asylum Seekers) v Immigration Appeal Tribunal* [2003] EWCA Civ 1892, [2004] All ER (D) 94 (Jan). That abuse is continuing.
- d

- [18] By the time the matter arrives at the Court of Appeal, two High Court judges, who are under a duty to give anxious scrutiny to all these cases, will have refused to grant permission to apply for judicial review, and in the matters which still relate to a refusal by the IAT to grant permission to appeal, that tribunal, too, will have decided that there is no merit in the appeal.
- e

- [19] We have discussed this matter with the Master of the Rolls and we have his authority to say that in future the lodging of a notice of appeal in the Court of Appeal in an immigration or asylum case when the refusal of a High Court judge to grant permission to apply for judicial review is under challenge should not be interpreted as giving rise to an automatic stay of deportation process. If the appellant wishes to seek a stay, he/she must make an express application for this purpose which the staff of the Civil Appeals Office must place before a judge of this court for a ruling on paper, as already happens when a stay is sought in connection with possession proceedings when the execution of a warrant of possession is imminent.
- f

- [20] The court would be grateful if widespread publicity is given to this change of practice, so that in future nobody can justly complain that they thought that the lodging of a notice of appeal in such a case with the Court of Appeal, however unmeritorious the grounds, will automatically confer a right to a stay in relation to deportation process. By the same token the court would be grateful if the Civil Appeals Office could be told immediately a deportation takes place after a notice of appeal has been filed in a case where no stay was sought or where a stay was expressly refused.
- g

- [21] Mr Pharis' case is a good example of the unmeritorious challenges that frequently find their way to this court. Maurice Kay J made it clear why the governing regulations permitted the Secretary of State to deport him to Nigeria, since that country was willing to receive him, and his notice of appeal simply did not engage that issue at all. If a stay of deportation had been sought at the time the notice of appeal was filed it would not have been granted,
- j

because it would have been evident that there was no merit at all in the proposed appeal. Permission to appeal is therefore refused. a

[22] This judgment contains guidance of general application. It is therefore released from the normal prohibition on citation of judgments of this kind. Needless to say, there must be no change of practice in those cases in which the statutory ban on deportation pending appeal still applies. b

Application dismissed.

Kate O'Hanlon Barrister.

Blake v Galloway

[2004] EWCA Civ 814

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, CLARKE AND DYSON LJJ

16, 24 JUNE 2004

Negligence – Duty of care – Breach of duty – Horseplay – Test for determining whether participant in horseplay breaching duty of care by causing injury to another participant.

The claimant and defendant were in a group of friends, all aged approximately 15 years old, who engaged in some high-spirited and good-natured horseplay by throwing twigs and pieces of bark chipping in the general direction of each other. The claimant did not join in at first, but eventually threw a piece of bark chipping, approximately 4 cm in diameter, at the lower part of the defendant's body. The defendant threw the chipping back in the general direction of the claimant. Although the defendant did not aim for the claimant's head, the chipping struck the claimant in the right eye, causing a significant injury. The claimant brought proceedings against the defendant for battery and/or negligence. At trial, the defendant relied primarily on the defence of consent. The judge rejected that defence, holding that, although the claimant had consented to participate in a game which might cause injury, he had not consented to the injury to his face. The judge therefore found for the claimant on both claims, but reduced the damages by 50% because of contributory negligence. On his appeal, the defendant challenged the judge's finding on consent, but the primary issue in respect of the negligence claim was whether he had failed to show reasonable care. In resolving that issue, the Court of Appeal considered whether guidance could be obtained from authorities dealing with injuries caused in the course of a formal sport or game. Those authorities indicated that a defendant would not be liable in negligence for an injury caused by a mere error of judgment or lapse of skill on his part in the course of the game.

Held – Where a defendant caused an injury to a claimant in the course of horseplay in which they were both participating and which was in the nature of informal play, conducted in accordance with certain tacitly agreed understandings or conventions that were objectively ascertainable by the claimant, the defendant would only be in breach of the duty of care owed by him to the claimant if his conduct amounted to recklessness or a very high degree of carelessness. The only real difference between such horseplay and organised and regulated sport or games was the lack of formal rules for the horseplay, but that was not a significant distinction. The common features between such horseplay and formal sport involving vigorous physical activity were that both involved consensual participation in an activity (i) which involved physical contact or at least the risk of it, (ii) in which decisions were usually expected to be made quickly and often as an instinctive response to the acts of other participants, so that (iii) the very nature of the activity made it difficult to avoid the risk of physical harm. In the instant case the defendant's conduct came nowhere near recklessness or a very high degree of carelessness. There might have been a breach of the duty of care if the defendant had departed from the tacit

understandings or conventions of the play and, for example, had thrown a stone at the claimant, or deliberately aimed a piece of bark at the claimant's head. But what had happened was, at its highest, an error of judgment or lapse of skill, and that was not sufficient to amount to a failure to take reasonable care in the circumstances of the horseplay. It was therefore unnecessary for the purposes of the claim in negligence to decide whether the judge had been right to hold that it was not defeated by consent. For the purposes of the claim in battery, however, the judge's conclusion was clearly wrong. By participating in the game, the claimant had to be taken to have impliedly consented to the risk of a blow on any part of his body, provided that the offending missile was thrown more or less in accordance with the tacit understandings or conventions of the game. Accordingly, the appeal would be allowed (see [13], [15]–[19], [24]–[27], below).

Wooldridge v Sumner [1962] 2 All ER 978 applied.

Notes

For standard of care in general and for negligence in the context of games and sports, see 33 *Halsbury's Laws* (4th edn reissue) paras 621, 672.

Cases referred to in judgments

Caldwell v Maguire [2001] EWCA Civ 1054, [2002] PIQR P45.

Condon v Basi [1985] 2 All ER 453, [1985] 1 WLR 866, CA.

Donoghue (or M'Alister) v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL.

Lane v Holloway [1967] 3 All ER 129, [1968] 1 QB 379, [1967] 3 WLR 1003, CA.

Rootes v Shelton [1968] ALR 33, Aus HC.

Wooldridge v Sumner [1962] 2 All ER 978, [1963] 2 QB 43, [1962] 3 WLR 616, CA.

Appeal

The defendant, Stephen Galloway, appealed with permission of Latham LJ granted on 7 April 2004 from the decision of District Judge Walker in the Plymouth County Court giving judgment for the claimant, Ross Blake, on his claims for battery and negligence against the defendant. The facts are set out in the judgment of Dyson LJ.

Richard Stead, who did not appear below (instructed by *Lyons Davidson*, Plymouth) for the defendant.

Nathan Tavares (instructed by *Wolferstans*, Plymouth) for the claimant.

Cur adv vult

24 June 2004. The following judgments were delivered.

DYSON LJ (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

[1] On 29 May 1997, the claimant was practising with a jazz quintet in which he played with four of his friends. One of them was the defendant. They were all approximately 15 years of age at the time. They were at Battsborough House, near Mothercombe in South Devon. At lunchtime, they decided to take a break. They went into the grounds and started to engage in some horseplay. This involved throwing twigs and pieces of bark chipping at each other. At first, the claimant did not join in. But after a while, he picked up a piece of bark chipping, approximately 4 cm in diameter, and threw it towards the lower part of the defendant's body. The defendant picked up the same piece of bark and threw it

a back at the claimant striking him in the right eye, causing a significant injury. The claimant started proceedings claiming that the injury was caused by the defendant's battery and/or negligence. The defendant relied on the claimant's consent as a defence to the claim in battery, and denied negligence. At the trial, the main focus of his defence to the claim in negligence was his reliance on the maxim *volenti non fit injuria*: his case was that the claimant had consented to the risk of being struck by the piece of bark even if it was thrown without reasonable care. In the alternative, the defendant alleged that the injury was caused or contributed to by the claimant's own negligence. Damages were agreed at £23,500.

[2] It will be necessary to examine the judgment in a little more detail later, but it is sufficient at this stage to say that District Judge Walker, sitting at Plymouth County Court, held that the injury was caused by the negligence and battery of the defendant, rejected the defence of *volenti non fit injuria*, but reduced the damages by 50% to reflect the claimant's contributory negligence. The defendant now appeals with the permission of Latham LJ.

[3] There was very little dispute as to the facts at the trial. It was common ground that these youths were engaged in high-spirited and good-natured horseplay. As the judge said:

'There was general messing around by all the participants. Nobody was throwing items towards anybody's head. There was no feeling of animosity between anybody taking part, and indeed no one was picking on any of the others.'

They were just randomly throwing twigs, pieces of bark and mulch in the general direction of each other.

[4] As regards the throwing that resulted in the injury to the claimant's eye, the only dispute of fact was as to whether the claimant and the defendant were between about 10 and 15 metres apart (as the defendant said in his evidence) or 4 to 5 metres apart (as the claimant said). The judge preferred the evidence of the claimant on this point. They were on a slight slope vis-à-vis each other, the defendant being at a higher level than the claimant. The claimant threw the piece of bark in the direction of the defendant's lower body, striking him on the bottom. He was not aiming at the defendant's head. The defendant picked the piece up, and threw it back in the general direction of the claimant, not aiming at his head. He did not shout any warning at the claimant, who was not looking in the direction of the defendant when the bark was thrown at him. Had he been doing so, it is probable that he would have seen it coming and been able to take avoiding action.

NEGLIGENCE

[5] As I have said, the principal issue at trial was whether the claim in negligence was defeated by the claimant's consent (encapsulated in the maxim *volenti non fit injuria*) as explained in a number of authorities, such as *Wooldridge v Sumner* [1962] 2 All ER 978 at 990, [1963] 2 QB 43 at 69 per Diplock LJ:

'The maxim in English law pre-supposes a tortious act by the defendant. The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk ... and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran ...'

[6] The judge expressed his conclusion on the issue of negligence and consent in these terms: a

‘In my view, taking into account all the circumstances in this case, I find that the claimant may well have consented to some risk in participating in this game which perhaps might have been—I am sure nobody when they started off expected anybody (sic) to be caused any injury, but there was some risk of that in some similar way to the analogy of throwing snowballs but I do not think that in this particular case the defendant took sufficient care to make sure that injury to the claimant’s head would not take place. It may be that in the minds of participants other than the claimant nobody particularly cared where items went. I am satisfied, as I say, in the particular circumstances of this case, there was, although consent to participate in a game which might have caused injury, no consent to the injury to the claimant’s face. I do not think he had the adequate opportunity of defending himself as he was not facing the defendant when the piece of bark was thrown.’ b

[7] In this court, Mr Stead (who did not appear at the trial) submits that the claim in negligence should have been dismissed on the simple ground that, in the particular circumstances of this case, there was no lack of reasonable care on the part of the defendant. Accordingly, the issue of *volenti* did not arise. Alternatively, he submits that, if there was a lack of reasonable care, then the judge was wrong to reject the defence of *volenti*. Although this represents a significant shift of emphasis from the way in which the defence to the claim in negligence was presented in the court below, there was no objection by Mr Tavares. c

[8] I start with the question of breach of duty. I do not believe it to be disputed that, generally speaking, participants in sport and games generally owe each other a duty of care. Difficult questions can, however, arise as to whether on the facts of any particular case there has been a breach of that duty. The standard of care which the common law requires depends on all the circumstances of the case. In *Wooldridge’s* case, the plaintiff was a spectator at a horse show who was injured when the defendant rode his horse too fast and lost control. Although that was a case about a spectator, and not a participant, it is clear that the observations made by this court, and in particular by Diplock LJ, are of application to spectators and participants alike. He said (1962] 2 All ER 978 at 988, [1963] 2 QB 43 at 67) that what is reasonable care in a particular circumstance is a jury question, which (in the absence of direct guidance from authority) may be answered by inquiring whether the ordinary reasonable person would say that in all the circumstances the defendant’s conduct was blameworthy. He said (1962] 2 All ER 978 at 989–990 [1963] 2 QB 43 at 68): d

‘The practical result of this analysis of the application of the common law of negligence to participant and spectator would, I think, be expressed by the common man in some such terms as these: “A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such act may involve an error of judgment or lapse of skill, unless the participant’s conduct is such as to evince a reckless disregard of the spectator’s safety.”’ e

f

g

h

i

- a [9] *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866 was a participant case. The plaintiff and the defendant were playing for opposing teams in a football match when the plaintiff suffered serious injuries as a result of a foul tackle by the defendant. The judge held that there was an obvious breach of the defendant's duty of care because he showed a reckless disregard of the plaintiff's safety and his conduct fell far below the standards which might reasonably be expected of anyone playing the game. The defendant's appeal to this court was dismissed. Sir John Donaldson MR cited ([1985] 2 All ER 453 at 454, [1985] 1 WLR 866 at 867) from the decision of the High Court of Australia in *Rootes v Shelton* [1968] ALR 33, saying:
- b

- c 'Barwick CJ said (at 34): "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist." Kitto J said (at 37): "... in a case such as the present, it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity. Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances." I have cited from those two judgments because they show two different approaches which, as I see it, produce precisely the same result. One is to take a more generalised duty of care and to modify it on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of the duty of care. That seems to be the approach of Barwick CJ. The other is exemplified by the judgment of Kitto J, where he is saying, in effect, that there is a general standard of care, namely the Lord Atkin approach in that you are under a duty to take all reasonable care taking account of the circumstances in which you are placed (see *Donoghue (or M'Alister) v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11); which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside. For my part I would prefer the approach of Kitto J,
- d
- e
- f
- g
- h
- j

but I do not think it makes the slightest difference in the end if it is found by the tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event, there is liability.’ a

[10] The final decision to which I wish to refer is *Caldwell v Maguire* [2001] EWCA Civ 1054, [2002] PIQR P45, another decision of this court. The claimant, a professional jockey, had been injured when he was unseated as a result of manoeuvres by two fellow jockeys (the defendants). The trial judge (Holland J) reviewed some of the authorities (including *Wooldridge*’s case and *Condon*’s case), from which he extracted these five propositions (at [11]): b

‘[1] Each contestant in a lawful sporting contest (and in particular a race) owes a duty of care to each and all other contestants. [2] That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants. [3] The prevailing circumstances are all such properly attendant upon the contest and include its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant. Thus in the particular case of a horse race the prevailing circumstances will include the contestant’s obligation to ride a horse over a given course competing with the remaining contestants for the best possible placing, if not for a win. Such must further include the Rules of Racing and the standards, skills and judgment of a professional jockey, all as expected by fellow contestants. [4] Given the nature of such prevailing circumstances the threshold for liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse in skill (and thus care) respectively when subject to the stresses of a race. Such are no more than incidents inherent in the nature of the sport. [5] In practice it may therefore be difficult to prove any such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant’s safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden.’ c d e f g

[11] On appeal, there was no dispute as to the correctness of the first three propositions, but it was submitted on behalf of the defendants that the last two were ‘unduly restrictive’ and not supported by the earlier authorities. The criticisms of Holland J’s formulation of the last two propositions were rejected. Tuckey LJ (at [23]) said that the threshold for liability was high: h

‘... there will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required. I do not think it is helpful to say any more than this in setting the standard of care to be expected in cases of this kind.’ j

[12] Judge LJ (at [37]) said that, in the context of sporting contests, it is right to emphasise the distinction between conduct which is properly to be characterised as negligent ‘and errors of judgment, oversights or lapses of attention of which

a any reasonable jockey may be guilty in the hurly burly of a race'. Lord Woolf CJ agreed with both judgments.

[13] In the present case, the horseplay in which the five youths were engaged was not a regulated sport or game played according to explicit rules, nor was it organised in any formal sense. Rather, it was in the nature of informal play, which was being conducted in accordance with certain tacitly agreed understandings or conventions. These were objectively ascertainable by the claimant, since he could see the nature of the horseplay in which his friends were indulging before he joined in. The understandings or conventions were that the objects that were being thrown were restricted to twigs, pieces of bark and other similar relatively harmless material that happened to be lying around on the ground; they were being thrown in the general direction of the participants in a somewhat random fashion, and not being aimed at any particular parts of their bodies; and they were being thrown in a good-natured way, without any intention of causing harm. The nature of the objects and the force with which they were being thrown were such that the risk of injury (almost certainly limited to injury to the face) was very small. There was no expectation that skill or judgment would be exercised, any more than there would be by participants in a snowballing fight. These were the characteristics of the game in which the claimant decided to participate.

[14] The offending blow was caused by a piece of bark which was thrown in accordance with the tacit understandings or conventions of the game in which the claimant participated. It was thrown in the general direction of the claimant, with no intention of causing harm, and in the same high-spirited good nature as all the other objects had been thrown.

[15] I recognise that the participants in the horseplay owed each other a duty to take reasonable care not to cause injury. What does that mean in the context of play of this kind? No authority has been cited to us dealing with negligence in relation to injury caused in the course of horseplay, as opposed to a formal sport or game. I consider that there is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the guidance given by the authorities to which I have referred to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay. But I do not consider that this is a significant distinction. The common features between horseplay of this kind and formal sport involving vigorous physical activity are that both involved consensual participation in an activity (i) which involves physical contact or at least the risk of it, (ii) in which decisions are usually expected to be made quickly and often as an instinctive response to the acts of other participants, so that (iii) the very nature of the activity makes it difficult to avoid the risk of physical harm.

[16] I would, therefore, apply the guidance given by Diplock LJ in *Wooldridge v Sumner* [1962] 2 All ER 978, [1963] 2 QB 43, although in a slightly expanded form, and hold that in a case such as the present there is a breach of the duty of care owed by participant A to participant B only where A's conduct amounts to recklessness or a very high degree of carelessness.

[17] If the defendant in the present case had departed from the tacit understandings or conventions of the play and, for example, had thrown a stone at the claimant, or deliberately aimed the piece of bark at the claimant's head, then there might have been a breach of the duty of care. But what happened here was, at its highest, 'an error of judgment or lapse of skill' (to quote from Diplock LJ), and that is not sufficient to amount to a failure to take reasonable

care in the circumstances of horseplay such as that in which these youths were engaged. In my view, the defendant's conduct came nowhere near recklessness or a very high degree of carelessness. It is true that this game was not being played in a manner that was closely analogous to the fast and furious conditions of a game of football or a horserace, where, in determining what reasonable care requires, account has to be taken of the fact that decisions are taken in the heat of the moment. But these youths were indulging in horseplay after spending the morning indoors. They were high-spirited and having fun, and no doubt the game was conducted at some speed and in a fairly vigorous fashion. It was implicit that nobody was expected to take care to aim the objects at any particular part of the body. They were simply aimed in the general direction of the intended 'victim'.

[18] The judge said that he did not 'think that in this particular case the defendant took sufficient care to make sure that injury to the claimant's head would not take place'. Since the argument before him was directed primarily to the issue of consent, it is not surprising that he did not address the issue of breach of duty in any detail. Mr Tavares submits that we should respect the judge's finding, and that we should only interfere if it is plainly wrong. He points out that the judge had the advantage, denied to us, of seeing the witnesses, and forming a view on what is essentially a matter of judgment, and submits that the judge's finding cannot be said to be plainly wrong. There are two answers to this. First, the judge did not consider what standard of care was required in the circumstances of this case. Indeed, he was discouraged from doing so by Mr McLaughlin (then appearing for the defendant) who submitted that the only real issue in the case was consent, and that there was no need to consider authorities such as *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866. Secondly, for the reasons that I have given I consider that the judge's conclusion was in any event plainly wrong. This was an unfortunate accident, and no more. There was no breach of the duty to take reasonable care.

[19] In these circumstances, it is unnecessary for the purposes of dealing with the claim in negligence to decide whether the judge was right to hold that the claim was not defeated by volenti. But I shall have to deal with the issue of consent when I deal with the claim in battery to which I now turn.

BATTERY

[20] It is trite law that a battery is the intentional and direct application of force to another person, and that where there is consent there is no battery. The question of what amounts to consent in the context of games and sport is not always easy to determine. Consent is rarely given expressly: it can be, and usually is, implied from conduct. Thus it can obviously be inferred from the act of taking part in a boxing match or other contact sport that a participant consents to being subjected to a degree of force. I would accept as an accurate statement of the law the following passage of *Clerk & Lindsell on Torts* (18th edn, 2000) p 681 (para 13-08):

'The claimant cannot claim compensation for the consequences of an act which he has freely invited, or in respect of which he has assumed the risk. The footballer cannot allege that a legitimate tackle is a battery. Thus, when the defendant maintains that the claimant consented to the force used against him, the key question becomes whether that consent extended to the degree or type of force employed against him. The claimant's consent need

- a not be specific to the alleged act of battery. He may be *volenti* to the general harm envisaged in a fight or in sport.'

[21] In a sport which inevitably involves the risk of some physical contact, the participants are taken impliedly to consent to those contacts which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts. Thus, for example, in the context of a fight with fists, ordinarily neither party has a cause of action for any injury suffered during the fight. But they do not assume 'the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence' (see *Lane v Holloway* [1967] 3 All ER 129 at 131, [1968] 1 QB 379 at 386-387 per Lord Denning MR).

c [22] It is difficult to envisage circumstances in which a participant in a contact sport or game would be taken to have impliedly consented to an act which would otherwise amount to a battery, where that act was negligent in the sense previously explained. As we have seen, a breach of the duty of care in such circumstances will only be established where there has been recklessness or a very high degree of carelessness.

d [23] So how should these principles be applied in the present case? It was conceded on behalf of the defendant before the judge that, but for the issue of consent, he would be liable in the tort of battery. The judge said that it may be that in the minds of participants other than the claimant nobody particularly cared where items went, but, he added:

e 'I am satisfied, as I say, in the particular circumstances of this case, there was, although consent to participate in a game which might have caused injury, no consent to the injury to the claimant's face.'

[24] In my judgment, the judge's conclusion on this issue was clearly wrong. By participating in this game, the claimant must be taken to have impliedly
f consented to the risk of a blow on any part of his body, provided that the offending missile was thrown more or less in accordance with the tacit understandings or conventions of the game. As I have already explained, this is indeed what happened. There is no basis for holding that the claimant impliedly withheld his consent to the risk of being struck by a piece of bark thrown in
g accordance with those understandings or conventions and without negligence. The question of the extent of the claimant's implied consent is a matter for the court to determine in the light of all the surrounding circumstances. There is nothing in those circumstances which indicates that the claimant's consent was restricted to the risk of being struck by objects being thrown at the lower part of his body. The game was played on the basis that the objects were thrown at no
h particular part of the body. It follows that an object thrown in the general direction of a participant, without negligence and without intent to cause injury, but which happened to hit him in the face, was being thrown in accordance with the understandings and conventions of the game, and in a manner to which the participants had consented.

j
CONCLUSION

[25] This was a most unfortunate accident, but it was just that. Young persons will always want to play vigorous games and indulge in horseplay, and from time to time accidents will occur and injuries will be caused. But, broadly speaking, the victims of such accidents will usually not be able to recover damages unless they can show that the injury has been caused by a failure to take care which

amounts to recklessness or a very high degree of carelessness, or that it was caused deliberately (ie with intent to cause harm). For the reasons that I have given, I would allow this appeal and dismiss the claim. a

CLARKE LJ.

[26] I agree.

SIR ANDREW MORRITT V-C. b

[27] I also agree.

Appeal allowed.

Celia Fox Barrister.

a Sharratt v London Central Bus Co and other cases (No 2)

The Accident Group Test Cases

b [2004] EWCA Civ 575

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, BUXTON AND MAY LJJ

28, 29 APRIL, 20 MAY 2004

- c** *Costs – Order for costs – Jurisdiction – After-the-event (ATE) insurance premium – Claims handling service – Claimants paying claims handling service ATE premium in respect of risk of incurring liability in proceedings – Successful claimants seeking to recover amount of ATE premium in costs – Flat fee paid for investigation of claims affecting calculation of amount of premium recoverable – Whether flat fee recoverable –*
- d** *Access to Justice Act 1999, s 29 – Solicitors Introduction and Referral Code 1990, r 2(3).*

The Accident Group Ltd (TAG), operated a scheme which provided ‘after the event’ insurance to claimants bringing small claims for personal injuries under conditional fee agreements. Claimants filled in application forms, establishing a contractual relationship with TAG, and at the same time were required to agree to take out a bank loan. TAG’s fee, described as a ‘premium’ was debited to the loan account, on the basis that the fee would either eventually be recouped from damages or repaid under the TAG insurance. TAG passed cases on to a sister company, Accident Investigation Ltd (AIL), for investigation. Solicitors on TAG’s ‘panel’ were required, as a term of their agreement with TAG, to enter into an agreement with AIL as its agent for the purposes of investigating, collating and assessing information with regard to claims. Panel solicitors also agreed to pay AIL’s £310 fee for every case referred, but actual payment to AIL was achieved by the fee being taken from the client’s loan account. Under s 29^a of the Access to Justice Act 1999, where a costs order was made in favour of any party who had taken out an insurance policy against the risk of incurring a liability in proceedings, the costs payable to him could include costs in respect of the premium. In a series of test cases, individual claimants sought to recover from defendants ‘premiums’ paid to TAG. The principal task of the costs judge was to determine how much of the ‘premium’ charged by TAG fell within s 29 of the 1999 Act. The question whether the fee paid to AIL was recoverable from the paying party arose, since if it were irrecoverable, the calculation of the premium allowable under s 29 would be affected. The judge held, *inter alia*, that the AIL fee was not recoverable as it was an unlawful referral fee by reason of r 2(3)^b of the Solicitors Introduction and Referral Code 1990 under which solicitors ‘must not reward introducers by the payment of commission or otherwise’. The claimants appealed, contending, *inter alia*, that the AIL fee was the price of the investigation of the claims, that the liability to pay the fee was that of the client from whose loan account it was discharged, and that TAG, not AIL, was the introducer.

a Section 29 is set out at [1], below

b Rule 2, so far as material, is set out at [39], below

Held – The fee paid to AIL was a referral fee; as such it had not been properly payable by the panel solicitors, had not therefore been chargeable to their clients and certainly was not recoverable from the paying party. The nature of the arrangement, viewed objectively, was that the fee had been compulsory for any solicitor wishing to be sent cases by TAG. The amount of the fee was standard in all cases and far outstripped any reasonable charge for the work done or purportedly done. The whole of AIL's income came from fees from panel solicitors and all that income was paid by AIL to TAG as administrative services and management charges. It could not therefore be said that the fee could not have been a referral fee because it was not paid to the introducer. Nor could the liability to pay the fee be said in reality to be that of the client as he had in fact no control over dealings with his loan account. Accordingly, the appeal would be dismissed (see [39]–[42], [46]–[48], below). a
b
c

Notes

For after the event insurance, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 807, and for introductions and referrals of business to and from solicitors, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 503–507. d

For the Access to Justice Act 1999, s 29, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1514.

Cases referred to in judgments

Callery v Gray (No 2) [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142; *aff'd* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000. e

Claims Direct Test Cases, Re [2003] EWCA Civ 136, [2003] 4 All ER 508.

Halloran v Delaney [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

Appeal

Gerald Sharratt and the other claimants in costs-only proceedings against the London Central Bus Co Ltd and other defendants known as The Accident Group Test Cases appealed with permission of Senior Costs Judge Hurst from his decision on 15 May 2003 ([2003] All ER (D) 232 (May), (2003) 153 NLJ 790). The facts are set out in the judgment of Buxton LJ. f

Timothy Dutton QC (who did not appear below) and Nicholas Bacon (instructed by Mace & Jones, Huyton) for the appellants. g

Michael Pooles QC and Andrew Neish (instructed by Beachcroft Wansbroughs) for the defendants.

Cur adv vult h

20 May 2004. The following judgments were delivered.

BUXTON LJ (giving the first judgment at the invitation of Kennedy LJ). j

INTRODUCTION

[1] Section 29 of the Access to Justice Act 1999 provides:

‘Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court

a proceedings to rules of court, include costs in respect of the premium of the policy.'

[2] With the effective withdrawal of legal aid for small claims for personal injuries it was inevitable, and seems to have been intended, that such claims would in future be financed by conditional fee agreements (CFAs). Such agreements were unlikely to be attractive to individual solicitors, at least without the imposing of success fees that made the deal unattractive to claimants. To meet this need, or opportunity, there has been created a new form of machinery, that handles small cases for a large number of claimants, and takes advantage of the accruing economies of scale.

c [3] One such organisation was Claims Direct, which provided 'after the event' (ATE) insurance to existing claimants to indemnify them should their claims be dismissed or discontinued. Accordingly, in the event of a claim succeeding, with a normal order for recovery of claimant's costs, s 29 of the 1999 Act prima facie provides for the inclusion of the premium charged for that insurance, or at least some part of that premium, within those recoverable costs. In *Re Claims Direct Test Cases* [2003] EWCA Civ 136, [2003] 4 All ER 508 this court gave guidance as to the assessment of what part of a premium paid to such an organisation can be properly regarded as paid for insurance against the risk to which s 29 refers. The present litigation concerns a scheme that was in many respects the same as the Claims Direct scheme. This scheme was operated by The Accident Group Ltd (TAG). The newly controverted issue in the present case was the appropriate factual analysis to be adopted in separating premium qualifying under s 29 from non-qualifying premium.

[4] The present litigation in form consists of a series of test cases, in which individual claimants seek to recover from defendants premiums paid to TAG. f Reference to the facts and circumstances of those individual cases proved illuminating at various stages of the argument. However, it would be artificial not to recognise that what is effectively at issue in this case is the nature, terms and reasonableness of the TAG scheme itself. As it is put in the appellants' skeleton argument, 'the driving force behind the support ... for this appeal has been a steering committee of TAG scheme insurers and finance providers'; just as the counterparties to the appeal are the liability insurers from whom s 29 recoveries are sought.

[5] The case was conducted over a substantial period before Senior Costs Judge Hurst ([2003] All ER (D) 232 (May), (2003) 153 NLJ 790), who had the benefit of a very large amount of written material and of oral evidence, as well as his own experience of involvement in the *Claims Direct* case. He reached conclusions contrary to the interests of the TAG parties, and the latter now appeal to this court, with the permission of the judge. Before addressing the issues in the case it is necessary to give an account of the TAG scheme. A very full account, with verbatim quotation from many of the documents, is to be found in the judgment of the senior costs judge. Mr Dutton QC, for the appellants, paid a very proper tribute to that exposition, and I would commend it to anyone who feels the need for a more detailed account than that which follows. I shall here only give enough of the bones of the scheme to enable the points in issue to be understood. I only refer to differences in the arrangements from year to year when such differences are material.

THE TAG SCHEME

[6] TAG went into administration in May 2003, in circumstances that are not the concern of this court. While it was still operating, it was a claims management company, similar to Claims Direct, that sold 'one-stop' services to members of the public who had or thought they might have personal injury claims. The scheme was vigorously marketed by a sales force of some 75 people, for instance by means of direct approach to members of the public in shopping malls and similar places, and many thousands of persons were attracted to it.

[7] The potential client filled in a simple application form, the purpose of which was first to establish the contractual relationship between the client and TAG, and second to enable TAG to decide whether to accept the case. The client undertook to enter into a 'legal expenses policy' which provided for: (i) a guarantee of a minimum sum of £500 damages after deduction of any obligation under the loan to be retained by the client if successful in his claim (this arrangement being known in this case as 'ring-fencing'); and (ii) if the claim was unsuccessful an indemnity against liability to pay the client's own disbursements and counsel's fees, the other side's legal costs, and any outstanding balance on the client's loan.

[8] The loan referred to was arranged under an agreement to take out a bank loan that the client was required to enter into at the same time as signing the application form. The loan was available to him because of block arrangements negotiated by TAG with particular banks. If TAG decided not to proceed with the case, the loan was simply cancelled. If TAG proceeded with the case, its fee or premium was debited to the loan account, on the basis that the fee would either be recouped from any damages that the client was eventually awarded, or repaid under the TAG insurance if the claim failed. There were certain other transactions put through the loan account, to which I shall refer below. Although the loan account was in the client's name, and on its face not subject to any restriction, Mr Dutton confirmed that the client had no control at all over the handling of the account, which was managed by TAG in accordance with the provisions of the scheme.

[9] Some application forms would be rejected on sight. The remainder were passed to an organisation called Accident Investigation Ltd (AIL) for investigation. AIL was a sister company of TAG, operating out of the same premises as TAG. It received a fixed fee of £310 plus VAT for every case referred to it. The legal status of this fee, and the role and status of AIL itself, are strongly in dispute in these proceedings. AIL then passed the papers to a 'vetting solicitor' who formed a view as to whether the claim had a more than 50% chance of success and whether the apparent value of the injuries was more than £1,500. If the claim thus qualified, he would then refer it to one of the solicitors on the TAG 'panel'. The solicitor had 48 hours to decide whether to take the case. If he accepted it, the client's insurance became operative, the solicitor issued him with a CFA, and the case thereafter proceeded as a normal piece of litigation. To obtain access to membership of the panel the solicitor had to enter into detailed, standard form, agreements, not only with TAG, but also with the funding banks and with AIL.

[10] At each stage of the process, if either TAG or the solicitor decided not to accept the claim the bank loan and other arrangements were simply cancelled.

[11] The charge made to clients by TAG, described as a 'premium', in the two years with which we are concerned was £840 (£800 plus insurance premium tax (IPT)) in 2000 and £997.50 (£950 plus IPT) in 2001. The ATE insurance that formed part of the TAG service was arranged by TAG with a number of Lloyds

a insurers in 2000, and in 2001 with Lloyds insurers and an organisation called NIG. Out of the sum charged to clients by TAG, in 2000 £320 was paid over to underwriters, leaving £480 with TAG. In 2001, £300 was paid to NIG and £650 remained with TAG. In respect of Lloyds in 2001 underwriters succeeded in negotiating to raise the insurers' share of the client's payment to TAG to £550.

b THE ISSUES

[12] The principal task of the senior costs judge was to determine how much of the 'premium' charged by TAG to the client was premium in respect of the risk referred to in s 29. He also had to decide two other issues. First, whether the AIL fee was recoverable from the paying party as a disbursement, or otherwise. That question not only affects the amount of costs recoverable by the client, but also, if the fee is irrecoverable, affects the calculation of the s 29 premium. Second, once the s 29 premium has been calculated, the costs judge had then to consider whether that amount is properly chargeable to the paying party as reasonable and proportionate under CPR 44.4. The senior costs judge applied that provision to reduce the amount for which the paying party was liable only in the case of the premium assessed for the Lloyds insurances in 2001. Both of these matters were strongly contested, and it will be convenient to take them at the end of this judgment.

[13] The appellants contested both the general approach of the senior costs judge and particular decisions that he made within the approach that he adopted. I take those in turn.

e METHODOLOGY

[14] The approach of the senior costs judge was to start with the sums paid over to underwriters. From those he deducted (assessed) sums or percentages attributable to risks that did not fall under s 29. He then added back commissions paid by the underwriters, which was accepted to be a proper element in the 'premium'; and also a sum in respect of 'cost of insurance services', an element that will have to be explained hereafter. This was called, for ease of reference only, the 'deconstructionist' approach. It is a more elaborate and worked-out version of the method suggested by this court in *Callery v Gray (No 2)* [2001] EWCA Civ 1246 at [12], [2001] 4 All ER 1 at [12], [2001] 1 WLR 2142 and *Re Claims Direct Test Cases* [2003] 4 All ER 508 at [87]–[88].

[15] The appellants argue that this approach is wrong in principle. The main complaint was in respect of the percentages assessed in respect of costs attributable to the insurance of risks falling outside s 29. The respondents adduced evidence from an actuary, a Mr Cowley, who, working on information obtained from TAG, assessed the percentages which the average costs of providing various items of cover that did not qualify under s 29 bore to the total average cost per claim. These percentages were then applied by the senior costs judge to the amount paid over to underwriters to identify the proper s 29 premium. The appellants said that this method was inappropriate and unfair. The senior costs judge should have started with the amount actually paid to TAG by the client, and deducted Mr Cowley's percentages from that sum.

[16] The appellants did not argue before the senior costs judge in favour of this approach, or against the 'deconstructionist' approach, even though they must have been aware, from the *Claims Direct* case, that the latter approach was likely to be adopted. Nor was this complaint, put as a matter of principle or logic, apparent from the original grounds of appeal, and we had to grant an application

to amend the grounds *de bene esse* to permit the point to be ventilated at all. However, even without the benefit of the view of the senior costs judge upon the argument, I have no hesitation in rejecting it out of hand. a

[17] The senior costs judge adopted ([2003] All ER (D) 232 (May) at [258]) the definition of 'premium' in *MacGillivray on Insurance Law* (9th edn, 1997) p 155 (para 7-2): '... the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance'. That formulation carries the authority of this court in the *Claims Direct* case [2003] 4 All ER 508 at [25]. It makes it quite clear that a 'premium' is the sum paid to the insurer. And as this court also made plain in the *Claims Direct* case an intermediary offering a basket of services, including but not limited to the negotiation of an insurance contract, cannot make his fee into a premium just by calling it such. The approach of the senior costs judge to a question arising under a statutory provision that refers to premium was therefore inevitable. b

[18] Further, I do not understand the particular complaint of the appellants, that Mr Cowley's percentages were applied to premiums charged by underwriters that had been arrived at without market experience and which his own figures showed to be inadequate for the management of the underwriters' business. The first of these factors is unfortunate, but cannot affect the analysis of what *percentage* of whatever premium was charged was attributable to non-qualifying risks. The second is also unfortunate, but the issue before the senior costs judge was nothing to do with the *profitability* of the underwriters' business, but rather with how much of their *income* could be attributed to s 29 business. c

[19] I will therefore proceed on the same, deconstructionist, basis as was adopted by the senior costs judge, and deal with the complaints made by the appellants within that approach. d

SUMMARY OF THE APPELLANTS' COMPLAINTS

[20] It is agreed that two items must be deducted from the premium in any event, as not falling within s 29. Those are 'ring-fencing' (see [7](i), above), valued at £10; and the cost of insuring the return of the premium, valued on the basis used by Mr Cowley at 15%. It was also agreed that if (as the senior costs judge found, and for reasons set out below I agree) the AIL fee was irrecoverable by the claimant because it had been an unlawful referral fee, the part of the premium attributable to such irrecoverability could not be included in the qualifying premium under s 29. Mr Cowley attributed 18% of the premium to that risk. Although these percentages were considerably debated before the senior costs judge, I did not understand them to be challenged, as figures, before us; but in any event they were subjected to close scrutiny by the senior costs judge on the basis of evidence that he heard and which was cross-examined before him, and it would need very strong grounds indeed for this court to reopen them. e

[21] Accordingly, the matters that remain in controversy in the main part of the appeal are as follows. (i) In 2002 TAG, in order to persuade the Lloyds syndicate to make available extra capacity, made an extra allocation to the syndicate, from clients' fees paid in 2002, of £150 per new policy, in order to offset losses suffered by the syndicate on the 2000 year. TAG argued that this amount should be allocated amongst the policies for 2000, and so lead to an increase in (recoverable) premiums for those years. One of the witnesses before the senior costs judge, adopting phraseology that does not appear to have been used contemporaneously between the parties, called the 2002 payment a 'loss f

- a experience adjustment premium', and the question therefore became known in the appeal as the 'LEAP' issue. (ii) The senior costs judge added back a sum for 'cost of insurance services', but limited the sum to £30, on the basis that that sum had been allowed in similar circumstances in the *Claims Direct* case. The appellants contended that a much larger sum, representing the actual value to the insurers of the services provided to them by TAG, was justified by the evidence that had been before the senior costs judge.
- b

LEAP

- [22] I have summarised this issue in [21](i), above. Before us, the appellants advanced various elaborate arguments as to how the sum paid in 2002 could be attributed to individual client accounts for the year 2000. Such reconstruction was indeed necessary, because the underwriting evidence was that the extra payment was simply required by the underwriters to make good their general deficiency on the 2000 contract. Attribution to individual clients was never undertaken or contemplated.
- c

- [23] The senior costs judge rejected the argument that LEAP should in some way be added to recoverable premiums for the year 2000, and he was right to do so. The question for him was what premium had been paid by the client, who is the recovering party in the costs application. No 2000 client paid a penny more for his insurance because of LEAP. What did happen was that the clients' agent, after the event, was persuaded to make a commercial payment to underwriters in order to obtain extra capacity, not for 2000 clients but for 2002 clients. That payment no more formed part of the premium actually paid by the 2000 clients, and was no more a proper charge on the paying party in those clients' cases, than if a successful claimant who had obtained and paid for an expert's report decided after the event that the expert had undercharged for his services, and sought to recover an *ex gratia* addition from the paying party.
- d
- e

- [24] It is also perhaps unnecessary to add that, even if LEAP were analysed as an element in the 2000 premium, that element in the 2000 client's costs would inevitably be disallowed under CPR 44.4.
- f

- [25] That this claim was made at all illustrates the reality of these proceedings, to which I have already referred at [4], above. We were frequently reminded during the appellants' submissions that the appellants are the individual claimants in the test cases, seeking to recover what they have properly spent. But LEAP was nothing to do with any individual claimant, and was not spent or contributed by individual claimants. LEAP was paid by TAG to further its business. It is of course in TAG's interest to place responsibility for LEAP on individual paying parties, because payment of the successful client's costs reduces the balance on his loan account, and thus reduces the risk to TAG under the ATE; but, assuming that TAG honours its liabilities, that does not affect the position of any individual client.
- g
- h

COST OF INSURANCE SERVICES

- [26] The agreements between TAG and underwriters recited a wide range of 'insurance services' that were to be provided by TAG to underwriters. These were largely concerned with ensuring that only suitable claims were accepted, and then ensuring that claims were properly processed and pursued. Mr Dutton urged that such services were of the greatest importance to insurers; it had been recognised in the *Claims Direct* case that the cost of such services was a proper addition to premium; and in contrast to the *Claims Direct* case, where the court
- j

had attributed to such costs what seemed to be a pro forma sum of £30, in this case the senior costs judge had evidence of actual cost, which he should have applied. a

[27] There is no cross-appeal against the senior costs judge's decision that an allowance should in principle be made under this head, but it would be wrong if I did not express my considerable doubts on that point. In the *Claims Direct* case [2003] 4 All ER 508 at [89] this court, although as we have seen entertaining such an allowance, said: b

'The obligation which the insurer undertook under his contract of insurance with the claimant was to provide an indemnity in the event that the claimant's compensation claim was dismissed or discontinued. It was not an obligation to provide the "Continuing Insurance Services" described in the ... agreement [between claims management company and insurer]. The claimant would be provided with these services in any event, whether or not the claim was unsuccessful.'c

Three points follow. First, the services are provided to the claimant as well as to the insurer. Second, to the extent that the services are provided to the insurer, the cost of them is exactly that, an expense of the insurer's business. The 'premium', the income of that business, should be assumed to have been fixed in the light of such expenses. If (as appears to be required by the present argument) TAG is being remunerated for providing those services, that should have been clearly stated in the contractual arrangements: not least because of its implications for transparency in the profit and loss accounts of the two parties. d Third, if these expenses can indeed be attributed to the 'premium' under the policy, as Brooke LJ pointed out in the *Claims Direct* case, it is unclear how that element in the premium, or at least all of it, relates to the s 29 risk. e

[28] However, it is not necessary to pursue these matters further, because the premise of the appellants' argument, that there is in the present case evidence of actual cost on which the senior costs judge should have acted, is not fulfilled. The appellants relied on two witnesses. First, Mr Blair, the finance director of TAG's parent company, who said that TAG spent 'hundreds of pounds' per case in providing the 'insurance services'. The senior costs judge found that evidence of no assistance to him, and he was justified in so finding. Mr Blair appears to have made no attempt to isolate and quantify those 'insurance services', if any, that are a proper addition to a premium that qualifies under s 29. f Second, the evidence of Mr Primer, managing agent of one of the Lloyds syndicates, was equally that the cost of undertaking insurance services ran into hundreds of pounds. This evidence however equally suffered from the difficulty that it made no attempt to isolate the items chargeable to s 29 premium. g

[29] The difficulty of the evidence is demonstrated by the failure of the appellants to provide detailed figures to the senior costs judge. According to his judgment ([2003] All ER (D) 232 (May) at [329]), various figures up to £150 were suggested. Before us, the appellants argued that the whole of the amount retained by TAG, less the irrecoverable items of ring-fencing, cost of funding and insurance against irrecoverability of the AIL fee, should be attributed to the recoverable premium. That would lead to a figure (for Lloyds 2000 as a representative year) of £216.95. That approach was on the basis that the evidence of Mr Blair and Mr Primer showed the total value to the underwriters of the insurance services to be greater than the amount retained by TAG. For the reasons already indicated, that point is not made good. h

j

- a [30] In the absence of any evidence on which he could properly act, the senior costs judge had no alternative to, and perhaps was somewhat generous in accepting, the £30 attributed to similar services in the *Claims Direct* case. There is no basis upon which this court can interfere with his conclusion.

REASONABLENESS AND PROPORTIONALITY

- b [31] The senior costs judge mentioned various cross-checks that reinforced his view that the figures that he had isolated for the s 29 premium were justified. I do not go into these, because the issue at that stage was simply and only the identification of the s 29 premium, which was justifiably arrived at by the method just set out. The senior costs judge did, however, apply CPR 44.4 in the case of the premium for the Lloyds year 2001, where, in a second judgment in July 2003 ([2003] EWHC 9004), he reduced the figure initially arrived at of £608 to £525, both figures including IPT. It was pointed out to the senior costs judge, and he appears in para [28] of his second judgment to have accepted and thought relevant, that other such premiums so far approved were £357.50 in *Callery v Gray* (No 2) [2001] 4 All ER 1, [2001] 1 WLR 2142 and £621.13 in *Re Claims Direct Test Cases* [2003] 4 All ER 508, the latter premium however being reasonably larger because it covered both sides' costs.

[32] Prominent in discussion of this issue was the Costs Practice Direction (CPD) para 11.10:

- e 'In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include—(1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover ...'

- f The appellants said that this was such a case. Although the CFA was drawn in terms that envisaged a success fee, the success fee imposed was in the event 0%. The senior costs judge accepted in that respect the relevance of CPD para 11.10. He was presented with a table drawn up by Mr McCulloch, one of the solicitors on the TAG panel, that showed in respect of each of the test cases the effect of applying to the solicitor's profit costs what Mr McCulloch assessed to be a proper success fee, and then adding to that fee the cost of insurance that would have been available in the market. That exercise produced sums very much in excess of the figures allowed by the senior costs judge. The appellants said two things. First, the exercise showed that the senior costs judge's work must in any event be wrong. Second, that in any event any reduction of his figures, as had occurred in the case of Lloyds year 2001, plainly could not be justified.

- h [33] I have already indicated that the first of these arguments is not available to the appellants. The first question is what in fact was the premium insuring against the risk that s 29 refers to. That other forms of insurance might have been more expensive; or that the claimants got a good deal; or that the insurers lost money on the transactions; are none of them to the point.

- j [34] So far as Lloyds year 2001 is concerned, there are a series of reasons why the approach of the senior costs judge cannot be faulted, quite apart from the striking global comparison with other actual rather than hypothetical premiums (see [31], above). Mr McCulloch had asserted appropriate success fees of between 18.5% and 31.5%. The senior costs judge described these as wholly unrealistic for straightforward cases like the test cases before him, and applied instead the 5% uplift envisaged by this court in *Halloran v Delaney* [2002] EWCA

Civ 1258 at [36], [2003] 1 All ER 775 at [36], [2003] 1 WLR 28. Mr Dutton made no attempt to support Mr McCulloch's figures. In their place, he argued that further work by the Civil Justice Council since the date of the decision of the senior costs judge had demonstrated that an agreed rate of uplift for straightforward cases was 12.5%, and that figure should be used in assessing the reasonableness of the premium under the machinery envisaged by CPD para 11.10. When applied to the solicitors' profits costs in any of the test cases, with the addition of assumed costs of alternative insurance, figures significantly in excess of £608 were achieved.

[35] We permitted material vouching for the origins and status of the 12.5% figure to be put before us, but none of it or of the argument that it was said to support was of any assistance to us. In the first place, we are concerned with an appeal from a decision of the senior costs judge in relation to insurances entered into in 2000 and 2001. If at the time of his decision 5% was indeed the 'going rate', it is impossible to see how he can have been wrong to adopt it.

[36] There is, however, a more fundamental difficulty about the appellants' argument. Percentage uplifts mean nothing without reference to the nature of the figure to which the percentage is to be applied. Mr McCulloch applied his percentages to the solicitors' *actual* profit costs. So did the senior costs judge. He illustrated his method by saying ([2003] All ER (D) 232 (May) at [232]):

'Applying a success fee of 5% to the largest of the profit costs estimated by Mr McCulloch, and adding a sum equal to the cost of an Accident Line Protect premium gives a figure of £442.'

But, as May LJ pointed out in the course of argument, the negotiations that resulted in the appropriate success fee of 12.5% envisaged that that percentage would be applied to the costs fixed as allowable under CPR Pt 45, and not (as in the senior costs judge's example) to the actual costs of the case. That that was the intention is confirmed by the provisions of CPR 45.7–45.11, which provides for the 12.5% uplift to be applied to fixed recoverable costs calculated according to CPR 45.9(1). The case taken as an example by the senior costs judge, with the highest profit costs amongst those cited by Mr McCulloch, was that of Ashmore, where agreed damages were £2,000. Accordingly, in contrast to the claimed profit costs of £2,538, the fixed recoverable costs would have been £1,200 (£800 under CPR 45.9(1)(a) plus, under CPR 45.9(1)(b), 20% of the agreed damages of £2,000). The success fee under the regime now argued for by the appellants would therefore have been £150, which added to the assumed cost of insurance of £315 gives a total of £465: a sum smaller than that allowed by the senior costs judge for Lloyds year 2001.

[37] These calculations perhaps do no more than demonstrate that a broad judgement such as is conferred on the costs judge by CPR 44.4 and by CPD para 11 cannot be exercised with mathematical nicety. What they certainly do not demonstrate is that there is any ground for challenging the decision of the senior costs judge to reduce on taxation the assessed premium for the Lloyds year 2001.

AIL: THE CONTRACTUAL SCHEME

[38] The senior costs judge made the following findings with regard to the AIL scheme. (i) The panel solicitors were required, as a term of their agreement with TAG, to enter into an agreement with AIL under which the panel solicitor appointed AIL as its agent for the purposes of investigating, collating and

- a assessing information with regard to claims. The panel solicitor also agreed to pay the AIL fee (of £310 plus VAT). At this point the client would almost certainly be unknown to the solicitor, nor would there be any retainer in place (see [2003] All ER (D) 232 (May) at [340]). (ii) Although the solicitor was contractually liable to pay the fee, actual payment to AIL was achieved by the fee being removed from the client's loan account. (iii) In 2000 the agreement between TAG and the client only referred to 'investigation fees' in those general terms. The client knew nothing of AIL, or of what its fee in fact would be (see [2003] All ER (D) 232 (May) at [352]). In 2001 the agreement recited that the client wished AIL to investigate and obtain further information about the claim, and agreed to pay AIL's fee, which was quantified. That did not create any obligation on the part of the client to AIL, because AIL's only contract was with the solicitors (see [2003] All ER (D) 232 (May) at [358]–[360]). (iv) The work that was done by AIL was done by AIL as agent for the panel solicitor to enable the panel solicitor to see whether or not he wished to take on the case (see [2003] All ER (D) 232 (May) at [354]). (v) The appellants agreed that the work done by AIL in any given case occupied no more than one hour (see [2003] All ER (D) 232 (May) at [373]).

d WAS THE AIL FEE A REFERRAL FEE?

- [39] If the AIL fee was a referral fee, it was not properly payable by the solicitors; not therefore chargeable to their clients; and a fortiori not recoverable from the paying party; by reason of r 2(3) of the Solicitors' Introduction and Referral Code 1990, which reads: 'Solicitors must not reward introducers by the payment of commission or otherwise.'

- [40] Mr McCulloch, the panel solicitor who gave evidence to the senior costs judge, said that he did not regard the AIL fee as a referral fee, but as the price for investigation of the claims. Mr Dutton argued that, in the face of that evidence, it was difficult or impossible for the senior costs judge to have found that the fee was indeed a referral fee. I am unable to agree. First, in determining the nature of a contractual arrangement, the court has to consider the objective nature of the arrangements, and not just the parties' assertions about the object of the arrangements. Second, Mr McCulloch, although acknowledging that contractually the solicitor was liable to pay AIL, regarded the liability as being in reality that of the client. He so said in a passage of his evidence quoted by the senior costs judge ([2003] All ER (D) 232 (May) at [212]), on the ground that the fee was 'discharged by the client directly out of his or her loan account'. That was despite the client having no control at all over dealings with his loan account (see [8], above). The assertion that the obligation to AIL was that of the client (which was persisted in by Mr McCulloch in a witness statement made by him in this appeal) was contrary to the findings of the senior costs judge (see [38](iii), above), and casts considerable doubt on whether Mr McCulloch truly understood the nature of the arrangements.

- [41] The senior costs judge was justified in finding that the AIL fee was a referral fee. In my view the factors pointing strongly in that direction were as follows. (i) The fee was compulsory for any solicitor wishing to be sent cases by TAG. It was not open to him to make other arrangements for investigation work. (ii) The amount of the fee was standard in all cases. (iii) A 'block' fee such as referred to in (ii), above will not always indicate that the fee is not being charged, or not wholly charged, for the work to which it purports to relate, but in the present case the amount of the fee far outstripped any reasonable charge for the work done or purportedly done. The amount in common sense must

have included a referral element. I do not accept what appeared to be the submission of the appellants that provided *some* element of a fee relates to matters other than referral the fee as a whole cannot be a referral fee. That argument is particularly unpersuasive where, as on the figures adopted by the appellants themselves (see [38](v), above), much less than half of the fee was attributable to that work. (iv) That very large fee was payable to a sister company of the introducer. We were told by the respondents, without challenge, that the whole of AIL's income came from fees from panel solicitors, and was then paid over by AIL to TAG as 'administrative services and management charges'. In those circumstances, it was little short of extraordinary for the appellants to argue, as apparently they did before the senior costs judge (see [2003] All ER (D) 232 (May) at [344]), that the AIL fee cannot have been an introduction fee because TAG, and not AIL, was the introducer.

[42] The senior costs judge was well aware of the seriousness of his finding, as am I; but for the reasons given it was inevitable. Claimants have been made liable for the amount of the AIL fee through deductions from the loan account over which they had no control, even though the contractual responsibility for the AIL fee rested with the panel solicitor, and it was illegal for the panel solicitor to pass on that responsibility to his client. I hope that we will be told that steps have now been taken by panel solicitors to regularise their clients' position.

WAS THE AIL FEE A DISBURSEMENT?

[43] Even if the AIL fee had not been a referral fee, it could only be charged to the paying party if it was a cost for which the client was responsible, or a disbursement made on his behalf. Analysis of this issue before the senior costs judge was made more difficult by the appellants' continued insistence that the fee was a direct responsibility of the client, and not a payment on his behalf by his solicitor. On the facts as found by the senior costs judge, the payment could not have been a disbursement, because the work to which it allegedly related was completed before the solicitor's retainer came into existence; was in reality undertaken on the solicitor's own account to enable him to decide whether to risk the case at all; and was only vaguely referred to in the documentation given to the client either before or after the retainer came into being.

[45] Mr Dutton argued that a sum paid by the solicitor prior to the retainer, for the purpose of investigating his potential client's case, could be a disbursement, at least if thereafter ratified by the client. As it was put in the appellants' skeleton argument before this court (not settled by Mr Dutton):

'There will be many situations in which work product is obtained and paid for by a solicitor before he and his client create the contractual relationship of their retainer. If that work product can be "sold" by the solicitor to his client for the purposes of progressing the client's case, then not merely will the client be accepting that he should pay for it but it will also be recoverable in an eventual inter partes costs assessment if and to the extent that the work is fairly referable to the client's case.'

The concept of a solicitor 'selling' pre-retainer work to his client, in the context of persuading the client to pay for that work, is unhappy indeed. But whether the transaction is thought of in those terms, or in the more proper terms of the solicitor giving the client disinterested advice, the work of AIL, such as it was, cannot possibly be analysed as an expenditure for which the client accepts responsibility to the solicitor. The solicitors' client care letter (the terms of

- a which, it should be noted, were dictated by TAG and in respect of which the solicitors had no discretion) made only a vague reference to 'investigation fees', and did not mention the AIL fee at all: and much less explained to the client that he had specifically to agree with the solicitor that work already done by or on behalf of the solicitor would be chargeable to his account. Nor was there any other evidence of such exchanges between solicitor and client. Indeed,
- b Mr McCulloch's evidence was that the exchanges did not take place, because the AIL fee had already been dealt with in the TAG documentation. But even if the very general references to AIL in TAG's documentation were capable of bearing the burden here sought to be placed on it, that only, as the senior costs judge found as set out at [38](iii), above, created a term in the contract between the client and TAG. It specifically did not create an obligation on the part of the client
- c to his (future) solicitor.

- [45] Mr Dutton also argued that, even if the AIL fee was not a disbursement, it was a 'charge' for which the client himself was responsible, and thus formed a legitimate item of costs under the definition in CPR 43.2(1)(a). I very much doubt whether anything remotely like the present case was in the mind of the draftsman
- d of that rule. But the argument fails in any event because, as the senior costs judge found (and however much the appellants still resist that finding), it was not the client but the solicitor who was responsible for AIL's fee. The fee could therefore only come into the category of *client's costs* as a disbursement.

THIS APPEAL

- e [46] I would therefore uphold the decision of the senior costs judge in its entirety. While I understand why the senior costs judge gave permission to appeal, and did so without limitation, this court has had to reconsider a series of matters that are questions neither of law nor of principle, but rather issues of fact or judgment on which the court is likely to be slow to differ from the assessment
- f of the very expert tribunal below. If in future similar cases should come before the costs judges, they, and this court, are likely, when considering applications for permission to appeal, to need to see detailed grounds of appeal, and to require specific demonstration that those grounds do indeed raise matters of principle suitable for the consideration of this court.

g MAY LJ.

[47] I agree.

KENNEDY LJ.

[48] I also agree.

Appeals dismissed.

Dilys Tausz Barrister.

R (on the application of Clift) v Secretary of State for the Home Department

[2004] EWCA Civ 514

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, RIX AND CARNWATH LJ

5, 29 APRIL 2004

Prison – Release on licence – Refusal to release on licence – Secretary of State having discretionary power to release on licence only prisoners serving determinate sentences of 15 years or more when their release was recommended by Parole Board – Secretary of State refusing to release on licence prisoner serving determinate sentence of 18 years whose release was recommended by Parole Board – Whether Secretary of State’s power discriminatory breach of right to liberty and security – Criminal Justice Act 1991, ss 35, 50 – Human Rights Act 1998, Sch 1, Pt I, arts 5, 14.

The effect of ss 35 and 50^a of the Criminal Justice Act 1991 and the Parole Board (Transfer of Functions) Order 1998 was that the Secretary of State retained his previously existing discretion to release certain prisoners on licence if recommended to do so by the Parole Board only in relation to prisoners serving a determinate sentence of 15 years or more. The claimant had been sentenced to a total of 18 years’ imprisonment. He became eligible for parole and the Parole Board recommended his release. There was a significant delay before the Secretary of State announced his decision and the claimant commenced proceedings for judicial review. Shortly thereafter the Secretary of State rejected the Parole Board’s recommendation. The claimant contended that the discretion remaining in the Secretary of State contravened the right to liberty and security contained in art 5^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in the Human Rights Act 1998) read together with the prohibition of discrimination secured by art 14^c of the convention. The discrimination alleged was between prisoners, such as the claimant, serving determinate sentences of over 15 years, and those serving determinate sentences of less than 15 years, in relation to whom the Parole Board’s decision would be final. The judge dismissed the application and the claimant appealed.

Held – The difference in the treatment of those prisoners serving determinate sentences of less than 15 years and those serving determinate sentences of 15 years or more was justifiable and therefore not in contravention of art 5 of the convention, read with art 14. The reason for a distinction between the treatment of those sentenced for a lesser period and those sentenced for 15 years or longer was made clear by the history of the legislation. While any cut-off point could, in the case of individual prisoners, create results which were difficult to justify so far as the relevant circumstances of each was concerned, it was necessary to draw

^a Sections 35 and 50, so far as material, are set out at [2], below.

^b Article 5, so far as material, is set out at [4], below

^c Article 14 is set out at [4], below

- a* dividing lines, and reasonable for the Secretary of State to say that, in relation to those prisoners who would, in the case of those sentenced to a determinate sentence, generally have committed the most serious crimes or have the worse record (or both), he should remain democratically accountable as Secretary of State and so have a residual discretion over their release. Choosing a period of years as the test achieved the required measure of legal certainty and the result was rational and proportionate. The appeal would, accordingly, be dismissed (see [25]–[27], [29]–[31], below).
- b*

Wandsworth London BC v Michalak [2002] 4 All ER 1136 applied.

Notes

- c* For the right to liberty and security of the person, and for the prohibition of discrimination, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127, 164.
- For the discretionary release of determinate sentence prisoners, see 36(2) *Halsbury's Laws* (4th edn reissue) para 620.
- For the Criminal Justice Act 1991, ss 35, 50, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue).
- d* For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 14, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553, 556.

Cases referred to in judgments

- Abdulaziz v UK* (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
- e* *Belgium Linguistic Case (No 2)* (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.
- Grice v UK* App No 22564/93 (14 April 1994, unreported), E Com HR.
- Petrovic v Austria* (1998) 4 BHRC 232, ECt HR.
- R (on the application of Giles) v Parole Board* [2003] UKHL 42, [2003] 4 All ER 429, [2004] 1 AC 1, [2003] 3 WLR 736; *affg* [2002] EWCA Civ 951, [2002] 3 All ER 1123, [2003] 2 WLR 196.
- f* *R (Smith) v Parole Board (No 2)* [2003] EWCA Civ 1269, [2004] 1 WLR 421.
- Van der Mussele v Belgium* (1984) 6 EHRR 163, [1983] ECHR 8919/80, ECt HR.
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- g* *Webster v UK* App No 12118/86 (4 March 1987, unreported), E Com HR.

Cases referred to in skeleton arguments

- Aerts v Belgium* (1998) 5 BHRC 382, ECt HR.
- Monnell v UK* (1988) 10 EHRR 205, [1987] ECHR 9562/81, ECt HR.
- h* *N v UK* (1986) 49 DR 170, E Com HR.
- R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.
- R (on the application of Erskine) v Lambeth London BC* [2003] EWHC 2479 (Admin), [2003] NPC 118.
- i* *R (on the application of Noorikoiv) v Secretary of State for the Home Dept* [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] 1 WLR 3284.
- R (on the application of Purja) v Ministry of Defence* [2003] EWCA Civ 1345, [2004] 1 WLR 289.
- R (on the application of West) v Parole Board* [2002] EWCA Civ 1641, [2003] 1 WLR 705.

Appeal

The claimant Sean Clift appealed from the decision of Hooper J on 13 June 2003 ([2003] EWHC Admin 1337, [2003] All ER (D) 177 (Jun)) refusing his application for judicial review of the decision of the Secretary of State for the Home Department on 25 October 2002 to reject the recommendation of the Parole Board on 25 March 2002 that the claimant be released from prison on licence. The facts are set out in the judgment of Lord Woolf CJ.

Tim Owen QC and Kris Gledhill (instructed by Pattersons, Halifax) for the appellant. Jonathan Crow and Steven Kovats (instructed by the Treasury Solicitor) for the Secretary of State.

Cur adv vult

29 April 2004. The following judgments were delivered.

LORD WOOLF CJ.

INTRODUCTION

[1] The role of the Secretary of State for the Home Department in determining when offenders should be released from prison on licence has been progressively reduced. His role now is confined to those serving a determinate sentence of 15 years or more. In relation to these prisoners, because of the provisions of ss 35 and 50 of the Criminal Justice Act 1991 together with the Parole Board (Transfer of Functions) Order 1998, SI 1998/3218, the Secretary of State still has jurisdiction. In these proceedings the question which we have to determine is whether that remaining power of the Secretary of State contravenes art 5 read with art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

THE LEGISLATION

[2] The relevant statutory provisions provide:

(i) Section 35 of the 1991 Act:

‘(1) After a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the [Parole Board], release him on licence.’ (A long-term prisoner is for the purposes of ss 32–51 of the 1991 Act a person serving a sentence of imprisonment for a term of four years or more (see s 33(5) of the 1991 Act).)

(ii) Section 50 of the 1991 Act gives the authority for making delegated legislation. It provides:

‘(1) The Secretary of State, after consultation with the [Parole Board], may by order made by statutory instrument provide that, in relation to such class of case as may be specified in the order, the provisions of this Part specified in subsections (2) or (3) below shall have effect subject to the modifications so specified.

(2) In section 35 above, in subsection (1) for the word “may” there shall be substituted the word “shall” ...

- a (5) No order shall be made under this section unless a draft of the order has been laid before and approved by resolution of each House of Parliament.'

- b [3], The effect of the 1998 order was that the Secretary of State's discretion to take a different view from that of the Parole Board was limited to prisoners serving sentences of 15 years or more. In the case of those prisoners, the Secretary of State retained a discretion to release them on licence if recommended to do so by the Parole Board.

[4] The relevant articles of the convention are arts 5 and 14. The material provisions of which are:

- c Article 5 of the convention states, so far as presently material:

'(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...

- d (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

- e Article 14 of the convention states:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

- f

THE FACTS

- g [5] A brief summary of the facts is all that is necessary as the facts have no direct impact on the outcome of this appeal. The appellant, who was born in 1966, was sentenced to a total of 18 years' imprisonment in 1994 for offences of attempted murder and causing grievous bodily harm. At the relevant times he was a category A prisoner. He became eligible for parole on 13 March 2002 and on 25 March 2002 the Parole Board recommended his release. There was significant delay before the Secretary of State announced his decision and on 15 October 2002 the appellant therefore commenced judicial review proceedings. However, on 25 October 2002 the Secretary of State rejected the recommendation of the Parole Board that the appellant be released. The Secretary of State gave reasons for his decision. It is not in dispute that those reasons provide justification for the Secretary of State's decision. The only issue is whether the Secretary of State's residual power complies with arts 5 and 14. It is, however, interesting to note that, when the question of the appellant's release was more recently considered, the Parole Board came to a different conclusion from that reached previously and did not recommend the appellant's release. j However, since the hearing in the court below before Hooper J, in which he gave judgment on 13 June 2003 ([2003] EWHC 1337 (Admin), [2003] All ER (D) 177 (Jun), [2003] ACD 408), the appellant has been released following a further recommendation in favour of release which was accepted by the Home Secretary.

[6] Despite his release, the appellant continues to challenge the decision of Hooper J that the residual powers of the Secretary of State under s 35 of the 1991 Act do not contravene arts 5 and 14. a

[7] The parties are agreed that the correct approach when determining whether or not there has been a breach of art 5 read with art 14 in this case is to follow the guidance given by Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617. b

[8] This involves adopting an approach suggested in *Human Rights: The 1998 Act and the European Convention* (2000) (Grosz, Beatson and Duffy), as a framework, and asking the following four questions. (i) Do the facts fall within the ambit of one or more of the substantive convention provisions? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and the other persons put forward for comparison (the chosen comparators) on the other? (iii) Were the chosen comparators in an analogous position to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification? c

[9] So far as the present appeal is concerned I agree with the parties that these four questions provide a convenient framework. I, therefore, like the parties, propose to examine each question separately. However, before doing so, it is helpful to make one or two general observations. The first is that a long-term sentence can, as Mr Owen QC contends on behalf of the appellant, be split into different segments. There is the initial period of a sentence which has to be served before an offender is eligible to be considered by the Parole Board. This is a period of half the sentence. There is then the segment of between a half and two-thirds of the sentence during which he can be released on parole, but in the case of a prisoner serving 15 years or more, only if he is first recommended for parole and the Secretary of State agrees with the recommendation of the Parole Board. There is then the period between the two-thirds and the three-quarter point of the sentence during which an offender will be in any event released if he is serving a long-term sentence and during which he will remain on licence subject to recall if he breaches his licence conditions or if he comes before the courts again and is sentenced for another offence. Finally, there is the last quarter of the sentence during which the licence conditions cease to apply subject to the power of the court under s 116 of the Powers of Criminal Courts (Sentencing Act) 2000 if he commits a further offence. The different segments which exist in the case of a long-term sentence means that there are differences between a prisoner sentenced to a long-term sentence and a prisoner sentenced to a discretionary or mandatory life sentence who remains subject to having his licence revoked for the rest of his life. d
e
f

[10] As the terms of art 14 make clear, art 14 has no independent life of its own. It obtains its vitality from its relationship with another article. In this context the appellant contends art 5. This does not mean that art 14's relationship with art 5 is entirely parasitic. It is in fact symbiotic so that the ambit of art 5 together with art 14 can be greater than that of art 5 by itself. As was said in the *Belgium Linguistic Case (No 2)* (1968) 1 EHRR 252 at 283 (para 9) in reference to art 14: g
h
j

'While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 it relates solely to "rights and freedoms set forth in the Convention", a measure which in itself is in conformity with the requirements of the Article enshrining the right or

a freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature ... It is as though [art 14] formed an integral part of each of the articles laying down rights and freedoms.' (See also the judgment of the court in *Abdulaziz v UK* (1985) 7 EHRR 471 at 499 (para 71).)

b ¶[11] It is common ground that a decision in favour of the Secretary of State in relation to any one of the four questions is fatal to the appellant's case. Hooper J found in favour of the appellant on the first three questions. However, on the fourth question he found in favour of the Secretary of State, so this was fatal to the appellant's contention. Before us the Secretary of State challenges the answers given by the judge to the first three questions but, not surprisingly, indorses the judge's conclusion on the fourth question.

c [12] Although the appellant's notice of appeal indicated that he was proposing to contend that it was inappropriate for the Secretary of State to have any involvement in the release process, he did not pursue this point on the appeal. Mr Owen, on behalf of the appellant, confined his argument to supporting the judge's approach when answering the first three questions and showing his answer to the fourth question was wrong.

d [13] I turn to the four questions.

ISSUE ONE: IS THE CASE WITHIN THE AMBIT OF ART 5?

e [14] It is part of the routine test for determining whether art 14 could apply to particular conduct to ask whether the conduct falls 'within the ambit' of one of the substantive convention rights. (See, for example, *Van der Mussele v Belgium* (1984) 6 EHRR 163 at 178–179 (para 43)). Limited further assistance is also given by the European Court of Human Rights in *Petrovic v Austria* (1998) 4 BHRC 232 at 237 (para 28) where the court stated:

f '... art 14 comes into play whenever the "subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed" ... or the measures complained of are "linked to the exercise of a right guaranteed" ...'

g [15] In support of his argument that the conduct of the Secretary of State would not be within the ambit of art 5, Mr Crow, on behalf of the Secretary of State, relies strongly upon the recent decision of the House of Lords in *R (on the application of Giles) v Parole Board* [2003] UKHL 42, [2003] 4 All ER 429, [2004] 1 AC 1. The claimant in that case was sentenced to a longer than commensurate sentence to protect the public. As a long-term prisoner, he was entitled to be considered for release by the Parole Board and, after he had served the punitive part of the sentence, he applied by way of judicial review for a declaration that, having been sentenced in part to protect the public, he was entitled to an oral hearing before the Parole Board upon the expiry of the punitive part of his sentence and at regular intervals thereafter, in order to decide whether it remained necessary to detain him in order to protect the public. This contention was rejected both by the Court of Appeal ([2002] EWCA Civ 951, [2002] 3 All ER 1123, [2003] 2 WLR 196) and the House of Lords. As Lord Bingham of Cornhill said ([2003] 4 All ER 429 at [10]):

'In the present case there was nothing arbitrary about the sentence, which was announced and explained in open court and upheld by the Court of

Appeal when refusing leave to appeal against sentence ... The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the half-way stage of the sentence, is accepted to be a judicial body.’ a

As to art 5(4), Lord Hope of Craighead made the position clear by saying (at [25]):

‘The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under art 5(1)(a), without the need for further reviews of detention under art 5(4) ...’ b

If art 5 is not in play, Mr Crow submits art 14 cannot be in play.

[16] An even clearer message is given by *R (Smith) v Parole Board (No 2)* [2003] EWCA Civ 1269, [2004] 1 WLR 421. Smith had been sentenced to six-and-a-half years’ imprisonment and subject to an extended licence under s 44 of the 1991 Act (which extends the licence under which a prisoner is released under the early release provisions from the three-quarter point of the sentence to the end of the sentence). The Home Secretary exercised his powers under s 39 of the 1991 Act to recall Smith to prison after he had been released from prison after serving two-thirds of his sentence. His case was then referred back to the Parole Board in the normal way. If the Parole Board recommends release, then the Secretary of State has to give effect to the recommendation; but, if not, under s 39(6) the prisoner ‘shall be liable to be detained in pursuance of his sentence’. c

[17] Representations were made by his solicitors in writing but Smith challenged the decision of the Parole Board rejecting his representations. Smith then brought proceedings for judicial review complaining of the lack of an oral procedure which he contended breached art 5. In its decision, the Court of Appeal decided that the recall of an offender is not an infringement of the right to liberty in the case of a prisoner serving a determinate sentence who has been released on licence part way through that sentence. His right to liberty up to the end of his sentence is lost by virtue of the sentence: there being no right to liberty which had been infringed, there can be no right to take proceedings to decide whether the detention is lawful. Again, art 5 is not in play. Kennedy LJ in his judgment, with which Brooke LJ agreed, said (at [23]): d

‘In my judgment the decision to recall is not an infringement of the right to liberty in the case of a prisoner serving a determinate sentence who has been released on licence because his right to liberty for the period up to the end of his sentence was lost when he was sentenced. There being no right to liberty which has been infringed there can be no right to take proceedings to decide whether the detention is lawful. That has already been decided.’ e

[18] I recognise that the authority of *Smith’s* case is supportive of the arguments Mr Crow advances. This is that the initial sentence by a court justifies what happens thereafter. However, the authorities to which I have referred can still, arguably, be distinguished if Mr Owen’s other arguments are right. There could then be, so it is argued, a process governing the appellant’s release that is arbitrary and discriminatory. This could create a situation where making some but not all prisoners obtain both a recommendation for release by the Parole Board and the confirmation of that recommendation by the Secretary of State before they can be released offends against art 5(4) read together with art 14. This situation would not have been in the contemplation of the House of Lords f

a in *Giles's* case and the Court of Appeal in *Smith's* case. It may be, as Mr Owen argues, that those authorities were not intending to exclude all reliance on art 5 because of the existence of a proper sentencing process. However, if the difference in treatment is justified, then that would still defeat any invocation of arts 5 and 14. Mr Owen would then be prevented from relying on the helpful approach, from the point of view of his argument, of the European Commission of Human Rights (the Commission) in *Webster v UK* App No 12118/86 (4 March 1987, unreported) and *Grice v UK* App No 22564/93 (14 April 1994, unreported). In *Webster's* case the Commission stated that: 'If a prison release scheme were operated in a discriminatory manner, an issue could arise under art 5 of the convention read in conjunction with art 14', while in *Grice's* case the Commission stated that—

c 'where ... procedures relating to the release of prisoners appear to operate in a discriminatory manner, [then] ... this may raise issues under art 5 in conjunction with art 14.'

d ISSUE TWO: WAS THERE ANY MATERIAL DIFFERENCE BETWEEN THE TREATMENT OF THE APPELLANT AND THOSE OF HIS CHOSEN COMPARATORS?

[19] I turn to the second question. Mr Owen contended that the comparators of the appellant were those serving determinate sentences of less than 15 years, in relation to whom the Parole Board's decision would be final. He does not suggest that those serving discretionary life sentences are comparators. His reason for this is the different nature of a life sentence and a determinate sentence. In the case of a life sentence, it has two parts. The first part is to be served by way of punishment and deterrence; the second part of the detention is because of the risk that the offender poses to the public. This division does not apply to those sentenced to a determinate sentence. Mr Crow submits that the judge was wrong to find that there was any material difference of treatment between one category of long-term prisoner and the other. He submits all long-term determinate sentence prisoners have access to discretionary conditional release after serving half their sentences. The same reports are prepared, the same criteria are applied in deciding whether to grant release and the fact that the Secretary of State is a member of the executive and the Parole Board is a judicial body is of itself of no consequence. As to the fact that two bodies are involved in considering release in the case of those serving the longest sentences, this is of no significance as they are both considering the same material.

h [20] In agreement with the judge, I do not accept this argument. As the results in the case of the appellant indicate, the fact that there are two bodies, both of whom legitimately can come to a different decision, demonstrates that there can be, and was in the case of the appellant, a difference in treatment. For your release to be subject to the decision of two decision-makers rather than one constitutes, in my judgment, a material difference in treatment.

j ISSUE THREE: IF THERE WAS A MATERIAL DIFFERENCE BETWEEN THE TREATMENT OF THE APPELLANT AND HIS COMPARATORS, WERE THE CHOSEN COMPARATORS IN AN ANALOGOUS SITUATION?

[21] The circumstances of the two categories of comparators were so similar as to call (in the mind of the rational and fair-minded person) for a positive justification for the less favourable treatment.

[22] Once it is established that there is a difference in treatment, then there should be some rational explanation for that difference in treatment. The more discriminatory the treatment, the greater the need for justification. a

[23] I turn to the last question.

ISSUE FOUR: IF ISSUES ONE TO THREE ARE DETERMINED IN FAVOUR OF THE APPELLANT, WAS THERE OBJECTIVE AND REASONABLE JUSTIFICATION FOR THE DIFFERENCE IN TREATMENT? b

[24] It was vigorously contended by Mr Owen that there was no rational basis for distinguishing between those serving a sentence up to 15 years and those serving a sentence of 15 years and over. If the comparators had been those serving discretionary life sentences, then it does seem to me that, at least arguably, Mr Owen would have had a case for saying that there was discriminatory treatment. He could reasonably argue that, in many cases, the fact that a person is sentenced to a discretionary life sentence rather than a long determinate sentence means that he is regarded by the sentencer as a particular potential risk to the public. Yet, in the case of discretionary life sentences, the Secretary of State no longer has any positive role and the decision-maker is the Parole Board. c
d

[25] The fact that the Secretary of State has no effective role is, however, for the reasons explained at the outset of this judgment. It was because of the former absence of a judicial decision as to which part of the sentence was for the protection of the public and which part was for punishment and deterrence. The Secretary of State's former role was removed so that the executive was not involved. However, in the case of sentences for 15 years and longer, it is self-evident that the Secretary of State's involvement exists because of the gravity of the crime committed by those who are sentenced for such a long period of time. e

[26] The history of the legislation makes clear the reason for a distinction between the treatment of those sentenced for a lesser period and those sentenced for 15 years or over. It is not difficult to argue that any cut-off point can, in the case of individual prisoners, create results which are difficult to justify so far as the relevant circumstances of each is concerned. However, dividing lines do have to be drawn and, in my view, it is perfectly reasonable for the Secretary of State to draw a line and say that in relation to those prisoners who will, in the case of those sentenced to a determinate sentence, generally have committed the most serious crimes or have the worst record (or both), he should remain democratically accountable as Secretary of State and so have a residual discretion over their release. It follows that, in my view, while there is a difference in treatment, that difference in treatment is justifiable and, therefore, there can be no contravention of art 5 read with art 14. f
g
h

[27] I would indorse the way the matter was dealt with by Hooper J at the end of his judgment ([2003] All ER (D) 177 (Jun) at [27]). It was—

‘the only sensible way of achieving the aim is to choose a period of years even though the result in certain cases may be arbitrary. Any other test would not have the required measure of legal certainty. There could be an argument for making the cut-off point lower but that would not assist the claimant. The result is rational and proportionate.’ i

[28] That brings me to the final point which I should mention. That is the contention that was originally raised by the appellant that the executive should, as a matter of principle, have no role in the discretionary release of prisoners.

- a* Mr Owen on the hearing of the appeal accepted this was not a point which he could argue before us and therefore it is sufficient if I record the position. The point was not argued in the lower court either.

[29] I would dismiss this appeal.

RJX LJ.

- b* [30] I agree.

CARNWATH LJ.

[31] I agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Gaca v Pirelli General plc and others

[2004] EWCA Civ 373

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MUMMERY AND DYSON LJJ

10, 26 MARCH 2004

Damages – Personal injury – Insurance – Deduction of proceeds of insurance policy – Employers taking out personal accident insurance policy for benefit of employees – Employee making no contribution to policy or premiums – Employee injured and receiving payment under policy – Whether payment under policy deductible from damages.

The claimant was employed by the defendant. He was seriously injured in an accident at work, as a result of which he was unable to return to work. Before his employment was terminated, he received several payments under a group personal accident insurance policy held by the defendant, and, after the termination of his employment, he received a further insurance payment. The defendant admitted liability in the claimant's action for damages for personal injury, and judgment was entered in favour of the claimant with damages to be assessed. The question whether the insurance payments should be deducted from the award of damages was ordered to be tried as a preliminary issue. The claimant accepted the fundamental principle that he was entitled to recover no more than the full extent of his net loss, but submitted that the insurance payments should not be deducted from his damages as they were to be treated as analogous to payments made by third parties out of sympathy and so fell within the ambit of the 'benevolence exception', the rationale for the exception to the fundamental principle being that it was contrary to public policy that a victim should have his damages reduced so that he could gain nothing from the benevolence of third parties. The judge accepted the claimant's submissions and the defendant appealed.

Held – Ex gratia payments made to victims by tortfeasors did not normally fall within the 'benevolence exception', even if it could be shown that they had been made from motives of benevolence. There was a fundamental difference between a payment made by an employer to his employee to compensate him for the consequences of injuries suffered in an accident, and a payment made to a victim of an accident by a third party out of sympathy for his or her plight. A payment should only be treated as analogous to a benevolent payment by a third party if the case for doing so was clearly made out, having regard to the rationale for the existence of the benevolence exception. In the instant case, where the payments had been made by the tortfeasor, and the payment of benefits under the insurance policy was not equivalent or analogous to payments made by third parties out of sympathy, the exception did not apply. The appeal would accordingly be allowed (see [31], [35]–[37], [39], [60]–[62], below).

McCamley v Cammell Laird Shipbuilders Ltd [1990] 1 All ER 854 disapproved.

Notes

- a** For deductions from damages, see 12(1) *Halsbury's Laws* (4th edn reissue) para 900.

Cases referred to in judgments

- Bradburn v Great Western Railway Co** (1874) LR 10 Exch 1, [1874–80] All ER Rep 195.
- b** *Chan v Butcher* [1984] 4 WWR 363, BC CA.
- Cunningham v Harrison* [1973] 3 All ER 463, [1973] QB 942, [1973] 3 WLR 97, CA.
- Cunningham v Wheeler, Cooper v Miller, Shanks v McNee* [1994] 1 SCR 359, Can SC.
- Hodgson v Trapp* [1988] 3 All ER 870, [1989] AC 807, [1988] 3 WLR 1281, HL.
- Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL; *rvsg* [1993] 4 All ER 180, [1993] QB 815, CA.
- c** *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541, [1988] AC 514, [1988] 2 WLR 266, HL; *affg* [1987] 1 All ER 417, [1987] 1 WLR 336, CA.
- McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963, CA.
- d** *Parry v Cleaver* [1969] 1 All ER 555, [1970] AC 1, [1969] 2 WLR 821, HL.
- Redpath v Belfast and County Down Railway* [1947] NI 167.
- Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL; *rvsg* [1997] 1 All ER 673, [1997] 1 WLR 652, CA; *rvsg* [1996] PIQR Q26.
- e** *Westwood v Secretary of State for Employment* [1984] 1 All ER 874, [1985] AC 20, [1984] 2 WLR 418, HL.
- Williams v BOC Gases Ltd* [2000] ICR 1181, CA.

Appeal

- f** The defendants, Pirelli General plc, appealed with permission of Sedley LJ from the decision of Mr Recorder Gibbons QC on 29 August 2003 in the Southampton County Court on the trial of the preliminary issue set out at [2] below in proceedings for damages for personal injury brought by the claimant, Jan Gaca, against the defendants. The facts are set out in the judgment of Dyson LJ.
- g** *Robert Moxon-Browne QC* and *Barry Cotter* (instructed by *Capital Law*, Southampton) for the defendants.
- John Foy QC* and *Nicolas Hillier* (instructed by *Lamport Bassitt*, Southampton) for the claimant.

h*Cur adv vult*

26 March 2004. The following judgments were delivered.

DYSON LJ (giving the first judgment at the invitation of Brooke LJ).

j**THE FACTS**

[1] On 7 August 1998, the claimant was seriously injured in an accident at work. The defendants were his employers. As a result of the accident, he was unable to return to work. His employment was eventually terminated on 19 March 2000 on the grounds of ill health. Whilst he was off work, but before his employment was terminated, he received sick pay from the defendants. He

also received payments (total £34,167.18) pursuant to a group personal accident insurance policy for 'Temporary Total Disablement' from Europ Assistance for the period from the accident until the termination of his employment. Following the termination of his employment, he received: (i) an ill health gratuity payment of £10,000 from the defendants themselves; and (ii) £88,620 from Europ Assistance under the terms of the insurance policy for 'Permanent Total Disability'.

[2] The claimant issued proceedings in June 2001. The defendants admitted liability and judgment was entered in favour of the claimant with damages to be assessed. The defendants contended that the proceeds of the insurance (£122,787.18) should be deducted from the damages awarded to the claimant. The claimant contended that they should not be deducted. A preliminary issue was ordered to be tried. In a careful judgment given on 29 August 2003, Mr Recorder Gibbons QC held that the insurance payments were not deductible. The defendants appeal against that decision with the permission of Sedley LJ. An important issue that arises on this appeal is whether the decision of this court in *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963 can be properly distinguished, or whether it should no longer be followed in the light of decisions of the House of Lords.

[3] By the terms of the insurance policy, the defendants were 'participating companies' and the claimant an 'insured person'. The 'operative times of cover' in relation to the claimant was 'whilst in pursuit of normal occupational duties on behalf of the Insured or whilst travelling directly between residence (normal or temporary) and place of work'. The Schedule identified the 'benefit descriptions'. These included: 'personal accident'; 'sickness'; 'medical expenses'; 'baggage and personal effects'; 'money'; and 'personal liability'. In relation to 'personal accident', the Schedule described six 'items' of benefit, including 'permanent total disablement' (item 4) and 'temporary total disablement' (item 5). The 'sums insured' for a person in Category B (such as the claimant) were 400% of annual salary for permanent total disablement, and 100% of annual salary for temporary total disablement. 'Salary' was defined to mean 'the total gross amount of remuneration paid to an Insured Person exclusive of overtime, commission and bonus payments'.

[4] The claimant's contract of employment was contained in a handbook issued by the defendants. The introduction to the handbook included:

'Welcome to Pirelli Cables Limited. The purpose of this handbook is to provide you with information about your employment with Pirelli. Section 3 sets out the main terms and conditions which, together with those in your offer letter, form your Contract of Employment with the Company. Other sections outline the benefits which are available to you as well as explaining the working arrangements which exist in the interests of fairness, safety, security and good relationships.'

[4] Section 2 of the handbook was entitled 'Benefits and Facilities'. Between pp 6 and 10 of the handbook there were mentioned the various benefits and facilities which were available to employees. These included under the heading 'Personal Accident/Travel Insurance':

'The Company operates a Personal Accident and Travel Insurance Scheme, which covers personal injury, loss and/or damage to personal property whilst on Company business.'

a [6] Section 3 of the handbook was entitled 'Terms and Conditions of Employment'. It stated:

'The following "Terms and Conditions of Employment" (pages 10 to 18) together with the terms and conditions in your offer letter constitute your Contract of Employment.'

b There was no reference in section 3 to the Personal Accident/Travel Insurance Scheme referred to in section 2. There was, however, a reference to a separate scheme for sick pay operated by the defendants themselves.

[7] The judge held that:

c 'The provision of the permanent health insurance for the benefit of the defendants' employees was not a contractual entitlement under their contracts of employment, nor did the claimant and his fellow employees make any direct contribution to the premiums. The defendants' only contractual liability to a sick or injured employee was under the wholly separate scheme for sickness pay where the payments came from the defendants themselves.'

d [8] There is no challenge by the defendants to the judge's finding that the provision of permanent health insurance was not a contractual entitlement.

e [9] Although the judge made no finding on the question whether the claimant was aware of the insurance policy, it is not disputed on behalf of the claimant that he must be taken to have been aware of its existence and terms. The terms of the policy were reviewed by the defendants from time to time, and documents that we have been shown indicate that their employees and representatives of the trade unions were informed about the terms of the policy whenever it was reviewed. It is not clear to what extent, if any, the terms of the policy were taken into account in negotiations between the defendants and the unions.

INTRODUCTION TO THE ISSUES

[10] It has been stated repeatedly that the fundamental principle is that a claimant is entitled to recover the full extent of his net loss, and no more. As Lord Reid pointed out in *Parry v Cleaver* [1969] 1 All ER 555 at 557, [1970] AC 1 at 13:

g 'Two questions can arise. First, what did the appellant lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages.'

j [11] It has never been in doubt that, if the injured claimant continues to receive his wages, whether under the name of sick pay or otherwise, these sums fall to be deducted from the damages for loss of earnings (see *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541 at 547, [1988] AC 514 at 530 per Lord Bridge of Harwich). It has also been stated on a number of occasions that there are two classes of payment to a claimant as a result of an accident which are not required to be brought into account in the assessment of damages. These are often referred to as the two exceptions against the rule against double recovery of damages. They are: (i) payments made gratuitously to the claimant by others

as a mark of sympathy ('the benevolence exception'); and (ii) insurance moneys ('the insurance exception'). a

[12] In the court below, it was submitted on behalf of the claimant that the proceeds of the insurance policy that were received by him in the present case should not be deducted from his damages on the grounds that they came within the ambit of the benevolence exception. The judge accepted that submission. On this appeal, the claimant has served a respondent's notice and contends that the judgment should also be upheld on the grounds that the proceeds of the policy fell within the insurance exception. b

THE BENEVOLENCE EXCEPTION

Review of the authorities c

[13] In *Parry's* case, Lord Reid said that he knew of no better statement of the reason for the benevolence exception than that of Andrews LCJ in *Redpath v Belfast and County Down Railway* [1947] NI 167 at 170. In that case, the defendant company sought to bring into account sums received by the plaintiff from a distress fund to which members of the public had contributed. Andrews LCJ said that the plaintiff's counsel had submitted— d

'that it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent railway company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely, if not entirely, dried up.' e

[14] A number of the subsequent cases in which the scope of, and reasons for, the exception have been discussed were not benevolence exception cases. Nevertheless, they contain dicta of the highest authority. In *Parry's* case, the issue was whether a disablement pension fell to be taken into account in the assessment of the plaintiff's financial loss. Lord Reid ([1969] 1 All ER 555 at 557, [1970] AC 1 at 13) said of the benevolence and insurance exceptions: 'The common law has treated this matter as one depending on justice, reasonableness and public policy.' After referring to the judgment of Andrews LCJ, Lord Reid said ([1969] 1 All ER 555 at 558, [1970] AC 1 at 14): f

'It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large ...' g

[15] In *Hussain's* case, the plaintiff was injured in an accident in the course of his employment with the defendants and was unable to continue his pre-accident work. For the first 13 weeks after the accident, he received full 'sick pay' from the defendants in accordance with the terms of his contract of employment. Thereafter, he received payments (as he was contractually entitled to do) equal to half his pre-accident earnings under the defendants' permanent health insurance scheme. It was held that his claim for damages in respect of loss of earnings fell to be reduced by the amounts of these payments. It was not argued on behalf of the claimant that the payments received under the insurance scheme h

a came within the benevolence exception. Rather, it was submitted that they were in the nature of insurance payments, and fell within the insurance exception. It was held that the payments were indistinguishable in character from the uninsured sick pay in lieu of wages, and that as such they fell to be deducted.

b [16] Having set out the facts, Lord Bridge ([1988] 1 All ER 541 at 544, [1988] AC 514 at 527) referred to the passage in Lord Reid's speech in *Parry's* case to which I have referred at [10], above, and said that the dichotomy (raised by Lord Reid's two questions) 'must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss'. Financial gains accruing to the plaintiff which he would not otherwise have received but for the event which gives rise to the cause of action are prima facie to be taken into account. But to this prima facie rule there are two well-established exceptions. Having referred c to the insurance exception, he described the benevolence exception in these terms ([1988] 1 All ER 541 at 545, [1988] AC 514 at 527):

d 'Secondly, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded ...'

[17] Lord Bridge continued:

e 'If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from the third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: why should the tortfeasor derive any benefit, in the one case, from the premiums which the plaintiff has paid to insure himself against some contingency, however f caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff? There are, however, a variety of borderline situations where a plaintiff may receive money which, but for the wrong done to him by the defendant, he would not have received and where there may be no obvious answer to the question whether the rule against double recovery or some principle derived by analogy from one of g the two classic exceptions to that rule should prevail. Some of these problems have been resolved by legislation, sometimes in the form of a compromise solution providing that a proportion only of certain statutory benefits is to be taken into account when assessing damages. But where there is no statute applicable the common law must solve the problem h unaided and the possibility of a compromise solution is not available. Many eminent common law judges, I think it is fair to say, have been baffled by the problem of how to articulate a single guiding rule to distinguish receipts by a plaintiff which are to be taken into account in mitigation of damage from those which are not. Lord Reid aptly summed the matter up in *Parry v Cleaver* [1969] 1 All ER 555 at 557, [1970] AC 1 at 13 when he said: "The i common law has treated this matter as one depending on justice, reasonableness and public policy."

[18] In that case, the defendant was the employer. Lord Bridge did not say anything more about the benevolence exception in particular, but there is one passage where he touched on the question whether it was material that the payments were made by or on behalf of the tortfeasor. Towards the end of his

speech, he referred to the decision of the British Columbia Court of Appeal in *Chan v Butcher* [1984] 4 WWR 363. In that case, it was held that a plaintiff could recover her full loss of earnings as damages from her employer notwithstanding that at the same time she received her full salary pursuant to a so-called 'short-term disability program' established and funded by the employer. Lord Bridge held that he would have decided the case the other way, since it did not fall within the insurance exception. He said ([1988] 1 All ER 541 at 548, [1988] AC 514 at 532):

'It positively offends my sense of justice that a plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, her employer and the tortfeasor. It would seem to me still more unjust and anomalous where, as here, the employer and the tortfeasor are one and the same.'

[19] In the Court of Appeal ([1987] 1 All ER 417 at 428, [1987] 1 WLR 336 at 350), Lloyd LJ discussed the position of the tortfeasor who pays in these terms:

'But there is one consideration of public policy which is worth mentioning. If an employee is injured in the course of his employment, and his employers make him an immediate ex gratia payment, as any good employer might, I see no reason why such a payment should not be taken into account in reduction of any damages for which the employer may ultimately be held liable. Employers should be encouraged to make ex gratia payments in such circumstances. If so, then public policy would seem to require that such payments be brought into account. It could, of course, be said that an ex gratia payment is like a sum coming to the plaintiff by way of benevolence, and should therefore be disregarded. This is so, where it is a third party who is ultimately held liable (see *Cunningham v Harrison* [1973] 3 All ER 463, [1973] QB 942). But there must surely be an exception to that general rule where the ex gratia payment comes from the tortfeasor himself. So, if it is right that an ex gratia payment by the employer should be brought into account where the employer is the tortfeasor, why should it make any difference that the payment is one which he has contracted to make in advance? So if counsel for the defendants is wrong in his main argument, that payments under the scheme are in the nature of wages and should be brought into account on that score, there would be much to be said for his alternative argument that such payments should in any event be brought into account on the grounds of "justice, reasonableness and public policy". But it is unnecessary to decide the case on that ground, since, on the facts of the present case, counsel for the defendants is entitled to succeed on his first ground.'

[20] The next relevant authority is *Hodgson v Trapp* [1988] 3 All ER 870, [1989] AC 807. In this case, the question was whether attendance and mobility allowances payable to the plaintiff pursuant to statute should be deducted from her damages. It was held that they should. Lord Bridge reiterated ([1988] 3 All ER 870 at 873, [1989] AC 807 at 819) the principle that damages for negligence are intended to be 'purely compensatory'. The basic rule is that the court must measure the net consequential loss and expense. To the basic rule there are well-established exceptions, although they are not always 'precisely defined and delineated' ([1988] 3 All ER 870 at 874, [1989] AC 807 at 819). It is the rule that is 'fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such'. He described the

- a benevolence exception as applying where 'moneys [are] received by the plaintiff from the bounty or benevolence of third parties motivated by sympathy for his misfortune'.

[21] The question in *Hodgson's* case ([1988] 3 All ER 870 at 874, [1989] AC 807 at 820) was how far it was appropriate to treat statutory benefits as analogous to the proceeds of voluntary benevolence 'intended to alleviate the plight of the victims of misfortune'. The analogy was rejected. Lord Bridge referred ([1988] 3 All ER 870 at 876, [1989] AC 807 at 822) to what he had said in *Westwood v Secretary of State for Employment* [1984] 1 All ER 874 at 879, [1985] AC 20 at 43:

- c 'I do not see any analogy at all between the generosity of private subscribers to a fund for the victims of some disaster, who also have claims for damages against a tortfeasor, and the state providing subventions for the needy out of funds which, in one way or another, have been subscribed compulsorily by various classes of citizens. The concept of public benevolence by the state is one I find difficult to comprehend.'

[22] I must now turn to *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963. The plaintiff suffered personal injuries during the course of his employment and claimed damages from his employers. He received a lump sum payment under an insurance policy taken out on behalf of the defendants by their parent company for the benefit of employees who were injured at work. The question was whether the lump sum payment fell to be deducted from the damages. This court held that the payment did not come within the insurance exception, since the plaintiff had not paid or contributed towards the payment of the premiums.

[23] The next question was whether it came within the benevolence exception. Caulfield J had found that the existence of the policy was unknown to both the plaintiff and his trade union. He held that the payment was not deductible. It seems that, founding himself on Lord Reid's speech in *Parry v Cleaver* [1969] 1 All ER 555, [1970] AC 1, he considered that the question whether the payment fell within the insurance exception depended on 'justice, reasonableness and public policy'. As was said in the judgment of this court, the judge treated this as a simple jury point, and decided that for the defendants to claim credit for the money offended his idea of justice. The court then said ([1990] 1 All ER 854 at 861, [1990] 1 WLR 963 at 971):

h 'The reason why the judge came to the correct decision on this matter is that the payment to the plaintiff was a payment by way of benevolence, even though the mechanics required the use of an insurance policy. The payment was not an ex gratia act where the accident had already happened, but the whole idea of the policy, covering all the many employees of British Shipbuilders and its subsidiary companies, was clearly to make the benefit payable as an act of benevolence whenever a qualifying injury took place. It was a lump sum payable regardless of fault or whether the employers or anyone else were liable, and it was not a method of advancing sick pay covered by a contractual scheme such as existed in *Hussain's* case. It was paid in circumstances quite different from those covered by Lloyd LJ's comment on public policy. That the arrangement was made before the accident is immaterial. The act of benevolence was to happen contingently on an event and was prepared for in advance. To refer to Lord Bridge's speech in *Hussain's* case this payment was one analogous to "one of the two classic

exceptions" to the rule that there should be no double recovery. The point was well made on behalf of the plaintiff that this sum was not to be payable in respect of any particular head of damage suffered by him and was not an advance in respect of anything at all. To say that does not mean that in an appropriate case there may not be a general payment or an advance to cover a number of different heads of damage. The importance in the present case is that the sum was quantified before there had been an accident at all and when it could not have been foreseen what damages might be sustained when one did take place. We would dismiss the defendants' appeal on the point of the insurance payment.'

[24] The significance of this decision for the present case is obvious. There are strong factual similarities; indeed, the judge in the present case did not feel able to distinguish it. Of particular significance is the fact that in both cases it was the tortfeasor who made the payment. Before I consider *McCamley's* case further, however, I need to complete this survey of the principal relevant authorities.

[25] In *Hunt v Severs* [1993] 4 All ER 180, [1993] QB 815 the plaintiff was injured by the negligence of the defendant. The defendant provided gratuitous nursing care and other assistance to the plaintiff. They married each other. The question was whether the defendant was required to pay the plaintiff a sum representing the value of the services which he had rendered to the plaintiff. In the Court of Appeal, Bingham MR, giving the judgment of the court, said ([1993] 4 All ER 180 at 191–192, [1993] QB 815 at 831):

'Where services are voluntarily rendered by a tortfeasor in caring for the plaintiff from motives of affection or duty they should in our opinion be regarded as in the same category as services rendered voluntarily by a third party, or charitable gifts, or insurance payments. They are adventitious benefits, which for policy reasons are not to be regarded as diminishing the plaintiff's loss. On the facts of the present case the judge's decision was not in our view contrary to principle or authority and it was fortified by what we regard as compelling considerations of public policy. We consider that he reached the right conclusion and would accordingly dismiss the defendant's appeal.'

[26] In the House of Lords, the leading speech was given by Lord Bridge. Having cited this passage from the judgment of the Court of Appeal, he referred to the two exceptions to the rule against double recovery, describing the benevolence exception as occurring where payments are made by 'the benevolence of third parties motivated by sympathy for the plaintiff's misfortune' ([1994] 2 All ER 385 at 389, [1994] 2 AC 350 at 358). The policy considerations which underlie the exceptions were, he said, 'well understood'. He continued:

'But I find it difficult to see what considerations of public policy can justify a requirement that the tortfeasor himself should compensate the plaintiff twice over for the self same loss. If the loss in question is a direct pecuniary loss (eg loss of wages), *Hussain's* case is clear authority that the defendant employer, as the tortfeasor who makes good the loss either voluntarily or contractually, thereby mitigates his liability in damages pro tanto.'

[27] Finally, *Williams v BOC Gases Ltd* [2000] ICR 1181. In that case, the plaintiff claimed damages from his employer in respect of injuries suffered during the course of his employment. The defendant paid the claimant a sum to which

a he had no contractual entitlement, saying that it was to be treated as an advance against any damages that he might be awarded against the defendant. The money came from the defendant's own fund. Brooke LJ (with whom Thorpe LJ agreed) reviewed the authorities to which I have referred. He said (at 1189 (para 26)):

b 'In my judgment, the judge was over-influenced by the decision of this court in *McCamley* which should be treated, until it receives the consideration of the House of Lords, as a case turning on its own particular facts: in other words, for what the members of that court, deciding the issue as a jury question, thought was just, reasonable and in accordance with public policy on the facts of that case.'

c [28] Brooke LJ considered the factors relied on as showing that the case fell within the benevolence exception, and concluded (at 1190):

d '32. In my judgment, these arguments are not strong enough to resist the force of the principles reiterated by Lord Bridge in his three speeches in the House of Lords to which I have referred. The "benevolence" exception is limited in terms to gifts arising from the benevolence of third parties, and does not cover benevolent gifts made by the wrongdoer himself, for which allowance ought prima facie to be made against any compensation he might have to pay. Neither of the justifications for the benevolence exception apply to the tortfeasor. Deductibility will encourage him to make benevolent payments in future to injured employees, rather than the reverse. And it certainly cannot be said that in making the gift, his intention was to benefit the plaintiff rather than to relieve himself of liability pro tanto: he would have been happy to achieve both purposes at once. A fortiori in a case in which he said in terms, at the time he made the gift, that it was to be treated as an advance against any damages he might have to pay.

f 33. I can see nothing unjust in the fact that on this approach the employee will not be able to recover more money from his employers because he can prove that some of the ailments from which he was suffering when he retired on medical grounds were caused by his employers' negligence. As a matter of public policy employers ought to be encouraged to make payments of this kind to their employees who retire on medical grounds, and there is no principle of public policy known to me which should tend to encourage employees to sue their employers if they have already received sums attributable to their injuries which exceed what their employers might otherwise be liable to pay.

g 34. The editor of *Fleming, The Law of Torts*, 8th ed. (1992) said at p. 249: "The case for crediting the tortfeasor for benefits with which he has himself furnished the plaintiff is perhaps strongest: here there is no room for the argument that it would subsidise the tortfeasor at someone else's expense; moreover, it encourages voluntary aid by those who are often in the best position to offer it to their victims when it is most needed."

j 35. I agree.'

Discussion of the benevolence exception without reference to McCamley's case

[29] If *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963 is put to one side, it is clear from these authorities that the essence of the benevolence exception is that it applies where payments have been made to

the claimant by third parties from motives of sympathy. Although Lord Reid in *Parry v Cleaver* [1969] 1 All ER 555 at 557–558, [1970] AC 1 at 14 used the word ‘benevolence’ rather than charity, he did so only because ‘rightly or wrongly, many people object to it’, and not because it is inaccurate to describe the payments which come within the exception as ‘charitable’. The *Oxford English Dictionary* definition of ‘benevolence’ includes ‘kindness, generosity, charitable feeling’. It is of note that in the Law Commission paper, *Damages for Personal Injury, Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com no 262) (1999) pp 103–106 (paras 10.10–10.14), the benevolence exception is discussed under the sub-heading ‘Charity’.

[30] In considering the scope of the benevolence exception, and in particular whether it extends to payments made by the tortfeasor, it is important to keep in mind the rationale for the exception. It is that ‘it would be revolting to the ordinary man’s sense of justice, and therefore contrary to public policy’ (see *Parry’s case* [1969] 1 All ER 555 at 558, [1970] AC 1 at 14 per Lord Reid) or ‘startling’ (see *Redpath v Belfast and County Down Railway* [1947] NI 167 at 170 per Andrews LCJ) that the victim should have his damages reduced so that he would gain nothing from the benevolence of third parties. Where ex gratia payments are made by the tortfeasor to the victim, the position is very different. Nobody could reasonably suggest that it would be revolting to the ordinary man’s sense of justice or startling that the victim’s damages should be reduced to take account of an ex gratia payment made by the tortfeasor. On the contrary, as was said by Lloyd LJ in *Hussain v New Taplow Paper Mills Ltd* and by Lord Bridge in *Hunt v Severs*, there is no good public policy reason for requiring a tortfeasor to compensate the victim of his negligence twice over. In fact, it offends one’s sense of justice that a claimant should be compensated twice by the tortfeasor. Moreover, there is a further important policy consideration which militates against treating ex gratia payments by tortfeasors as coming within the benevolence exception. As Lloyd LJ said, employers should be encouraged to make ex gratia payments where their employees are injured during the course of their employment. They are likely to be discouraged if such payments are not deducted from awards of damages. Brooke LJ made the same point in *Williams’ case*. Although payments by third parties made out of sympathy for the plight of victims of accidents are to be applauded, there is not the same public policy interest in encouraging such payments as there is in encouraging employers to make ex gratia payments to their employees when they are injured in the course of their employment.

[31] As a matter of principle, therefore, and on the basis of the authorities (apart from *McCamley’s case*) I would hold that ex gratia payments made to victims by tortfeasors do not normally fall within the benevolence exception, even if it can be shown that they are made from motives of benevolence. I say ‘normally’ because it would be possible, in theory at least, and so long as there is nothing in his insurance policy to put his cover at risk if he takes such a course, for the tortfeasor to make an ex gratia payment, and to spell out explicitly that the payment is a gift made on the basis that it should not be deducted from any damages that may be awarded to the employee if litigation ensues. In that exceptional situation, the position may be different.

McCamley v Cammell Laird Shipbuilders Ltd

[32] I must now consider *McCamley’s case*. This decision has been described as ‘a difficult case’ (*McGregor on Damages* (17th edn, 2003) p 1248 (para 35-134))

- a and a case that is 'a difficult one to interpret' (Law Com no 262 pp 105–106 (para 10.14)). Mr Moxon-Browne QC submits that in that case the Court of Appeal approved the approach of Caulfield J to treat the issue of deductibility as a simple jury question to be answered by the application of the principles of justice, reasonableness and public policy. It is not clear to me whether this court did, indeed approve that approach. But in my view, the issue of deductibility
- b should not be determined on the application of a broad brush principle of justice, reasonableness and public policy. Such an approach would introduce unnecessary and unacceptable uncertainty into this area of the law. Moreover, it flies in the face of the basic principle that a claimant is only entitled to his net loss subject to the two classic exceptions. The exceptions are not precisely defined, and there may be justification for extending the scope of an exception to include
- c payments which are analogous to those which fall within an exception as it has been defined hitherto. But the case for such treatment must be clearly made out.

- [33] It is, therefore, necessary to examine the reasons given by the Court of Appeal in *McCamley's* case [1990] 1 All ER 854 at 861, [1990] 1 WLR 963 at 971 for holding that the payment 'was a payment by way of benevolence'. Two main
- d reasons were given for concluding that the judge reached the right conclusion. The first was that the payment was pursuant to an insurance policy and was quantified before there had been any accident at all. I do not see how this sheds any light on the character of, or the motive for, the payment. As Lloyd LJ asked rhetorically in the passage from *Hussain's* case cited by the Court of Appeal in *McCamley's* case, why should it make any difference that the payment is one
- e which the employer has contracted to make in advance? The second reason is that the money paid was simply a lump sum paid regardless of fault and not in respect of any particular head of loss. But the sum (a wages benefit) was one which the plaintiff would not have received from his employer but for the accident, and, on the basis of the authorities to which I have referred, *prima facie*
- f it fell to be deducted from his claim for loss of earnings. I do not see how the fact that the lump sum was paid regardless of fault sheds any light on whether its payment was an act of benevolence.

- [34] For these two reasons, the court felt able to decide that the payment in that case was analogous to one falling within the benevolence exception. As I have said, I do not consider that either of these reasons supports this conclusion.

- g [35] In my judgment, *McCamley's* case was wrongly decided for two principal reasons. First, the payment in that case manifestly was not analogous to a payment within the classic benevolence exception. There is a fundamental difference between: (i) payments made by an employer to his employees to compensate them for the consequences of injuries suffered in an accident
- h (whether or not caused by the employer's fault, and whether or not the payments are made directly or indirectly by means of an insurance policy as in *McCamley's* case and the present case), and (ii) payments made to victims of accidents by third parties out of sympathy for their plight. As I have said earlier, different public policy considerations apply in the two cases. Moreover, it is unreal to treat the
- j payment of benefits under an insurance policy as equivalent, or even analogous, to payments made by third parties out of sympathy. Such benefits are made available by employers to their employees not (or, at least, not principally) out of sympathy or charity, but in order to promote good relations with their employees and the trade unions to their mutual advantage. In other words, they are essentially management arrangements. The judgment in *McCamley's* case does not explain why, despite the obvious differences, it is right to classify ex

gratia payments by an employer in the same way as ex gratia payments by third parties. a

[36] The second principal reason why I consider *McCamley's* case to have been wrongly decided is that, for the reasons I have given earlier, ex gratia payments made to employees by their employer tortfeasors do not normally fall within the benevolence exception, even if it can be shown that they are made from motives of benevolence. It is worthy of note that in *McCamley's* case the court cited, with apparent approval, the passage from the judgment of Lloyd LJ in *Hussain's* case, in which he said that: (i) public policy considerations required ex gratia payments by tortfeasors to fall outside the benevolence exception, and (ii) the fact that the payment by the tortfeasor was one which he had contracted to pay in advance should make no difference. And yet the court did not explain why the payments fell within the benevolence exception although they had been made by the tortfeasor, or why it made a difference that the defendant had contracted to make the payments in advance. b c

[37] In *Williams v BOC Gases Ltd* [2000] ICR 1181, Brooke LJ said that *McCamley's* case should be treated as a case turning on its own facts, ie for what the court, deciding the issue as a jury question, thought was just, reasonable and in accordance with public policy on the facts of that case. I prefer to hold that *McCamley's* case was wrongly decided and should not be followed. As I have explained, the question whether a payment falls within one of the two classic exceptions is not a jury question to be determined in some vaguely Solomonic way according to the judge's sense of what is just and reasonable and what is therefore required by public policy. A payment should only be treated as analogous to a benevolent payment by a third party if the case for doing so is clearly made out, having regard to the rationale for the existence of the benevolence exception. As the Law Commission has said, when referring to *McCamley's* case (Law Com no 262, pp 105–106 (para 10.14)), the law in relation to charity by tortfeasors is unclear. For the reasons that I have given, there is no case for generally extending the scope of the benevolence exception to include payments made by tortfeasors to their victims. d e f

[38] It may be said that it is not open to this court to say that *McCamley's* case should no longer be followed. But the decision is plainly inconsistent with what Lloyd LJ said explicitly on the issue of payments by tortfeasors in *Hussain's* case in the passage apparently approved in *McCamley's* case. It is also inconsistent with what Lord Bridge said in *Hussain's* case [1988] 1 All ER 541, [1988] AC 514 when discussing *Chan v Butcher* [1984] 4 WWR 363 (admittedly an insurance exception case), and what he said in *Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350 in the passage that I have cited at [26], above. In short, the facts in *McCamley's* case did not satisfy the criteria for the benevolence exception as it has been expounded (and its rationale explained) in statements of the highest authority. g h

The benevolence exception in the present case

[39] The judge applied *McCamley's* case. He felt unable to distinguish the facts of the two cases. Since for the reasons that I have given, *McCamley's* case should no longer be followed, this court is not inhibited in the way that the judge was. I would hold that this case does not come within the benevolence exception because: (a) the payments were made by the tortfeasor, and (b) the payment of benefits under the insurance policy was not equivalent, or analogous, to payments made by third parties out of sympathy. j

a [40] If it were necessary, I would in any event hold that *McCamley's* case can and should be distinguished. The judge held that the claimant had no contractual entitlement to benefits under the policy, since there was no reference to it in section 3 of the handbook. There is no challenge to that part of the judge's decision. I think that the judge may well have been wrong about that. Be that as it may, the entitlement to benefits under the policy was part of the employment package that, to the knowledge of the claimant, was available to him. It was referred to in the handbook as a benefit available to employees. By contrast, in *McCamley's* case the existence of the policy was unknown to the plaintiff and his trade union. The plaintiff had no contractual entitlement to receive benefits pursuant to it, nor even any reasonable expectation that he would receive such benefits. In those circumstances, it is not altogether surprising that the benefits should be regarded as bounty. The position is significantly different where the employee has a contractual entitlement to the benefit, or at least a reasonable expectation that he will receive it on the basis that it forms part of the employment package which is offered to him by his employer. It is somewhat unreal to describe a benefit paid in such circumstances as being charitable or benevolent.

THE INSURANCE EXCEPTION

[41] Mr Foy QC submits that the payments should not be deducted because they fall within the insurance exception. The existence of the insurance exception is not in doubt. It was first formally recognised in *Bradburn v Great Western Railway Co* (1874) LR 10 Exch 1, [1874–80] All ER Rep 195. In that case, the plaintiff had received a sum of money from a private insurer to compensate him for lost income as a result of an accident caused by the negligence of the defendant. It was held that he was entitled to full damages as well as the payment from the insurer. Pigott B said ([1874–80] All ER Rep 195 at 197):

f '... I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying by for a rainy day." He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money ... and I think that it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants.'

g [42] In *Parry v Cleaver* [1969] 1 All ER 555 at 558, [1970] AC 1 at 14, Lord Reid said of the insurance exception:

h 'As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor.'

j [43] Lord Pearce said ([1969] 1 All ER 555 at 575, [1970] AC 1 at 14 at 35):

'One must, I think, start with the firm basis that *Bradburn v Great Western Ry Co* was rightly decided and that the benefits for a private insurance by the plaintiff are not to be taken into account.'

There are passages to similar effect in the speeches of Lord Morris of Borth-y-Gest ([1969] 1 All ER 555 at 572, [1970] AC 1 at 31) and Lord Wilberforce ([1969] 1 All ER 555 at 579, [1970] AC 1 at 39).

[44] In *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541 at 544–545, [1988] AC 514 at 527, Lord Bridge said of the insurance exception:

‘First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor ...’

[45] In *Hodgson v Trapp* [1988] 3 All ER 870 at 874, [1989] AC 807 at 819, Lord Bridge referred to the first ‘classic’ exception to the basic rule as ‘moneys accruing to the injured plaintiff under policies of insurance for which he has paid the premiums’. In *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854 at 860, [1990] 1 WLR 963 at 970, the court said that the payment of the insurance money in that case did not come within the insurance exception:

‘The basis on which that exception exists is that the plaintiff has a right in law or in equity to receive the money because he has paid the premiums himself or in some way contributed towards them.’

[46] In *Hunt v Severs* [1994] 2 All ER 385 at 389, [1994] 2 AC 350 at 358, Lord Bridge described the insurance exception as—

‘the fruits of insurance which the plaintiff himself has provided against the contingency causing his injuries (which may or may not lead to a claim by the insurer as subrogated to the rights of the plaintiff) ...’

[47] Finally, I should refer to *Page v Sheerness Steel plc* [1996] PIQR Q26. In that case, the plaintiff was a member of a scheme which entitled him to permanent health insurance benefits. The issue was whether the insurance moneys received by the plaintiff were to be treated as sick pay (and therefore deductible from the damages) or insurance moneys falling within the insurance exception. I said (at Q33–Q34):

‘In my view it is quite wrong to treat the plaintiff’s membership of the Sick Pay Insurance Scheme in the present case as a contract of insurance within the meaning of the exception. There is no contract between the plaintiff and the insurance company. He did not pay the premiums. There is no evidence that the plaintiff would have got more pay but for the insurance, or that the existence of the insurance had any effect on his remuneration ... I cannot accept [counsel for the plaintiff]’s submission that it is immaterial whether the plaintiff paid or contributed to the premiums or gave consideration for the insurance in some other way. It seems to me that it is an essential requirement of the insurance exception that the cost of the insurance be borne wholly or at least in part by the plaintiff. There are cases where insurance is provided by the employer at no cost to the plaintiff ...’

[48] The part of the judgment of the Court of Appeal which dealt with this issue is not included in the reports, *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1997] 1 All ER 673, [1997] 1 WLR 652. But my reasoning was supported by the court (see pp 108–111 of the approved transcript), as it was in the House of Lords (see [1998] 3 All ER 481 at 499–500, [1999] AC 345 at 381–382).

a [49] Mr Foy advances two main submissions. First, he says that it is immaterial to the question of deductibility of the proceeds of insurance whether the claimant has paid or contributed to the payment of the premium. The relevant question is whether the insurance payments are of the same character as wages or sick pay; it is only if they are that they should be deducted. Secondly, even if the insurance exception only comes into play where the claimant pays or contributes to the premium, then on the facts of this case the claimant did contribute to the payment of the premium, since the money which enabled the defendants to pay the premium was the fruit of the labour of their employees, including the claimant: it does not matter that a specific sum cannot be identified as a premium contribution. Mr Foy relies on *Parry v Cleaver* case in support of both submissions.

b [50] The first submission is in plain conflict with the statements of the scope of the insurance exception as is clear from the passages in the authorities to which I have referred. Time and again, reference has been made to the need for payment of the premium by the claimant. That is consistent with the rationale for the insurance exception as explained in *Bradburn's* case and by Lord Reid in *Parry v Cleaver*. As I have said, Mr Foy relies on *Parry v Cleaver* itself. In view of what was said by their Lordships specifically about the insurance exception in that case, it would be most surprising if *Parry v Cleaver* provided support for the proposition that a claimant is entitled to the benefit of the insurance exception even if he has not paid or contributed in some way to the payment of the premium.

c [51] The question in *Parry v Cleaver* was whether a disablement pension should be deducted from the plaintiff's damages. The House of Lords held that it should not be deducted. The issue was whether the pension was to be treated as ([1969] 1 All ER 555 at 559, [1970] AC 1 at 16) 'a form of insurance' or 'something quite different'. Lord Reid said that a contributory pension should not be deducted because of its 'intrinsic nature'. That is because—

'by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights ... His earnings are greater than his weekly wage ... The products of the sums paid into the pension fund are in fact delayed remuneration for his current work.'

g But as Lord Reid pointed out, the employee does not get back in the end the accumulated sums paid into the fund on his behalf. It depends, for example, on how long he lives. It is for this reason that the pension can be said to be a form of insurance. As he said ([1969] 1 All ER 555 at 560, [1970] AC 1 at 16), the true situation is that wages are a reward for contemporaneous work, whereas a pension is 'the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind.' In *Parry v Cleaver*, the claimant had contributed to the pension scheme from his pay, but it seems that this fact may not have been central to the decision that the pension was not deductible. Lord Pearce said ([1969] 1 All ER 555 at 576–577, [1970] AC 1 at 36) that a dividing line could not be drawn between contributory and non-contributory pensions. And Lord Wilberforce was clearly of the same opinion. Thus, he said ([1969] 1 All ER 555 at 582, [1970] AC 1 at 42):

'If, therefore, his earning capacity is reduced by his injury, there would seem no good reason why he should not recover damages for any loss of earning capacity as well as receiving his pension. This line of argument is

consistent with, and supported by, that view of the matter which, I think rightly, regards the pension as representing the earnings, or reward of past saving, to the extent his own contribution and his past service as to the rest.'

[52] It is true that the decision in *Parry v Cleaver* was to treat the pension payments as an exception to the net loss rule. They were assimilated to the insurance exception, because the pension payments were not to be characterised as wages, or the equivalent of wages. But that is not to say that pension payments are the same as insurance payments. As Lord Wilberforce said ([1969] 1 All ER 555 at 581–582, [1970] AC 1 at 42):

'I regret that I cannot agree that it is easy to reason from one type of benefit to another. One cannot argue from non-deductibility of gifts to non-deductibility of the proceeds of insurance, nor from the non-deductibility of insurance to the non-deductibility of pensions. Accident insurances are not gifts or like gift, they are essentially wagers: pensions, if insurance at all, are not insurance in the same sense as accident insurance, and mere use of the common word is not enough to produce a common principle.'

[53] It is thus fallacious to reason from the fact that: (i) pension payments are treated as being analogous to insurance payments, and (ii) it is immaterial whether the claimant has contributed to a pension scheme, that (iii) it is also immaterial whether the claimant has contributed to insurance premiums. The weight of authority is decisively against Mr Foy's first submission. Perhaps the clearest statement which blocks his argument is my own in *Page's* case, where I explicitly rejected the submission that it is immaterial whether a claimant paid or contributed to the premium or gave consideration for the insurance in some other way.

[54] Mr Foy's second submission is that the claimant should be treated as having paid or contributed to the premium simply by virtue of the provision of labour pursuant to his contract of employment. A similar argument was rejected by this court in *Hussain v New Taplow Paper Mills Ltd* [1987] 1 All ER 417 at 424, [1987] 1 WLR 336 at 345. Lloyd LJ said that the evidence did not support the conclusion that the plaintiff would have received more pay but for the insurance. He continued:

'In truth the judge was, I think, resting his conclusion on a broader ground. Even if the plaintiff's wage would have been the same, he has nevertheless earned the benefits payable under the scheme by working for the defendants. As counsel for the plaintiff put it, in language adopted by the judge, the benefits are part of the wage structure. The difficulty I feel with that argument is that it would apply equally to sickness or injury benefit paid during the first 13 weeks of incapacity. It was never suggested that this payment should be left out of account. Yet those payments were "earned" in exactly the same way as the subsequent payments.'

[55] Kerr LJ dealt with the point at [1987] 1 All ER 417 at 429, [1987] 1 WLR 336 at 351. He too concluded that the moneys were to be deducted on the grounds that there was no evidence that the plaintiff's wages would have been higher but for the insurance scheme. Lloyd LJ's way of dealing with the broader ground was endorsed by Lord Bridge in *Hussain's* case ([1988] 1 All ER 541 at 546, [1988] AC 514 at 529). Mr Foy's submission is also inconsistent with what I said in *Page v Sheerness Steel plc* [1996] PIQR Q26 (see [47], above).

a [56] It follows that an employee is not to be treated as having paid for, or contributed to the cost of, insurance merely because the insurance has been arranged by his employer for the benefit of his employees. The insurance moneys must be deducted unless it is shown that the claimant paid or contributed to the insurance premium directly or indirectly. Payment or contribution will not be inferred simply from the fact that the claimant is an employee for whose benefit the insurance has been arranged. There is little guidance in the English cases as to what is sufficient to constitute evidence of indirect payment or contribution. The issue has, however, been discussed in a number of Canadian cases, most notably in *Cunningham v Wheeler*, *Cooper v Miller*, *Shanks v McNee* [1994] 1 SCR 359. The majority decision was given by Cory J, who said (at 407) that what was required was—

c 'that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage reflected in a collective bargaining agreement, will be sufficient.'

d [57] He then gave a non-exhaustive list of possible examples of the sort of evidence that could well be sufficient to establish that the employee had paid for the benefit. In her dissenting judgment, McLachlin J said (at 388–389) that she regarded this approach as likely to generate uncertainty. She preferred to hold that there was a general rule of deduction, subject only to exceptions for charitable payments, and non-indemnity insurance and pensions. If the payment was in the nature of an indemnity, then it should be deducted to prevent double recovery, regardless of whether the claimant had contributed to the cost, unless it was established that a right of subrogation would be exercised.

e [58] The approach adopted by Cory J is similar to that which Lloyd and f Kerr LJ had in mind when they concluded that there was no evidence that the wages benefits in *Hussain's* case had been paid for directly or indirectly by the plaintiff on the facts of that case. Similarly, my own judgment in *Page's* case.

g [59] Turning to the facts of the present case, Mr Foy cannot identify any evidence which shows that the claimant paid or contributed to the cost of the insurance policy. All he can point to is the fact that the fruits of the claimant's labour enabled the defendants to pay for the insurance. But for the reasons that I have given, that is not enough to avoid the deduction of the benefits from his damages.

CONCLUSION

h [60] For the reasons that I have sought to explain, neither the benevolence exception nor the insurance exception applies in the present case. I would allow this appeal.

MUMMERY LJ.

j [61] I agree.

BROOKE LJ.

[62] I also agree. When I was sitting as a member of a two-judge court in *Williams v BOC Gases Ltd* [2000] ICR 1181 I was doubtful whether the judgment of this court in *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963 was consistent with three decisions of the House of Lords that

were delivered in the two years immediately preceding the decision in that case or in the four years that followed it (*Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541, [1988] AC 514, *Hodgson v Trapp* [1988] 3 All ER 870, [1989] AC 807 and *Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350). On that occasion, however, it was unnecessary to decide the point, which is why I adopted the formula I used in my judgment in *Williams' case* [2000] ICR 1181 at 1189 (para 26) (see [27], above). a

[63] The point now arises directly for decision. I agree with Dyson LJ, for the reasons he gives in [38], above that the judgment in *McCamley's case* should no longer be followed, and that it is unnecessary for us to refer the matter to the House of Lords in order for it to deliver the final coup de grace. b

Appeal allowed.

Kate O'Hanlon Barrister.

a **Page v Plymouth Hospitals NHS Trust**
[2004] EWHC 1154 (QB)

QUEEN'S BENCH DIVISION

DAVIS J

b 5, 6, 20 MAY 2004

Damages – Personal injury – Amount of damages – Discount rate for future pecuniary loss – Whether claimant entitled to recover as damages predicted costs of investment advice and fund management charges incurred in managing award.

c The claimant was born with severe physical disabilities as a result of the negligence of the defendant NHS trust. In subsequent proceedings between the parties, only quantum was in dispute. The projected damages were assumed to be not less than £2m for the purposes of the determination of a preliminary issue, namely whether the claimant would be entitled to recover, as part of his damages, the predicted costs of investment advice and fund management charges incurred in the management of his award. In contending that he was so entitled, the claimant submitted that he would reasonably and necessarily incur annually significant investment advice costs in investing the prospective award in a mixed portfolio to achieve full compensation; that such investment costs were properly to be regarded as a separate head of damages, to be included in the multiplicand and to be subject to the appropriate multiplier; and that, in prescribing a discount rate of 2.5% in respect of awards for future pecuniary loss in personal injury cases, the Lord Chancellor had anticipated that the inevitable costs of investment advice would be claimable separately.

f **Held** – The claimant was precluded from recovering, as part of his damages, the predicted costs of investment advice and fund management charges incurred in the management of the prospective award. The Lord Chancellor had essentially prescribed the discount rate by reference to index-linked gilt-edged stock and not a mixed portfolio. Investment costs were contemplated as arising in respect of the investment advice anticipated to be obtained by a claimant, but investment advice related to the setting of the appropriate discount rate. Thus although the annual investment costs could be presented as an element of the multiplicand to which the appropriate multiplier was to be applied, they were, for those purposes, in substance to be regarded as within the territory of the applicable discount rate. Such a conclusion had the advantage of creating certainty in an area of law where the objective of certainty currently, and for clear policy reasons, seemed to hold sway. The preliminary issue would therefore be decided in favour of the trust (see [46], [49], [54], [65], below).

g *Anderson v Davis* [1993] PIQR Q87 and *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481 considered.

j

Notes

For calculating future pecuniary loss, see 12(1) *Halsbury's Laws* (4th edn reissue) para 881.

Cases referred to in judgment

Anderson v Blackpool NHS Trust (20 March 2003, unreported).

Anderson v Davis [1993] PIQR Q87.

Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe, Page v Lee [2003] EWCA Civ 1370, [2004] 1 All ER 797, [2004] 1 WLR 251.

Eagle v Chambers [2003] EWHC 3135 (QB), [2003] All ER (D) 387 (Dec).

Ejvet v Aid Pallet (11 March 2002, unreported).

Francis v Bostock (1985) Times, 9 November.

Routledge v MacKenzie [1994] PIQR Q49.

Warriner v Warriner [2002] EWCA Civ 81, [2003] 3 All ER 447, [2002] 1 WLR 1703.

Webster v Hammersmith Hospitals NHS Trust [2002] All ER (D) 397 (Feb).

Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL; *rvsg* [1997] 1 All ER 673, [1997] 1 WLR 652, CA.

Preliminary issue

By order of Master Ungley dated 13 January 2004, the court was required to determine a preliminary issue, set out at [5], below, arising on the assessment of damages in proceedings for negligence brought by the claimant, Callum Page, a child suing by Samantha Jane Page, his mother and litigation friend against the defendant, Plymouth Hospitals NHS Trust. The facts are set out in the judgment.

Andrew Spink QC and *Cara Guthrie* (instructed by *Wolferstans*, Plymouth) for the claimant.

Michael de Navarro QC and *Mary O'Rourke* (instructed by *Bevan Ashford*, Bristol) for the defendant.

Cur adv vult

20 May 2004. The following judgment was delivered.

DAVIS J.

INTRODUCTION

[1] Callum Page was born by emergency caesarean section on 21 December 1996 at a hospital in Plymouth controlled and managed by the Plymouth Hospitals NHS Trust. His apgar score was nine after one minute. Thereafter there were incidents of fits and hypoxic ischaemic encephalopathy. It was subsequently identified that he had predominantly dyskinetic quadriplegic cerebral palsy; and he also has severe motor developmental impairments. His intellectual capacities, however, are unimpaired.

[2] On 15 January 2001 proceedings were issued on his behalf against the defendant trust. It was said that his injuries were caused by the negligence of the defendant's employees at the hospital. Liability has since been admitted. Quantum is in dispute, and a trial on the issue of quantum is scheduled for the end of 2004.

[3] On any view, the projected amount of damages is likely to be very substantial. The claim currently is for a sum in excess of £5m. A counter-schedule put in on behalf of the defendant proposes a figure of around £2.25m. For the purposes of the hearing before me, the defendant has been prepared to proceed on the assumed basis that the award of damages will not be less than £2m.

a [4] Although there is a dispute as to life expectancy, it is agreed that it is significant. The claimant puts it to the age of 74.4 years and proposes a life multiplier of 33.54. The defendant currently puts life expectancy to the age of 63.7 years and proposes a life multiplier of 30.51. Callum is now, of course, seven years old.

b [5] As part of the claim for damages the claimant seeks damages for the projected costs (in the form of investment advice and fund management charges) for the investment management of his award; and has relied on two reports of Mr Rowland Hogg FCA for that purpose. The defendant disputes the claimant's entitlement to such an award. It seemed to the parties that the matter could appropriately be dealt with as a preliminary issue; and in the event a trial of such issue was directed by the master by order dated 13 January 2004. The issue is
c rather compendiously worded. It reads as follows:

d 'Whether the claimant (who is seven years old and has cerebral palsy, but whose funds are not anticipated to be placed under the control of the Court of Protection on his obtaining majority) is entitled to recover, as part of his damages, the predicted costs of investment advice and fund management charges incurred in the management of his award, which will exceed £2m, or whether such a claim is inadmissible.'

e [6] It is that issue which has come on for trial before me. The hearing lasted two days. The claimant was represented by Mr Spink QC and Miss Guthrie. The defendant was represented by Mr de Navarro QC and Miss O'Rourke.

f [7] I was told that the issue debated before me has wider implications. The issue has generated acute differences of opinion amongst those specialising in personal injury litigation and advice: as seems to be borne out also by differing viewpoints advanced by eminent textbooks in this field. It also appears that the correct resolution of this issue could have a significant impact on the size of total
g awards in cases of this nature. In the present case, for example, Mr Hogg has calculated that the sum needed to cover the cost of managing the investment of the claimant's damages for future loss at nearly £530,000 on an award of £2.5m; and nearly £930,000 on an award of £5m. Mr de Navarro has made it clear that, if there is to be a full trial on this matter, these figures are disputed root and branch; but it is, all the same, an indication of what claimants may seek to claim in cases such as this.

h [8] I should add that counsel before me were agreed that the preliminary issue before me did not extend to the administration costs of the High Court's involvement (through the Public Trustee's Office) in managing the claimant's affairs while he was under 18: although the issue would extend to the fees of any
i brokers that the High Court may retain to advise on investment of the award. I should also observe that counsel before me asked me to proceed, for the purposes of this preliminary issue, on the footing that 'investment advice and fund management charges' were to be taken to include, and not to be differentiated from, actual transaction costs: and no separate legal argument as to transaction costs was advanced before me. I think this worth pointing out, since one can see some possibility for differentiation; but I proceed on that agreed footing, as asked, for the purposes of this preliminary issue.

THE LEGAL BACKGROUND

[9] To explain how this point has arisen it is necessary to go into some legal background.

[10] The fundamental principle is this. The object of an award of lump sum damages is as nearly as possible to provide full compensation for the injury which a claimant has suffered: that is, to place the injured party as nearly as possible in the same financial position that that party would have been in but for the tort. The aim is to award such a sum of money as will amount to no more and no less than the net loss. It is acknowledged that this principle may necessarily have to operate in a rough and ready way and there may well be imprecision in the result in individual cases. But that, nevertheless, remains the object (see *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345).

[11] For very many years, the conventional approach involved the court calculating the net annual loss, typically comprising in the usual case as its principal elements the projected loss of future earnings and the cost of future care. To that (the multiplicand) there is applied the multiplier, calculated by reference to the number of years the loss is projected to last, adjusted to reflect contingencies and also adjusted to allow for the fact that the claimant will be receiving the lump sum award and will have it available to him earlier than otherwise would have been the case.

[12] For a long time courts proceeded on the assumption that the discount to be applied in calculating the multiplier, reflecting what was called 'the real rate of return' on investment after tax, was to be between 4% and 5%. The real rate of return was projected as the return after inflation: it being assumed that appropriate investment by the reasonable claimant would be in a mixed portfolio (essentially of equities, cash and gilts) which would cover anticipated inflation. The measure of the discount rate to be applied was thus the rate of return reasonably to be expected on the sum if invested so as to enable a claimant to meet the whole amount of his loss during the period which had been taken for it by the expenditure of income and capital. Further, as put by Lord Hope of Craighead in *Wells's case* [1998] 3 All ER 481 at 508, [1999] 1 AC 345 at 391—

'The assumptions to be made at the stage of selecting the discount rate are simply these. First, it is to be assumed that the lump sum will be invested in such a way as to enable the plaintiff to meet the whole amount of the losses or costs as they arise during the entire period while protecting the award against inflation, which can thus be left out of account. Secondly, it is to be assumed that that investment will produce a return which represents the market's view of the reward to be given for foregoing the use of the money in the meantime. This is the rate of interest to be expected where the investment is without risk, there being no question about the availability of the money when the investor requires repayment of the capital and there being no question of loss due to inflation.'

[13] A full exposition of the history of, and rationale for, the courts' approach to the application of an appropriate discount rate can be found in the Court of Appeal's judgment in *Wells's case* [1997] 1 All ER 673, [1997] 1 WLR 652, as well as in the speeches in the House of Lords' decision.

[14] In 1981, index-linked government stock (ILGS) was introduced by the government as a marketable security. During the 1980s a body of opinion held that the discount rate should preferably be calculated by reference to the yield on ILGS. However the traditional approach, on the footing of presumed investment in a mixed portfolio (including equities), continued to hold sway in the courts. In 1994 a working party chaired by Sir Michael Ogden QC strongly advocated the adoption

a of the ILGS discount rate as the basis for the appropriate multiplier in place of the customary 4% to 5%. That recommendation in essentials was followed by the Law Commission in its own recommendations in its report on *Structured Settlements and Interim and Provisional Damages* (Law Com No 224) (1994).

[15] In *Wells's* case (and two related cases) the first instance judges were prepared to depart from the traditional approach in fixing the appropriate multiplier. They adopted a discount rate by reference to ILGS. In essence, their reasoning was that (applying the fundamental principle) the question was not whether it would be prudent for a claimant to invest in equities but whether investment of the award in ILGS would achieve the necessary object of compensation with greater precision: and in their view investment in ILGS would do that. That necessarily connoted a significantly lower discount rate (and hence higher amount of award of damages) than under the traditional approach. The Court of Appeal reversed these decisions. The Court of Appeal held, among other things, that a claimant in such a case was not to be put in some separate category distinct from the ordinary prudent investor; that ordinary principles of prudent investment had not in this context become outmoded by reason of the introduction of ILGS; and that, applying the fundamental principle, the traditional approach (on the basis that a claimant would probably be advised to invest in a mixed portfolio) remained valid. That decision of the Court of Appeal was reversed by the House of Lords. (It may in passing be noted that at least two of the cases considered in *Wells's* case involved patients: but the House of Lords did not seem to draw any distinction in that regard.) The House of Lords decided that a claimant recovering a substantial lump sum award in personal injury litigation was not to be regarded as in the same position as an ordinary prudent investor: and that the applicable discount rate was to be fixed by reference to ILGS. The House of Lords decided that, on that approach, the appropriate discount rate was to be 3%, to be of general application in the typical case but to await the fixing of a rate by the Lord Chancellor under his delegated powers conferred by the Damages Act 1996.

[16] The 1996 Act in the relevant respects provides as follows:

g '1.—(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

h (2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates of return for different classes of case.'

j It had been made known that the Lord Chancellor was awaiting the outcome of *Wells's* case before making an order under s 1(1).

[17] On 25 June 2001 the Lord Chancellor (Lord Irvine of Lairg) made such an order (the Damages (Personal Injury) Order 2001, SI 2001/2301), giving accompanying reasons. He fixed the discount rate at 2.5%. Very soon thereafter, objections were made that Lord Irvine LC had been provided with incorrect information as to the average gross redemption yield on ILGS for the three years up to June 2001. In consequence, Lord Irvine LC reconsidered the matter.

Having done so, he maintained a discount rate of 2.5%, and declined to withdraw his previous order of 25 June 2001. He gave reasons dated 27 July 2001, expressly stating that he had considered the matter 'completely afresh'. a

[18] Lord Irvine LC concluded that he should set a single rate to cover all cases; should set a rate easy for parties and their lawyers to apply in practice, and to the nearest 0.5%, to be used in conjunction with the *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (the Ogden Tables); and should set a rate which should endure for the foreseeable future. He abjured an inclination to 'tinker' with the rate to take account of transient shifts in market conditions. He made clear that he proposed to apply the fundamental principle, and stated (p 2 of his reasons): 'It is accordingly unrealistic to require severely injured claimants to take even moderate risks when they invest their damages awards.' He indicated that any approach to setting the discount rate must be 'fairly broad-brush'. He indicated that he did not consider that he was obliged to follow the basic reasoning of the House of Lords in *Wells's* case as to the averaging of gross redemption yields on ILGS in deciding on a rate of 3%. Lord Irvine LC concluded that the average gross redemption yield on ILGS before tax was 2.46% and that 'the net average yield on Index-Linked Government Stock, as adjusted to take account of tax, lay in the range between 2% and 2.5%'. Given his decision to set the rate to the nearest 0.5%, the discount rate was thus to be either 2.5% or 2%; and he stated that *Wells's* case did not require him to set one rate or the other. Stating that he had regard to the fundamental principle and to matters relevant to the setting of a discount rate which was just as between claimants and defendants as groups, he concluded that as at 25 June 2001 he should have set the rate at 2.5%. b
c
d

[19] In so concluding, Lord Irvine LC went on to state that he noted that the real rate of return to be expected from ILGS tended to be higher the lower the rate of inflation was assumed to be. He stated that he considered it reasonable to assume a rate of inflation for the reasonable future lower than 3% and that in turn 'provides comfort that a discount rate set at 2.5% is reasonable'. e
f

[20] He stated (as he had in his original reasons) that he was 'further supported' in his conclusion that a rate of 2.5% was reasonable by indications that the rate of return in respect of ILGS did not represent an undistorted real rate of return, for investments of minimal risk, having regard to the information provided to him by experts and to a consideration of rates of return on other available lower-risk investments. Points regarded as significant (see pp 5–6 of the reasons) were: (1) the market in ILGS was currently distorted, so that prevailing yields could be regarded as 'artificially low'; (2) the Court of Protection, even after *Wells's* case, had continued to invest (on behalf of claimants who were patients) in multi-asset portfolios comprising equities, gilts and cash in a way expected to produce real rates of return 'well in excess of' 2.5%; and it appeared that— g
h

'there are ... investment strategies available to claimants which would enable them comfortably to achieve a real rate of return at 2.5% or above, without their being unduly exposed to risk in the equity markets ...' i

(3) It was likely that 'real claimants' would not be advised solely or even primarily to invest in ILGS but in a mixed portfolio 'in which any investment risk could be managed so as to be very low'. The responses from expert financial analysts to him were such that—

a 'This suggests that setting the discount rate at 2.5% would not place an intolerable burden on claimants to take an excessive, i.e. moderate or above, risk in the equity markets, and would be a rate more likely to accord with real expectations of returns, particularly at the higher end of awards.'

b He also noted the power of the courts under s 1(2) of the 1996 Act to adopt a different rate 'if there are exceptional circumstances which justify [them] in doing so'.

c [21] On 29 November 2001 there was a debate in the House of Lords as to the order, there being a motion for it to be revoked (see 629 HL Official Report (5th series) (cols 525–538)). Various speakers spoke for or against the motion. Baroness Scotland of Asthal responded on behalf of Lord Irvine LC. It was common ground before me that I could have regard to what she said in this regard, which was stated by her to 'explain and amplify' the decision reached: and although of course this was said after the order was made and reasons promulgated, it can be taken to be a fully briefed response as to the rationale for such order and reasons. In the course of her response, Baroness Scotland said this (col 535):

d 'He [Lord Irvine LC] considered that claimants with a large award as compensation could reasonably be expected to seek expert financial advice. I was not surprised to hear the noble Lord, Lord Hunt of Wirral, say that that was in accordance with good practice. The advice that my noble and learned friend received demonstrated that a mixed portfolio, which would be recommended as offering a low-risk form of investment, could be expected to produce real rates of return well in excess of 2.5 per cent. Nevertheless, the Lord Chancellor followed their Lordships in *Wells v Wells* and decided that he should use the average yield on index-linked government stock as the benchmark for setting the rate.'

f She went on to note that the average yield net after tax on ILGS was 2.09% and that the net average yield on ILGS, adjusted for tax, lay in the range between 2% and 2.5%. She said: 'In his [Lord Irvine LC's] opinion, following *Wells v Wells*, the discount rate should be set with that range in mind.' After further observations, she went on (cols 535–536):

g 'It was in the context of that final stage of the reasoning process—whether to round up or down—that the Lord Chancellor again considered the advice received through consultation. That included advice that the present rate of return in respect of index-linked government stock does not represent a pure and undistorted measure of the real rate of return that markets would afford. h It also appeared that there are sensible low-risk investment strategies available to claimants that will enable them comfortably to achieve a real rate of return of 2.5 per cent or above, without their being unduly exposed to risk in the equity market—a point reinforced this evening by the noble Lord, Lord Hunt of Wirral.'

j Baroness Scotland supported the rejection of the suggestion of a flexible rate, saying: 'What people most need in this area is certainty.' This clearly reflected Lord Irvine LC's general approach in his reasons. She also noted that Lord Irvine LC had, since the order, been criticised by those wanting a lower discount rate than 2.5% (thereby increasing damages awards) and by those wanting a higher rate (thereby reducing damages awards): her suggestion being that if no

one was entirely happy then '[o]ne almost feels' that Lord Irvine LC 'has probably got it exactly right'.

[22] Dissatisfaction on the part of some has, so it would seem, nevertheless persisted. In *Warriner v Warriner* [2002] EWCA Civ 81, [2003] 3 All ER 447, [2002] 1 WLR 1703, evidence—from, as it happened, Mr Hogg—was put in on behalf of the claimant to the effect that the projected award of £2.75m would in fact, if invested in ILGS, achieve a net return of 1.63%; and it was said that Lord Irvine LC's methodology in arriving at his average gross ILGS yield was 'unfair'. That evidence was sought to be relied on to support an application under s 1(2) of the 1996 Act for some other rate of return. The evidence was ruled inadmissible. It was held that there were no exceptional circumstances justifying a different rate of return and that s 1(2) could not be invoked to circumvent the application of the prescribed 2.5% rate which was designed, on policy grounds, to be of general application.

[23] That frontal assault on the prescribed discount rate having failed, a flank assault was launched in *Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe, Page v Lee* [2003] EWCA Civ 1370, [2004] 1 All ER 797, [2004] 1 WLR 251. In *Cooke's* case the claimant (again armed with reports of Mr Hogg) stated that costs of future care—the main issue in that case—historically increased at a significantly higher rate than represented by the retail price index (RPI). A revised multiplicand, to reflect such faster rate of increase in care costs, was proposed: it being said that this was a 'separate issue' from the discount rate of 2.5% prescribed by Lord Irvine LC. But, after a most helpful and clear review of the background, Laws LJ, with whom Carnwath LJ (with additional reasoning) and Dyson LJ agreed, held that the discount rate used in any lump sum award in any given personal injury case was the only factor to allow for future inflation and that the multiplicand could not be taken to allow for the same thing. The suggestion that the proposed calculations by reference to the multiplicand were a 'separate issue' from the discount rate prescribed by Lord Irvine LC was roundly rejected, the arguments being described as 'smoke and mirrors'.

[24] In the present case the defendant says, and the claimant denies, that the claim for a sum of damages to reflect investment advice and fund management charges on the prospective lump sum award is, in substance, a further flank assault on the prescribed discount rate: which should likewise, according to the defendant, be repelled.

INVESTMENT ADVICE AND FUND MANAGEMENT CHARGES

[25] The question of whether investment advice and fund management charges could properly be reflected in a lump sum award of substantial damages in personal injury litigation had become a matter of some controversy before the decision of the House of Lords in *Wells's* case and the order of Lord Irvine LC.

[26] So far as the researches of counsel in the case before me show, the matter was first the subject of judicial decision in *Francis v Bostock* (1985) Times, 9 November. In that case, Russell J stated that a claim for damages in that regard was 'misconceived and untenable' for a variety of reasons. Those reasons were stated as follows:

'The award I make is compensatory. The whole object of the exercise upon which I have embarked by the progress of multipliers and multiplicands is to achieve a figure which compensates the plaintiff once and for all. The calculation of that figure, so far as future economic loss is concerned, seeks to achieve such a sum as will enable the plaintiff to recover

- a her annual economic loss for the rest of her life, whilst in the process dissipating the fund. The result is what should be achieved by the award itself. Having acknowledged that proposition however, the court is not concerned with the disposal of the award once it is made. The plaintiff may spend it as she wishes. The defendant, in my judgment, should not be called upon to find further moneys to assist the plaintiff in the proper administration of an award which, in itself, affords adequate compensation.
- b Furthermore in my view the employment of financial advisers and the like is a consequence of my award and not a consequence of negligence of the defendant. The claim fails on the ground of remoteness.'

- c There were a number of other first instance decisions to like effect. For example, in *Routledge v MacKenzie* [1994] PIQR Q49 Otton J followed the reasoning of Russell J. He too held that such costs and charges were too remote. He indicated that a claimant of sound mind was free to administer his or her own award but at his or her own expense. He said about the claim put forward (at 59): 'There is an element of unreality in this head of damage.' He also queried why, if the cost of investment advice were recoverable, dealing costs were not also recoverable.

- d [27] There are, however, various first instance decisions to the contrary. The reasoning behind these decisions is perhaps most clearly explained in the decision of Rodger Bell QC (then sitting as a deputy judge of the High Court) in *Anderson v Davis* [1993] PIQR Q87. After citing the judgment in *Francis v Bostock*, Mr Bell said (at 101):

- e 'That judgment of Russell J., as he then was, has been followed in other cases and it is with some trepidation that I decided not to follow it here, for the following reasons. First, in a case like this, which is one where any wise plaintiff without financial or investment expertise would be bound to require skilled advice on the management of his fund, I can see no difference, in principle, between an expense which is necessary under the Rules of the Supreme Court or pursuant to the direction of the judge on the one hand, and an expense which is enforced by circumstance, or which will probably be enforced by circumstance, save that the Court of Protection fees are bound to be judged as reasonable expenses, whereas other management fees may or may not be judged to be reasonable, in all the circumstances.
- f Secondly, if the plaintiff has, in commonsense and good judgment, to spend management fees to use his fund to provide true compensation, that seems to me to be part of the economic loss which the Court is enabling him to recover. Put another way, if he does not take such management advice, at a cost to him, the reality is that the award will not compensate him as the Court intends it to do by making its award of damages.'
- g
- h

[28] Mr Spink submitted that the reasoning of Mr Bell in *Anderson v Davis* was correct. Mr de Navarro submitted that it was incorrect: although his principal submission was that it had been overtaken by the decision in *Wells's* case.

- j [29] To the extent that Russell J (as part of his reasoning) concluded that a claim for the cost of investment advice was too remote as being a consequence of his award and not of the defendant's negligence, that does not fit at all well with the reasoning of the Court of Appeal in *Wells's* case (not in this respect challenged in the House of Lords) where it was decided that the costs of a solicitor retained by the receiver of the claimant (Mrs Wells), who was a patient, were recoverable. It is true that the Court of Appeal expressly acknowledged ([1997] PIQR Q1 at

Q40) that such a case could be distinguished from a case where the Court of Protection was not involved. Even so, the Court of Appeal went on (at 41) to quote *Anderson v Davis* without disapproval and, on the contrary, with tacit approval. My own view is that the views expressed in *Anderson v Davis* have a good deal of force on that particular point. It seems to me, with all respect, that the contrary view as to remoteness is too narrow—indeed I would be tempted to say itself having an element of unreality, were it not that Otton J had said that of the view as it came to be enunciated in *Anderson v Davis*. The practicality, to my mind, was that, to achieve the net return of 4% to 5%, the claimant foreseeably would need to have expert investment advice: that was required to achieve the requisite return. As Lord Steyn, speaking generally, said in *Wells v Wells* [1998] 3 All ER 481 at 504, [1999] 1 AC 345 at 386: ‘Such plaintiffs have not chosen to invest: the tort and its consequences compel them to do so.’

[30] In *Francis v Bostock*, Russell J also thought (in the first part of his reasoning) that the award would ‘in itself’ afford adequate compensation. That possibly leaves open the question of whether he was taking it that there was already factored into the award the element of the cost of investment advice in achieving adequate compensation (although the general tenor of his remarks seems to suggest that he was not). On the other hand, in *Anderson v Davis* it was asserted that the ‘reality’ was that the award would not truly compensate the claimant ‘as the court intends it to do’ unless the claimant took management advice, at a cost to him. But what is rather unclear to me is as to what evidence or argument there was in that case to show not just that the claimant foreseeably needed investment advice to achieve the required rate but in addition that he would otherwise suffer loss unless he was compensated for taking that advice to achieve the required rate. The assumption, all the same, seems to have been in *Anderson v Davis* that the then required yield was to be taken as gross, not net, of investment costs.

[31] Be that as it may I am nevertheless of the view that the decision in *Anderson v Davis* (and, indeed, *Francis v Bostock*) has been overtaken by the decision of the House of Lords in *Wells*’s case.

[32] In the course of his speech, Lord Steyn said ([1998] 3 All ER 481 at 505, [1999] 1 AC 345 at 387):

‘First, there was much controversy about the real return on equities ... For my part I am content to approach the matter on the basis that a diversified portfolio of equities would yield over a substantial period a better return than index-linked government securities. But I am not satisfied that even on this basis, and ignoring the availability of index-linked government securities, a net rate as high as 4.5% was justified. Bearing in mind the surprisingly high cost of advice that would be needed by a plaintiff to invest in a portfolio of equities my view is that the Court of Appeal took a rather optimistic view.’

To my mind, that connotes that Lord Steyn took it that a ‘net rate’ of 4.5% (under the conventional approach) did in fact include within it the costs of investment advice. That is consistent with the observations of Lord Hope of Craighead where he said ([1998] 3 All ER 481 at 509, [1999] 1 AC 345 at 392):

‘There is much to be said for the view that a better return can be obtained by the ordinary investor who invests his money in equities. But the rises and falls in the market value of equities are unpredictable both as to their timing

a and as to their amount. Further problems are presented by the cost of investment advice and by the possible impact of capital gains tax if reliance has to be placed on the capital gains which can be achieved to deal with inflation and to supplement the income return by way of dividend.'

And, rather more specifically, Lord Clyde said ([1998] 3 All ER 481 at 514, [1999] 1 AC 345 at 397):

b 'On this approach the problem which was raised of the need to allow for the costs and charges involved in the management of an investment portfolio substantially disappears. There is certainly no likelihood of costs and charges being regularly involved on the scale which would probably apply to the management of a portfolio of equities. The assumption would be that the index-linked investment would be held to maturity. In relation to such investments such costs and charges as there would be may for practical purposes be ignored.'

(That also perhaps accords with what Lord Lloyd of Berwick apparently thought: see [1998] 3 All ER 481 at 493, [1999] 1 AC 345 at 374.)

d [33] In my view, those observations indicate that the costs of investment advice were to be taken as included in an award of damages, applying the relevant discount rate; and not as separately recoverable. Further, on the approach of the House of Lords, (which approach fixed the discount rate by reference to the yield on ILGS) it seems to me that it would potentially be double recovery for a claimant both to get the lower discount rate (and hence higher award) on the basis of ILGS average yields and simultaneously to recover the costs of investment advice for a mixed portfolio including equities. Although Mr Spink was not initially minded to concede this, on further reflection he indicated that he did concede this. In my view, this concession was rightly made.

f [34] Mr Spink's submission, however, was that even if that were so by reason of the House of Lords' decision in *Wells's* case, it ceased to be so after the order of Lord Irvine LC: in consequence of which, he submits, claimants are again entitled to claim, as part of their damages, the costs of investment advice, pursuant to the principles enunciated in *Anderson v Davis*.

g [35] I will have to deal with that submission in due course. But it may be observed that it does not coincide with three separate High Court decisions on the point, pronounced after 27 July 2001.

h [36] The first is the decision of Judge Dean QC (sitting as a judge of the High Court) in *Webster v Hammersmith Hospitals NHS Trust* [2002] All ER (D) 397 (Feb). The issue was, it is plain, thoroughly argued before Judge Dean; and because his reasoning is so clear, I think it appropriate to quote it in full:

j 'Mr Maskrey [counsel for the claimant] also sought additional compensation to cover the cost of investment advice and investment costs as distinct from the administration of the trust fund. Before the decision in *Wells v Wells* there was conflicting authority at first instance as to whether such a claim could be justified, see *Butterworth's Personal Injury Litigation Service* at paras 1006–1008 and the cases there cited. It will be noted that the discussion in *Butterworth* does not make a distinction between the cost of administration of the fund as such and pure investment advice as has been canvassed in the argument before me. So far as investment advice is concerned, I do not consider that a claim for the cost of general investment advice can now be justified following the decision of the House of Lords in

Wells v Wells [1998] 3 All ER 481, [1999] 1 AC 345. This decision set the discount rate for personal injury damages at 3%, representing a non-speculative return by reference to index-linked gilts. Such an investment will not require the same degree of active management as would an equity portfolio, see Lord Lloyd in *Wells v Wells* [1998] 3 All ER 481 at 493, [1999] 1 AC 345 at 373–374 and Lord Clyde ([1998] 3 All ER 481 at 514, [1999] 1 AC 345 at 397). The discount rate has now been reduced to 2.5% by the Lord Chancellor pursuant to his powers under the Damages Act 1996. In consequence defendants now have to provide a substantially larger fund to take account of lower but more secure rates of return. Claimants are not, of course obliged to limit their fund to investment in gilts whether in whole or in part. This is not the practice followed by the Court of Protection and this fact was recognised by the Lord Chancellor in his formal statement commenting upon his decision to set the rate at 2.5%. The choice of investment remains one for claimants and their advisors. If they wish to take the chance of obtaining a higher, if less secure, return, this is a decision which they are entitled to make. However, this course is not one which is necessary to maintain the value of their fund or future income. In my judgment it is not one which it would be reasonable to require a defendant, who is already having to provide a greater capital sum to ensure a level of income based on the security of gilt investment, to have to pay. I accept that even investment in gilts requires some expertise which goes beyond that which is available to the average claimant, but a claim was not made on this more limited basis. This head of claim is disallowed.

[37] A similar conclusion was reached by Judge Fawcus (sitting as a judge in the High Court) in *Anderson v Blackpool NHS Trust* (20 March 2003, unreported). He concluded that ‘despite the attraction of Judge Bell’s reasoning’ (viz in *Anderson v Davis*) that case had been overtaken by *Wells v Wells* and that it was unreasonable to expect a defendant to recover damages for advice that may provide a better return than investment in ILGS. (Judge Fawcus was, however, prepared to award £25,000 as a one-off charge for advising the claimant, who was, as the judge found, unable to manage his own affairs.) And in *Eagle v Chambers* [2003] EWHC 3135 (QB), [2003] All ER (D) 387 (Dec), being a case where the claimant was a patient, Cooke J, for brief reasons in what seems to have been a shortly argued and relatively small element of the case before him, concluded that (despite it being common ground that the award would be invested in a mixture of investments) it appeared to be the ‘inevitable consequence’ of the principle of *Wells*’s case that damages had to be assessed ‘on a uniform basis in the round’ (as he put it). In consequence he refused to award damages for panel brokers’ fees. I was told that an appeal from that ruling is pending.

[38] It is the submission of Mr Spink that those three cases were incorrectly decided on this point—in particular, because they failed to have due regard to the effect of Lord Irvine LC’s order of 25 June 2001 and the reasons given for that order. I turn, then, to the competing submissions in this case.

SUBMISSIONS

[39] On behalf of the claimant, it is, in summary, submitted as follows: (1) The fundamental principle of full compensation, as reaffirmed in *Wells*’s case, must be adhered to. (2) The reality is that the claimant in each year will—and reasonably and necessarily will—incur significant investment advice costs in investing the prospective award in a mixed portfolio in order to achieve full

- a compensation. (3) Such investment costs are properly regarded as a separate head of damages, to be included in the multiplicand and to be the subject of the appropriate multiplier. (4) It is inherent in Lord Irvine LC's reasons that he recognised that a claimant would require and receive investment advice: and in setting the discount rate at 2.5%, Lord Irvine LC was anticipating that the inevitable costs of such investment advice would be separately claimable.
- b Nowhere, it is submitted, is the contrary suggested in the reasons. (5) Such approach on the part of the claimant is not an attack on the discount rate as prescribed by Lord Irvine LC's order: rather, it is an application of Lord Irvine LC's reasons.

c [40] Mr Spink supported his submissions as to what was intended by Lord Irvine LC by reference to a number of subsequent consultation papers, some emanating from the Lord Chancellor's Department. In my judgment (and contrary to a submission of Mr de Navarro) some regard may properly, in a context such as the present, be had to such materials: although I think they are of limited weight.

- d [41] For example, in the Lord Chancellor's Department's consultation paper *Damages for Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases* (March 2002) it is noted (para 19), without adverse comment, that large awards often include provision for financial advice; and in Annex A, para 9(c) it is stated that one effect of an order for periodical payments would be to lower claimants' investment advice costs 'with consequential savings for defendants and their insurers'. In the regulatory impact assessment for the then Courts Bill as to the power to order periodical payments, published in November 2002, it is stated that damages awards can include an allowance for investment advice and management fees 'which inflates the value of the award' (see para 24 and cf paras 28–30 of the Annex). The report of the highly experienced Master of the Rolls' Working Party on Structured Settlements (August 2002) referred to the 'potential' for a further claim to be added as part of the damages to cover such investment costs (it being noted, however, in a footnote that that 'remains controversial'). The explanatory note to the Courts Bill (20 May 2003) suggests (para 312) that an order for periodical payments would create savings for the National Health Service in that such an order 'would not need to include the claimant's costs for investing a lump sum ...'

- g [42] Mr de Navarro told me that his impression was that in the immediate aftermath of *Wells*'s case claims for damages under this head were infrequent but that they have become rather more frequent since Lord Irvine LC's order. Some claimants have made such a claim; others have not. Where there have been settlements, I was told that sometimes no (or minimal) regard was paid to such a claim, if made; sometimes, on the other hand, it has featured significantly. I was referred to an agreed award, noted in Kemp and Kemp *The Quantum of Damages* vol 1, Ch 5, App IVA, in *Ejvet v Aid Pallet* (11 March 2002, unreported) where an agreed head of £300,000 (as part of a total award of £2m) included, in part, such an element. The commentary to the report of such case in *Kemp and Kemp* (para A5-283/7) includes the following observations (which in many respects are a succinct encapsulation of the principal way Mr Spink puts his case):
- h
- j

'Moreover, in *Wells v. Wells* the use of a notional fund, invested entirely in ILGS was put forward to attack (successfully) the use of an annual discount rate of 4.5 per cent when calculating multipliers in claims involving future losses and expenses. Since the House of Lords decision, the Lord Chancellor

has exercised his powers under the Damages Act to fix the applicable discount rate by statutory instrument. It follows that there is no longer any need to hypothesise that the fund will be made up entirely of investments in ILGS. If there was any doubt before, this opens the way for claimants to argue that bankers' and advisers' fees are recoverable because the reality at the present time is that investment advice will be necessary and brokers' fees will probably be incurred each year for the life of the fund. The cost of running the fund is an inevitable expense. If the purpose of an award of damages is to compensate the successful claimant then it is simply a matter of law that such costs and expenses should be recoverable.'

[43] On behalf of the defendant, on the other hand, it is submitted, in summary, as follows. (1) The claim for investment costs and fund management charges is an indirect and illegitimate attack on the discount rate prescribed by Lord Irvine LC for lump sum awards in personal injury claims. (2) Such a claim (if admissible) would create great uncertainty, when it was the intention of Lord Irvine LC to avoid uncertainty. (3) In setting the discount rate at 2.5% Lord Irvine LC had regard to the likelihood of claimants seeking professional investment advice, with attendant cost, and took that factor into account in prescribing the discount rate at 2.5%. (4) The House of Lords in *Wells v Wells* [1998] 3 All ER 481, [1999] 1 AC 345 had implicitly rejected the prospect of separate recoverability of damages for investment costs when fixing a rate of 3% (by reference to the yield on ILGS) and Lord Irvine LC is not to be taken as having reverted to a position prevailing before the House of Lords' decision. (5) There in any event is a 'fatal flaw' in the claimant's claim under this head, in that he has not adduced, or attempted to adduce, any evidence to the effect that only if the claimant was compensated for the costs of investment advice and fund management charges would he be likely to achieve a net rate of return of 2.5% on his prospective award.

DECISION

[44] I have come to the conclusion that the defendant's arguments are to be preferred.

[45] It is plain that when Lord Irvine LC fixed the discount rate at 2.5% he did so with the intention of abiding by, and fulfilling, the fundamental principle. He says so in terms. He further made clear that he wished to achieve certainty and consistency for the usual case and was averse to tinkering.

[46] In my view, Lord Irvine LC was essentially prescribing the discount rate by reference to ILGS and not a mixed portfolio. I consider that that can be seen to be so both from the structure and from the express statements in the reasons. It is true that he indicated that he did not regard himself as bound to follow the reasoning of the House of Lords, but those comments were made in the context of the assessment of the average gross redemption yield and of the establishment of a rate of 3%. He did not, as I read the reasons, indicate an intention to depart from the yield on ILGS (as opposed to a mixed portfolio) being the reference point for fixing the discount rate. As Lord Irvine LC in terms said in part of his reasons: 'It is accordingly unrealistic to require severely injured claimants to take even moderate risks when they invest their damages award.' In my view the observation of Baroness Scotland in the debate in the House of Lords was well-founded: Lord Irvine LC had followed the decision in *Wells's* case and decided that he should use the average yield on ILGS as 'the benchmark for setting the rate'.

- a [47] I have concerns that the present claim does, in substance, represent an indirect attack on Lord Irvine LC's order prescribing the rate. As Laws LJ said in *Cooke v United Bristol Healthcare NHS Trust*, *Sheppard v Stibbe*, *Page v Lee* [2004] 1 All ER 797 at [28], [2004] 1 WLR 251, the courts cannot depart from Lord Irvine LC's discount rate (save in a case properly falling within s 1(2) of the 1996 Act) whether the means of doing so are direct or indirect.
- b [48] I accept, in this regard, that the present case is distinguishable from *Cooke's* case. In *Cooke's* case, the attempt was made to cover care costs said to be likely to increase way in excess of inflation by putting forward a multiplicand increased to cover the cost of such anticipated inflation: it being said that if that were not done, an application of the conventional method would result in a failure to achieve the fundamental full compensation principle. But, as Laws LJ demonstrated, it was fallacious to regard as a 'separate issue' the issue of earnings or care costs increasing at a greater rate than general inflation as measured by the RPI. On the contrary the multiplicand was to be treated as based on current costs at the date of trial: and in a lump sum award in a personal injury case the discount rate was designed to be the only factor to allow for relevant future inflation. But
- c in the present case it can be said (and Mr Spink does say) that here investment costs are an annual impost and properly therefore to be regarded as an aspect of the multiplicand. That I readily follow.

- [49] Even so, I have doubts: and for this reason. It is plain enough from the reasoning of the House of Lords in *Wells's* case, and it also, in my view, is implicit in Lord Irvine LC's reasons, that investment costs are contemplated as arising in respect of the investment advice anticipated to be obtained by a claimant. But investment advice (on the claimant's own approach) relates to the setting of the appropriate discount rate. Thus although the annual investment costs can be presented as an element of the multiplicand to which the appropriate multiplier is to be applied, in my judgment they are, for these purposes, in substance to be
- e regarded as within the 'territory' (to use a word employed in argument) of the applicable discount rate.

- [50] Mr Spink, however, submitted that by virtue of Lord Irvine LC's reasoning, in particular set out at p 6 of the reasons, a claimant is *required* (in the sense of obliged) to invest, in part, in equities if he is to achieve at least a net return of 2.5%; and accordingly he submitted that a claimant is entitled to claim the investment advice costs required to be incurred in order to achieve that result. Indeed he suggested that it was only because of that requirement so to invest that Lord Irvine LC was able to round up to 2.5% rather than round down to 2%. On that basis, it is said that, consistently with *Anderson v Davis* [1993] PIQR Q87, a sum to cover such investment costs is properly claimable by way of
- g damages.

- [51] In my judgment, however, that is not correct. It is true that, in some financial contexts, the phrase 'real rate of return' may be taken simply to mean the rate of return after allowance for inflation. It is also true that Lord Irvine LC, in respect of his conclusion that the appropriate discount rate was 2.5%, said that
- j he was 'further supported' by various other matters, including the continuing practice of the Court of Protection investing in multi-asset portfolios in a way expected to produce real rates of return well in excess of 2.5% or at least comfortably achieving such a rate of return; and that he took into account the fact that it was likely that 'real claimants' would invest in a mixed portfolio, thereby suggesting that a discount rate of 2.5% would not place an intolerable burden on claimants. Baroness Scotland also adverted to these points in the debate in the

House of Lords. But I do not myself read these reasons as *requiring* a claimant to invest in a mixed portfolio: rather I view them as in effect points of reassurance, by reference to what claimants may be expected to do in practice, to support the appropriateness of a rate of 2.5%. Were it otherwise Lord Irvine LC would in effect be sanctioning a return to the position prior to the decision of the House of Lords in *Wells's* case. And in my view that is not the tenor of Lord Irvine LC's reasons, when read as a whole, at all. Further, I think it is a point of comment that Lord Irvine LC, although taking the view that investment in a multi-asset portfolio would yield a return 'well in excess of' or 'comfortably [achieving]' 2.5%, did not fix the rate any higher than 2.5%. a

[52] Moreover, I find it difficult to think that Lord Irvine LC, in making these observations, could or would have overlooked the attendant costs involved in seeking investment advice in setting the discount rate as he did. It is true that Lord Irvine LC does not expressly say that he had taken them into the account (and Mr Spink told me that the point seems not to have been explicitly raised in the preceding consultation process). But in my judgment it is inherent in Lord Irvine LC's reasoning: and that is of a pattern with the observations of Lord Hope and Lord Clyde in *Wells's* case. Thus when, in the course of his reasons, Lord Irvine LC refers to the position about investment on mixed-asset portfolios, I think it likely that he was there referring to a real rate of return 'comfortably' exceeding 2.5% as connoting a return net not only of tax but also of investment costs. b

[53] Mr Spink did rely, in this context, on the observations of Latham LJ in *Warriner v Warriner* [2003] 3 All ER 447 at [44], [2002] 1 WLR 1703, where this was said: c

'The evidence of Mr Hogg raises no special features which take this case outside the category of those in receipt of large awards specifically referred to by Lord Irvine in his reasons, as explained by Dyson LJ. Lord Irvine explains fully why he considered that the 2.5% rate of return is appropriate for them, and refers to the fact that proper advice is likely to result in a wider spread of investment than solely in index-linked stock. Lord Irvine indeed went further in his reasons for prescribing the rate of 2.5% than merely his calculation based upon the rate of return from index-linked stock. Mr Hogg's report makes no reference to those matters and does not seek to deal with them in any way.'

d

But that was said in the context of a specific evidential point arising in that case and I do not read it as connoting an acceptance that a claimant is to be treated as obliged (under and as a consequence of Lord Irvine LC's reasons) to invest in a mixed portfolio with expert investment advice, with the right to recover the costs of such advice accordingly. Nor do I think that the expressions of opinion in the various subsequent consultation papers to which I was referred should displace that conclusion. e

[54] Such a conclusion, to my mind, has the advantage of creating certainty. The desirability of achieving, on the one hand, certainty and the desirability of retaining, on the other hand, flexibility are competing considerations in many areas of the law. But this is an area of law where the objective of certainty (and notwithstanding the prima facie width of the discretion conferred under s 1(2) of the 1996 Act) currently—and for clear policy reasons—seems to hold sway. Mr Spink submitted that such a consideration was irrelevant if this head of claim was treated as part of the multiplicand: for that, he observes, constantly (for f

- a example, in future costs of care cases) gives rise to uncertainty and dispute. He further said that, in any event, one or two test cases could be expected speedily to establish the appropriate approach to awards under this head. But, as I have sought to say earlier, I do not think that such a claim is to be regarded simply and solely as an aspect of the multiplicand. In addition, I would query (not least because life expectancies and the assessment of prevailing and future market conditions will vary from case to case) whether potential disputes as to quantum under this head would speedily become limited. In my judgment, considerations of certainty reinforce the defendant's arguments.
- b

- [55] The relevance of the issue of certainty seemed to me to be yet further reinforced during Mr Spink's submissions. In his opening submissions he argued that all the costs of investment advice and fund management charges should in principle be recoverable as damages. But in reply he shifted. He said that the costs so recoverable were not all those incurred by any claimant (for example, one choosing to invest in a very high percentage of equities): rather the recoverable costs were those limited to the investment advice needed to match Lord Irvine LC's projected real rate of return of 2.5%. That immediately raises the difficulty of how that calculation is to be made. Certainly it cannot be assessed by reference to the postulated net of tax figure of 2.09%—not least because of Lord Irvine LC's express observations as to the distortions in the prevailing ILGS market. The point, at all events, raises obvious difficulties; and is not obviously covered in Mr Hogg's reports (in para 3.7 of his first report he refers to 'the investment criteria contemplated by the Lord Chancellor'—but he does not identify just what those are said to be).
- c
- d
- e

- [56] It has been and remains the complaint of many who advise claimants—the view on behalf of defendants is quite different—that a discount rate of 2.5% has proved insufficient fully to compensate claimants. Complaints of that kind, however, have already been roundly rejected both in *Warriner's* case and in *Cooke's* case: in effect, just because it is the Lord Chancellor who has decided the matter. It is clear from Lord Irvine LC's reasons that political, economic and policy considerations apply here, with which the courts are not well equipped to deal (cf the judgment of Carnwath LJ in *Cooke's* case). I take the view that if claimants (such as the present claimant) consider that they have a grievance and that the prescribed discount rate will not, in the event, have operated to fulfil the fundamental principle of full compensation, the remedy is to seek to persuade the Lord Chancellor to prescribe a different (and lower) discount rate.
- f
- g

'FATAL FLAW'

- h [57] Mr de Navarro also submitted—in his oral arguments he in fact advanced this as his first submission—that in any event there was a 'fatal flaw' in the claimant's case on the preliminary issue. He submitted that the claimant must prove that he had suffered loss caused by the tort of the defendant; and therefore must set out to prove that (on the balance of probabilities) he would not achieve a net real rate of return of 2.5% after payment of the costs of investment advice and management charges. But in neither of the two reports of Mr Hogg is this asserted.
- j

[58] In the present case, Mr Hogg (in para 3.10 of his first report) stated (as he had stated in his reports in *Warriner's* case) that the net return for the claimant if his award were invested solely in ILGS would result in a substantial shortfall: he says that in the present case the net return on such a basis would 'probably be

crystallised at less than 1.5%'. What Mr Hogg says on the present point, however, is to be found in para 3.8 of his first report:

'It is sometimes suggested that investment charges are self-financing on the basis that the advice obtained will enable a claimant to improve on returns available to other investors and, in particular, the net rate of 2.5% used in the calculation of the damages. I do not agree. A substantial proportion of the costs are disbursements which have no effect on returns and the advice allowed for is, in my view, the minimum needed by an inexperienced claimant with no expertise in investment markets (especially in present uncertain market conditions). There is no assurance that a net real return of 2.5% on the whole portfolio will be achieved, let alone beaten.'

Mr de Navarro's simple point is that the claimant cannot recover damages for a lack of 'assurance'; and nowhere is it said that the claimant probably would not achieve a net real rate of return of 2.5% after deduction of investment costs and management charges (whether in the entire period of the life expectancy or any shorter period) and nowhere is it said that only if the claimant were compensated for the costs of investment advice and management charges would he be likely to achieve a net real rate of return of 2.5%.

[59] I in fact agree with that submission. The ordinary rule, of course, is that it is of no concern to the court as to what a claimant does with his damages—whether he fritters them away or thriftily invests them. But here the rationale of such a claim is that a claimant cannot be expected to achieve a net real rate return of 2.5% without investment in a mixed portfolio. It is thus inherent in the claimant's argument that investment (in part) in equities is a required form of investment, needed to secure for any claimant the return of 2.5% (net). But if such investment is so required, and if that investment will yield 2.5% or more even after allowance for investment costs and fund management charges, then the individual claimant will have suffered no loss caused by the tort in that regard. It therefore seems to me that claimants would in any event need to adduce evidence to address that point if they are to establish loss. In the present case this has not been done. Mr Spink, I might mention, did in the course of argument, in order to rebut the suggestion that on his case the claimant potentially might in this respect be in breach of the fundamental principle by being overcompensated, assert that in reality the future costs of care and the like will always increase at a rate much greater than the RPI. But in the light of *Cooke's* case that is not an available argument.

[60] However I am reluctant to decide this preliminary issue on this 'fatal flaw' ground alone: because it may be, perhaps, that Mr Hogg thought it implicitly covered in his reports or, at all events, it may be, perhaps, that further evidence could be adduced on behalf of the claimant to cover that point.

SECTION 1(2) OF THE 1996 ACT

[61] During the course of his opening submissions, I asked Mr Spink if he was seeking to rely on s 1(2) of the 1996 Act as a mechanism for achieving the overall result desired by the claimant. What I had in mind were the observations of Dyson LJ in *Warriner's* case [2003] 3 All ER 447 at [33], where he said:

'We are told that this is the first time that this court has had to consider the 1996 Act, and that guidance is needed as to the meaning of "more appropriate in the case in question" in s 1(2). The phrase "more appropriate", if considered in isolation, is open-textured. It prompts the

- a question: by what criteria is the court to judge whether a different rate of return is more appropriate in the case in question? But the phrase must be interpreted in its proper context, which is that Lord Irvine LC has prescribed a rate pursuant to s 1(1) and has given very detailed reasons explaining what factors he took into account in arriving at the rate that he has prescribed. I would hold that in deciding whether a different rate is more appropriate in
- b the case in question, the court must have regard to those reasons. If the case in question falls into a category that Lord Irvine did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return and (b) are shown from an examination of Lord Irvine's reasons not to have been taken into account, then a different rate of return may be "more appropriate".

- c It occurred to me that Mr Spink might be seeking to suggest that Lord Irvine LC had failed to take into account a feature—viz the cost of investment advice and fund management charges—which should have been taken into account. Mr Spink's initial response was that he did not rely on s 1(2) (and certainly no such reliance is pleaded). On the following day, however, Mr Spink, having
- d considered the matter further, indicated that he did seek to rely on s 1(2). In doing so, he made it clear that that was an alternative argument to his argument that the claim under this head was properly to be regarded as a separate head of damages: which he stressed remained his primary argument.

- e [62] In my judgment, reliance on s 1(2) of the 1996 Act does not avail Mr Spink. First, this case cannot (as Mr Spink accepted) be said to fall into a category that Lord Irvine LC had not taken into account. Secondly, there are no 'special features' which an examination of the reasons shows not to have been taken into account—on the contrary, as I have previously said, the probability of a claimant taking investment advice and incurring cost in doing so in my view had been taken into account by Lord Irvine LC.

- f [63] It is perhaps a point of comment all the same that this claim is considered capable of being advanced, albeit in the alternative, by reference to s 1(2). (Mr de Navarro in fact noted that the size of the award under this head as argued for by Mr Hogg—if correct—would in very approximate terms be equivalent to an applicable discount rate of 2%.) At all events, it does not remove my concern that
- g this claim, in seeking damages for the cost of investment advice and fund management charges, may represent an indirect attack on the discount rate of 2.5% as prescribed by Lord Irvine LC's order.

CONCLUSION

- h [64] I therefore think that the defendant's submissions are well founded. It also follows that I agree with the decisions on this point of Judge Dean QC in *Webster v Hammersmith Hospitals NHS Trust* [2002] All ER (D) 397 (Feb) and Judge Fawcus in *Anderson v Blackpool*. (I would however disagree with Judge Fawcus when he went on to award, as being reasonable, a sum of £25,000 as a 'one-off charge' for advising the claimant. The reasoning for that, with respect, is rather
- j difficult to follow, and includes an incomplete citation from the speech of Lord Clyde. In my view, accepting that transaction costs and advice costs will necessarily be incurred in acquiring and dealing with any portfolio, even a portfolio of gilts, the observations of Lord Hope and Lord Clyde indicate that recovery even of such costs is precluded. Whether they are in truth to be regarded as so insubstantial as to be treated as minimal might be queried: but that is the approach of Lord Hope and Lord Clyde, seemingly on pragmatic grounds.)

It also follows that I agree with the decision of Cooke J in *Eagle v Chambers* in disallowing panel brokers' fees: for my present view is that, for these purposes, there is no distinction to be drawn between Court of Protection cases, in this particular regard, and other cases. a

[65] Accordingly I hold that the claimant is precluded from recovering as damages the costs of investment advice and fund management charges incurred in the management of the prospective award. The preliminary issue is therefore to be decided in favour of the defendant. b

Order accordingly.

Aaron Turpin Barrister.

**Campbell and others v South
Northamptonshire District Council and
another**

[2004] EWCA Civ 409

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON AND JACOB LJ AND SIR WILLIAM ALDOUS

26 FEBRUARY, 7 APRIL 2004

Social security – Housing benefit – Entitlement – Church members occupying church-owned property communally for religious reasons under agreements creating legally enforceable liability for rent and providing for specified form of lifestyle – Whether agreements pursuant to which church members occupying property on a commercial basis – Whether taking into account factors manifesting church members' religious beliefs breaching right to freedom of thought, conscience and religion – Human Rights Act 1998, Sch 1, Pt I, art 9 – Housing Benefit (General) Regulations 1987, SI 1987/1971, reg 7.

Social security – Housing benefit – Entitlement – Vires – Proposed amendments to housing benefit regulations referred to independent advisory committee informally for decision as to whether proposed amendments be referred to it formally – Whether amendments ultra vires – Whether committee misled – Whether amendments impliedly presented as neutral in effect – Housing Benefit (General) Regulations 1987, SI 1987/1971, reg 7.

The claimants were all members of the same church. They occupied community houses owned by the church under conditions of residence which created a genuine and legally enforceable liability on the part of the members to make payments in respect of their occupation. The conditions of residence required members to pool their income in a common purse, donate all their belongings to the church trust, actively to pursue a particular religious lifestyle, submit to the authority of the elders of the church, bring up their children in a specified way and participate wholeheartedly in the activities of the church and the communal life of the community houses. Under reg 7^a of the Housing Benefit (General) Regulations 1987, SI 1987/1971 (as amended by the Housing Benefit (General) Amendment (No 2) Regulations 1998) a person who was liable to make payments in respect of a dwelling was to be treated as if he were not so liable where, inter alia, the tenancy or other agreement pursuant to which he occupied the building was not on a commercial basis. In determining whether an agreement was not on a commercial basis 'regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable in law'. Prior to the amendment made by the 1998 regulations the claimants would not have fallen within reg 7. The procedure adopted in relation to amendments to regulations such as the 1987 regulations was that the Department of Social Security referred proposed amendments to an independent advisory committee on an informal basis so that the committee had the opportunity to decide whether it wished the proposed amendments to be referred to it formally

under the Social Security Administration Act 1992. The department's usual practice was to specify whether amendments were neutral in effect. It did not do so in relation to the amendments made by the 1998 regulations; its explanatory letter referred to 'additional categories' being included and explained that there was a saving provision for existing recipients of housing benefit. The claimants' applications for housing benefit were refused by a social security appeal tribunal, which held that the agreements under which they occupied their dwellings were not 'on a commercial basis', so that they were to be treated as if they did not have to pay rent and thus were not entitled to housing benefit. Their appeals to a social security and child support commissioner were refused. The claimants appealed against that decision contending (i) that the tribunal had erred in law in giving weight, in deciding whether the agreements were 'on a commercial basis', to factors which were manifestations of their religious beliefs, since that violated their right to freedom of religion guaranteed by art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998); and (ii) that the 1998 regulations were ultra vires in that the department had implied that the effect of the proposed amendments was wholly neutral, so misleading the advisory committee into agreeing that a formal reference under the 1992 Act was unnecessary.

Held – (1) The convention could not, and did not purport to, change facts or make evidence relevant to a factual inquiry inadmissible. Whether there was a commercial basis for a tenancy or other agreement was an issue of fact. In the instant case the arrangements were, for religious reasons, non-commercial. Religious, or indeed any other, reasons could not turn that which was non-commercial into that which was commercial (see [13]–[15], [60]–[61], below); *Thlimmenos v Greece* (2001) 31 EHRR 411 considered.

(2) The committee had not been told by implication that the proposed amendments were wholly neutral. On the contrary there had been clear indications that they might not be in some cases. Moreover, it was clear that the position of religious groups who lived communally had been explicitly drawn to the committee's attention. Therefore the committee had not been misled and the 1998 regulations were not ultra vires. The appeal would, accordingly, be dismissed (see [51]–[57], [64], [65], below).

Notes

For the right to freedom of thought, conscience and religion and the freedom to manifest religion and belief, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 156, 157.

For jurisdiction and vires in general, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) paras 74–76.

For the Human Rights Act 1998, Sch 1, Pt I, art 9, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

For the Housing Benefit (General) Regulations 1987, SI 1987/1971, see 10 *Halsbury's Statutory Instruments* (2004 issue) 162.

Cases referred to in judgments

Botta v Italy (1998) 4 BHRC 81, ECt HR.

Chapman v UK (2001) 10 BHRC 48, ECt HR.

Domalewski v Poland App No 34610/97 (15 June 1999, unreported), ECt HR.

Gaygusuz v Austria (1997) 23 EHRR 364, [1996] ECHR 17371/90, ECt HR.

- a* *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, [2003] ICR 405.
Logan v UK (1996) 22 EHRR CD 178, E Com HR.
Neill v UK App No 56721/00 (29 January 2002, unreported), ECt HR.
Nitecki v Poland App No 65653/01 (21 March 2002, unreported), ECt HR.
Poirrez v France App No 40892/98 (30 September 2003, unreported), ECt HR.
- b* *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.
R (on the application of Purja) v Ministry of Defence [2003] EWCA Civ 1345, [2004] 1 WLR 289.
- c* *R (on the application of Tucker) v Secretary of State for Social Security* [2001] EWCA Civ 1646, [2002] HLR 500.
R (on the application of Williamson) v Secretary of State for Education and Employment [2002] EWCA Civ 1926, [2003] 1 All ER 385, [2003] QB 1300, [2003] 3 WLR 482.
Sentges v Netherlands App No 27677/02 (8 July 2003, unreported), ECt HR.
Stubbings v UK [1997] 3 FCR 157, ECt HR.
- d* *Thlimmenos v Greece* (2001) 31 EHRR 411, [2000] ECHR 34369/97, ECt HR.
Walden v Liechtenstein App No 33916/96 (16 March 2000, unreported), ECt HR.
X v Netherlands (1986) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.
Zehnalová v Czech Republic App No 38621/97 (14 May 2002, unreported), ECt HR.
- e* **Appeal**
The claimants John Charles Campbell, Jeffrey John Haynes, Tina Bradbury and Ase Johannessen appealed from the decision of a social security and child support commissioner (Mr Commissioner Jacobs) on 20 May 2003 dismissing their appeals from the decision of the Social Security Appeal Tribunal sitting at Northampton on 15–17 April 2002 (Mr Richard Poynter) that the agreements pursuant to which the claimants occupied their dwellings fell within reg 7 of the Housing Benefit (General) Regulations 1987 as amended by reg 3 of the Housing Benefit (General) Amendment (No 2) Regulations 1998 so that their claim for housing benefit made to the defendants, the South Northamptonshire District Council and the Secretary of State for Work and Pensions, failed. The facts are set out in the judgment of Jacob LJ.
- g* *James Goudie QC and Paul Stagg* (instructed by *Mason Bullock*, Northampton) for the appellants.
James Findlay (instructed by *Kevin Paul Lane*, Northampton) for the council.
- h* *Philip Sales and Marie Demetriou* (instructed by the *Solicitor for the Department of Work and Pensions*) for the Secretary of State.
- j* 7 April 2004. The following judgments were delivered.

Cur adv vult

JACOB LJ (giving the first judgment at the invitation of Peter Gibson LJ).

[1] This appeal is from a decision of Mr Commissioner Jacobs given on 20 May 2003 when sitting as a social security and child support commissioner. He dismissed appeals in five cases decided by Mr Richard Poynter, the Social Security Appeal Tribunal (17 September 2002). Mr Commissioner Jacobs gave permission

to appeal to this court. The four appellants claim housing benefit (HB). This has wrongly been refused contends their counsel, Mr James Goudie QC. a

[2] The decisions below set out with commendable clarity the details of the facts. Essentially the position is simply as follows. All the appellants are members of the Jesus Fellowship Church (the church). They have become what are called 'style three' members. This means that they have agreed to live communally, pooling their income in a common purse, and giving all their capital to the church trust (the trust). They occupy properties owned by the church under agreements of various types. These agreements are genuine legal agreements, not shams. There are real legal liabilities for rent. It is not suggested the agreements were created to take advantage of the HB scheme. b

[3] The provision with which we are concerned is reg 7 of the Housing Benefit (General) Regulations 1987, SI 1987/1971, as amended by reg 3 of the Housing Benefit (General) Amendment (No 2) Regulations 1998, SI 1998/3257. This reads: c

'(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where—(a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis ... d

(1A) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable at law.' e

[4] The tribunal, upheld by the commissioner, held that the agreements pursuant to which the appellants occupied their dwellings were 'not on a commercial basis'. So by the regulation, they are treated as if they do not have to pay rent and hence are not entitled to HB.

[5] Mr Goudie has two main points, one under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the other relating to how reg 7 of the 1987 regulations came to be amended in 1998. His convention point does not challenge the validity of the regulation as such—his point relates to what he claims is an error of approach caused by a failure to take the convention into account in reaching the decision. His alternative point about the amendment, if right, would have the consequence that the amendment would be ultra vires and invalid. It is a pure domestic law point. f

THE CONVENTION POINT

[6] I begin by setting out the tribunal's reasons for holding that the agreements were *not on a commercial basis*. It did so in a model way, first identifying the 'commercial' factors and then those which were 'non-commercial'. g

'Factors which tend to suggest the agreements are commercial

75. The factors which tend to suggest that the agreements are commercial are as follows. (a) The trust is non-charitable. The trustees are under legal obligations to protect trust property, to ensure that it is only used for proper purposes and to secure a proper return on trust assets. Its finances are properly managed by Mr Farrant and are subject to detailed and rigorous financial controls. (b) Those conditions of residence which deal with the board and lodging charge create a genuine and legally enforceable liability on the part of community members to make payments in respect of the h

a occupation of community houses. (c) The trust takes reasonable measures to enforce payment of arrears of the board and lodging charge by former residents of community houses who have left. (d) The trust takes reasonable measures short of eviction against community members who are in arrears of the board and lodging charge but are otherwise in good standing with the church and who wish to remain as community members.

b

Factors which tend to suggest the agreements are not commercial

76. The factors which tend to suggest that the agreements are not commercial are as follows. (a) The lifestyle conditions which (inter alia) require members to pool their income in a common purse, actively to pursue a particular religious lifestyle, submit to the authority of the elders, bring up their children in a specified way and participate wholeheartedly in the activities of the church and the communal life of the community houses. (b) In the case of the elders' conditions of residence, the requirements to be responsible for oversight of the religious life of the community house, including matters of religious discipline. (c) Full style three members are required to donate all their belongings to the trust. (d) The board and lodging charge is not set so as to maximise the trustees' return on their investments but so as to cover costs and provide a reasonable return on capital. It is also relevant that: (i) the board and lodging charge is not based on the current values of the trust's property portfolio but on its historic cost; (ii) the board and lodging charge is not based on the actual value of the property occupied by the payor but on figures calculated on the value of the trust's property portfolio as a whole; (iii) the board and lodging charge is not related to the size of the accommodation occupied by the payor and his or her family; (iv) as the board and lodging charge is based on bed-spaces, the return which the trust receives from the elders (who are, in effect, the head licensees) varies according to the number of occupiers. (e) The board and lodging charge can be increased by the trustees, on occasion with retrospective effect, without consulting or securing the prior agreement of the payor. (f) The elders may unilaterally change the sleeping arrangements of community members. (g) The elders' conditions of residence may be unilaterally changed by the trustees. (h) The procedure of merging a common purse which is in financial trouble with one which is not. The possibility that one group of sub-licensees of a landlord should intervene to assist the landlord by assuming the financial responsibilities of another group of the landlord's sub-licensees is without any parallel in the commercial letting market. (i) Community members in good standing are permitted to run up arrears of board and lodging charge indefinitely without being evicted as long as the failure to pay the charge results from factors outside that member's control, such as non-payment of housing benefit. Mr Farrant said in evidence that, in the long run, the trustees stood a better chance of recovering their money by keeping the person with arrears as a style three member and that since a continuing style three member would already be paying all of his or her income into the common purse there would be no assets against which any legal judgment could be enforced. That may be so in the short or even the medium term but ultimately there would come a point when a commercial landlord would cut his or her losses and seek to replace a tenant who could not pay the ongoing charge with one who could, even at the risk of making it more difficult to recover any arrears. A

commercial landlord would not have permitted the elders of ... to accumulate arrears in excess of £84,000 without taking steps to terminate their licenses no matter what the reasons for the arrears may have been. (j) When pursuing arrears, even through the courts, the trust or the elders do not normally make a claim for interest.' a

[7] For convenience I set forth the convention provisions relevant to this case: b

'Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence. c

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedom of others. d

Article 9

Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. e

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others ... f

Article 14

Prohibition of discrimination g

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status ... h

The First Protocol

Article 1

Protection of property j

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general

a interest or to secure the payment of taxes or other contributions or penalties.'

[8] Mr Goudie's argument goes in a number of steps. I take them from his skeleton argument. (1) Was the tribunal obliged to consider the appellants' convention rights in drawing the inference about commerciality? (2) Are the appellants being discriminated against? (3) Was art 14 engaged? (4) Was the discriminatory treatment imposed in furtherance of a legitimate aim? (5) Was the discrimination proportionate to the aim?

b [9] As will be seen from what I say below, I would answer these questions as follows: (1) no; (2) no; (3) no because there is no violation of any substantive article; (4) there is a legitimate aim and no discriminatory treatment; and (5) in any event if there is discrimination it is proportionate in furtherance of a legitimate aim.

COMMERCIALITY AND THE CONVENTION

[10] Mr Goudie accepts that this point is crucial to his argument. In essence he contends that the tribunal was wrong in law to take into account any actual facts if the cause of them is the appellants' religious beliefs. His argument is that the overall evaluation of whether there is a *commercial basis* involves taking into account a number of primary detailed facts—as the tribunal so clearly set out. Thus the question is analogous to the exercise of a discretion where one weighs relevant factors. In his skeleton argument he actually went so far as to suggest that the determination of whether or not there was a commercial basis was an exercise of discretion.

e [11] Perhaps recognising that would not do (and it obviously will not) in oral argument he shifted his position. He said the overall evaluation 'had a lot in common' with the exercise of a discretion in which one weighed a number of factors. And, he submitted, in weighing the various factors, the weight to be given to those factors the reason for which was religious belief should be nothing or very slight. This was because the convention was engaged—the factors were manifestations of the belief. To take into account factors due to manifestation of religion was to take into account factors which were not lawfully relevant.

[12] Mr Goudie's argument then proceeded to examine the various negative factors identified by the tribunal, factors which he accepted overlap in part with one another. Most of the factors had some connection with the religious belief indeed only (c) was wholly untouched by belief. The key factor was (a). If weight was given to these factors, manifestations of religious belief, then, he submitted there was an interference with the appellants' religious practices contrary to art 9. It followed that the enjoyment of the right to freedom of religion—and particularly the freedom to manifest that religion—should be secured by art 14.

h [13] I would reject this argument. The issue of whether or not there is a *commercial basis* is one of fact. True it is that this overall question involves weighing a number of factors—sub-facts so to speak. But everything in the evaluation is purely factual. The convention cannot and does not purport to change facts or make evidence relevant to a factual inquiry inadmissible. The true position is that the arrangements are non-commercial for religious reasons. Religious, or indeed any other, reasons cannot turn that which is non-commercial into that which is.

j [14] Although we were taken to a number of authorities, both in the United Kingdom and in the European Court of Human Rights (ECHR), none came near to establishing that at the stage of a factual investigation reality should be ignored.

Perhaps the nearest, but only at first blush, was *Thlimmenos v Greece* (2001) 31 EHRR 411. A Jehovah's witness was convicted of refusing to enlist in the army. Greek law said that anyone who had a conviction could not be a chartered accountant. The reason for the conviction did not matter. The ECHR held that there was a violation of art 14 taken in conjunction with art 9. It said (at 424–425):

'44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different ...

47. The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. The Court takes note of the Government's argument that persons who refuse to serve their country must be appropriately punished. However, it also notes that the applicant did serve a prison sentence for his refusal to wear the military uniform. In these circumstances, the Court considers that imposing a further sanction on the applicant was disproportionate. It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony.

48. It is true that the authorities had no option under the law but to refuse to appoint the applicant a chartered accountant. However, contrary to what the Government's representative appeared to argue at the hearing, this cannot absolve the respondent State from responsibility under the Convention. The Court has never excluded that legislation may be found to be in direct breach of the Convention. In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants.'

[15] So it was the Greek law itself which violated the convention. By way of contrast in this case no challenge is made to the relevant law, amended reg 7. The argument before us did not go into why there was no challenge. Mr Sales, for the Secretary of State, said that if there had been a challenge he had plenty of answers to it. What is clear is that *Thlimmenos v Greece* is not authority for the proposition that facts are changed by the convention.

[16] Since Mr Goudie accepts that this first point is crucial to the rest of his argument it is not necessary to go further. I will, however, consider some of the

a later stages of the argument too, for in my judgment his argument fails at later stages too. The points of failure are: (a) the absence of a material interference with the appellants' religious practice; (b) the proportionality of the grounds for refusal of HB; (c) the lack of a sufficient nexus (close link) between the alleged discrimination and the refusal of HB.

b NO MATERIAL INTERFERENCE

[17] It is said that reg 7(1)(a) indirectly discriminates against the appellants because the lifestyle conditions of residence are manifestations of their religious practice. In this context 'manifestations' should be given a wide interpretation (see *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, [2003] 1 All ER 385, [2003] QB 1300). So, it is said, refusal of HB is a material interference with the appellants' religious practices—without HB they will have to abandon or modify lifestyles dictated by their religious beliefs.

[18] But I cannot see that is so. The tribunal so held as a matter of fact. It put it this way:

d '102. Further, the type of communal living desired by the appellants is not incompatible with the receipt of housing benefit. In order to receive housing benefit, it is not necessarily that, as between themselves, they should abandon any of their religious beliefs, practices or discipline, or the pooling of their income and capital, or the donation of surplus income to the church.

e All that is required is that they should have a normal commercial relationship with those who let or licence them to occupy their homes. Given my conclusions on the commerciality issue, this will require that the terms on which they occupy those homes should not impose those religious practices and discipline as a condition of occupation and that the properties occupied should not be let or licensed by the church, the trust or, possibly, the housing association. (In this, the position of the appellants is analogous to that of the claimant in *R (on the application of Tucker) v Secretary of State for Social Security* [2001] EWCA Civ 1646, [2002] HLR 500 who is free to rent accommodation from any landlord in the country who is willing to let it except from the father of her child). It is no part of the statement of faith and practice that the communal living which is considered desirable should necessarily take place in property owned by the church or persons and organisations connected with it.'

f

g

[19] We were taken to the church's 'statement of faith and practice'. I can find nothing in that which suggests the tribunal's conclusions were wrong. So far as I can see you can be a member of the church, even a style three member, and yet have entirely commercial arrangements vis-à-vis a commercial landlord. And if you otherwise qualify for HB under that arrangement you will be entitled to it.

[20] Furthermore this point seems to be one of fact and appeal to this court lies only on points of law (see s 15 of the Social Security Act 1998).

j PROPORTIONALITY AND INSUFFICIENT NEXUS

[21] Moreover I can see no real distinction between this case and that of *R (on the application of Tucker) v Secretary of State for Social Security* [2001] EWCA Civ 1646, [2002] HLR 500. HB was refused under one of the other heads of the amended reg 7(1)—reg 7(1)(d). This is, in effect, where the landlord is responsible for the applicant's child. It was said that the circumstances were

within the scope of art 8 (respect for private and family life and home) and that art 14 was engaged when read together with art 8. Mr Goudie argues that here, though he suggested his strongest case was art 14 with art 9. Waller LJ (with whom the other members of the court agreed) assumed that the facts brought the matter within the scope of art 8 on the basis that art 8 with art 14 applied. On that assumption he upheld Maurice Kay J's rejection of an ECHR attack on the provision. It was not disproportionate, aimed as it was against abuse.

[22] The position is exactly the same here. Assume that art 14 with art 9 applies. Is the regulation or its operation disproportionate? In my view manifestly not. The practice of religious beliefs of any kind does not receive a positive subsidy from the state. Yet if the appellants were right, their special form of communal non-commercial arrangements would be entitled to a subsidy by way of HB because it was based on religious belief. Uniquely, as compared with that of any other religion, the practice of the applicants' religion would get a subsidy.

[23] Mr Sales pointed to other cases which, he submitted, were stronger than the present yet in which it was held there was no breach of convention rights.

[24] In *Logan v UK* (1996) 22 EHRR CD 178 the European Commission of Human Rights held inadmissible a claim by a father that the amount of maintenance he was ordered to pay left him with inadequate funds to enable him to maintain reasonable contact with his children in violation of art 8. That was rejected. So also was his complaint that the maintenance payments restricted his ability to practise his religion by restricting his ability to attend places of Buddhist worship (at 181): 'The Commission is not persuaded ... that visits to the priories can be considered as an indispensable element of the applicant's religious worship.'

[25] In *Botta v Italy* (1998) 4 BHRC 81, a physically disabled person complained to the carabinieri that the relevant authorities (eg the mayor) had failed to equip bathing establishments with appropriate facilities required by Italian law. He said there was a violation of art 8. The ECHR held there was no violation of art 8 because there was no direct link between the measures he said should be taken and his private life. And the ECHR made it clear that art 14 complements the substantive provisions of the convention—you have to find that a substantive right is engaged before art 14 can come into play.

[26] It is to be noted that the ECHR applied a 'direct link' test. Here, submitted Mr Sales, in my judgment correctly, there can be no question of a 'direct link' between the refusal of HB and the rights of the appellants under art 9 to their freedom to manifest their religion. The link here is even more tenuous than the insufficient link in *Botta v Italy*.

[27] In *Chapman v UK* (2001) 10 BHRC 48 a gipsy lived in a caravan on her own land in violation of planning control. She said there was a violation of her art 8 rights, that there was discrimination because she was a gipsy and an interference with her right to respect for private life, family life and home. The ECHR rejected the claim, holding that enforcement of planning control was proportionate and legitimate in a democratic society. The fact that alternative accommodation was not available at suitable prices was not relevant. The ECHR accepted that the imposition of far-reaching positive obligations on a state was not required by art 8.

[28] This seems to me to be a point of importance. There is a real difference between requiring a state to observe the rights conferred by the convention in a negative way—refraining from acts which would interfere with those

a rights—and a positive obligation on a state to subsidise or allocate scarce resources to enable a particular lifestyle or belief to be practised. Proportionality dictates that this must be so.

[29] Another example of the application of the difference between negative and positive obligations on a state is *Sentges v Netherlands* App No 27677/02 (8 July 2003, unreported). The applicant had MS. The evidence was that the provision of some relatively expensive equipment would greatly improve his life. The ECHR said:

c 'In the instant case the applicant complained in substance not of action but of a lack of action by the state. While the essential object of art 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, inter alia, *X v Netherlands* (1986) 8 EHRR 235 at 239–240 (para 23), *Stubbings v UK* [1997] 3 FCR 157 at 172 (para 62)). The court has held that art 8 may impose such positive obligations on a state where there is a direct and immediate link between the measures sought by an applicant and the latter's private life (see *Botta v Italy* (1998) 4 BHRC 81 at 88–89 (para 34)). However, art 8 does not apply to situations concerning interpersonal relations of such broad and indeterminate scope that there can be no conceivable link between the measures the state is urged to take and an individual's private life (see *Botta v Italy* at 89 (para 35)). The court has also held that art 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the state's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life (see *Zehnalová v Czech Republic* App No 38621/97 (14 May 2002, unreported)). Even assuming that in the present case such a special link indeed exists—as was accepted by the Central Appeals Tribunal—regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by states in this respect in determining the steps to be taken to ensure compliance with the convention (see *Zehnalová v Czech Republic*). This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited state resources ... In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court ... In the present case the court notes that the applicant has access to the standard of health care offered to all persons insured under the Health Insurance Act and the Exceptional Medical Expenses Act (see *Nitecki v Poland* App No 65653/01 (21 March 2002, unreported)). It thus appears that he has been provided with an electric wheelchair with an adapted joystick. The court by no means wishes to underestimate the difficulties encountered

by the applicant and appreciates the very real improvement which a robotic arm would entail for his personal autonomy and his ability to establish and develop relationships with other human beings of his choice. Nevertheless the court is of the opinion that in the circumstances of the present case it cannot be said that the respondent state exceeded the margin of appreciation afforded to it.

[30] All of that reasoning applies here. It is true that Mr Goudie primarily relies upon art 9 rather than art 8 but I can see no relevant difference between the two articles. Neither right is absolute. Article 9 in particular confers a right on all, including the applicants, to manifest their religion. It does not confer a right to have that manifestation subsidised by the state. The state is in the best position to allocate its limited resources—which includes the provision of HB.

THE ARTICLE 1 OF THE FIRST PROTOCOL POINT

[31] Although not advanced below, we permitted Mr Goudie to raise the point. The oral argument was supplemented by written submissions from Mr Sales and Mr Goudie. Mr Goudie contended that the removal of the applicants from their previous entitlement to HB amounted to 'deprivation of a possession' within the meaning of art 1 of the First Protocol to the convention (1P1). The removal from entitlement was effected by the 1998 amendment to the 1987 regulations (see below for more detail).

[32] At first blush this is a startling proposition. The appellants never 'owned' a right to HB in any meaningful sense. HB is a non-contributory state benefit given to certain persons who have housing needs and who satisfy the relevant criteria. If it is a right, then so far as I can see, any form of state benefit would count as a 'possession'. So, once a state has allowed payment of a benefit, it could never be withdrawn or even, I suppose, reduced. And Mr Goudie did not shrink from so contending.

[33] Standing in the way of Mr Goudie's proposition is the decision of this court in *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577. It was a case concerned with jobseeker's allowance and income support—welfare benefits which it was not suggested differed in any material way from HB. After reviewing the Strasbourg authorities, particularly the case of *Gaygusuz v Austria* (1997) 23 EHRR 364, Laws LJ concluded ([2003] 3 All ER 57 at [47]):

'It seems to me, then, that the law of the convention is settled on this point as to the scope of "possessions" for the purpose of art 1P. The policy of the cases is, I think, that while states are in general free to grant, amend or discontinue social security benefits and to change the conditions for entitlement to them as they please without any convention constraint, yet where contributions are exacted as a price of entitlement the contributor should be afforded a measure of protection: it has, so to speak, cost him something to acquire the benefit.'

[34] If that conclusion is right, then Mr Goudie must fail here. But, he says, it is wrong; things have moved on in Strasbourg since *Carson's* case. Although he refers to other cases, at the heart of his argument is the recent Strasbourg case of *Poirrez v France* App No 40892/98 (30 September 2003, unreported). The case concerned a refusal by France to award to a non-French national an allowance for

a disabled adults (allocation aux adultes handicapés) (AAH). The ECHR held that AAH was a 'possession' within 1P1 and that there was a violation of art 14. It said:

b '37. The court also points out that it has already held that the right to emergency assistance—in so far as provided for in the applicable legislation—is a pecuniary right for the purposes of art 1 of the First Protocol to the convention. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions" (see *Gaygusuz v Austria* (1997) 23 EHRR 364 at 380–381 (para 41)). In that connection the court considers that the fact that, in that case, the applicant had paid contributions and was thus entitled to emergency assistance (at 380 c (para 39)) does not mean, by converse implication, that a non-contributory social benefit such as the AAH does not also give rise to a pecuniary right for the purposes of art 1 of the First Protocol.

d 38. In the instant case it was not disputed that the applicant had been registered as 80% disabled and issued with an invalidity card. His claim for an allowance for disabled adults was refused solely on the grounds that he was neither a French national nor a national of a country that had signed a reciprocity agreement in respect of the AAH. Accordingly, the court notes that the allowance could be awarded both to French nationals and to nationals of a country that had signed a reciprocity agreement with France to that end.

e 39. In the court's view, the fact that the applicant's country of origin had not signed such an agreement, whereas the applicant had been issued with an invalidity card, resided in France, was the adopted son of a French citizen residing and working in France and, lastly, had previously been receiving the minimum welfare benefit, did not in itself justify refusing him the allowance in question. As the allowance is moreover intended for persons with a disability, the court also refers to the recommendation of the Committee of Ministers no R (92) 6, adopted on 9 April 1992 ... which is aimed at the adoption of a policy and measures adapted to the needs of the persons with disabilities, and to the conclusions of the European Committee of Social Rights ...

g 40. Furthermore, the court notes that the nationality condition for the award of the allowance was abolished by the Act of 11 May 1998. The AAH has therefore been awarded without any distinction on grounds of nationality since that Act was enacted. The applicant has indeed received it since June 1998, that is immediately after the Act was passed.

h 41. The court considers finally that the refusal to award the allowance to the applicant prior to June 1998 was based on criteria—possession of French nationality or the nationality of a country having signed a reciprocity agreement with France in respect of the AAH—which amount to a distinction for the purposes of art 14 of the convention.

j 42. Having regard to all the foregoing considerations, the court holds that the applicant had a pecuniary right for the purposes of art 1 of the First Protocol and that art 14 of the convention is also applicable in the instant case.'

[35] I do not read this as laying down a general rule that all social security benefits are 'possessions'. If that were so, then all reference to 'contribution' in the other cases would be misleading because it would be wholly irrelevant. I here refer to *Gaygusuz v*

Austria (1997) 23 EHRR 364 at 380–381 (para 41), *Neill v UK* App No 56721/00 (29 January 2002, unreported), *Domalewski v Poland* App No 34610/97 (15 June 1999, unreported), *Walden v Liechtenstein* App No 33916/96 (16 March 2000, unreported) and the cases referred to by Laws LJ in *Carson's* case.

[36] Mr Goudie submits that these cases are all admissibility cases only and that *Poirrez v France* has swept all that away. I cannot see that is so. *Poirrez v France* seems to me to be a case on very special facts, facts which indeed the ECHR felt it necessary to take into account as the rather lengthy citation shows.

[37] Mr Goudie suggests that *Carson's* case has itself been departed from by this court in *R (on the application of Purja) v Ministry of Defence* [2003] EWCA Civ 1345, [2004] 1 WLR 289. This was the claim concerning the pensions of Gurkha soldiers. Mr Goudie submitted that there was no contribution there. I do not agree. On the contrary, Simon Brown LJ's judgment (at [42]) explicitly considers that although there may have been no distinct abatement of pay for pension provision, the Gurkhas' overall pay package in effect included a pension entitlement. Far from dropping the contribution requirement, this court looked for and found what was in substance a contribution.

[38] Moreover in *Poirrez v France* there was direct discrimination—refusal of AAH because the applicant was not French (or a citizen of a relevant convention country). Hence art 14 came into play. It by no means follows, even if one regards HB as a 'possession', that an indirect link with what is said to be discriminatory state conduct would apply. On the contrary the reasoning in *Sentges v Netherlands* App No 27677/02 (8 July 2003, unreported) seems to me to apply just as much to the 1P1 argument as it does to those under arts 8 and 9. The reason that the present appellants are being refused HB is not because of their religious practices, it is because their arrangements are non-commercial.

[39] There is a further reason in this particular case for rejecting the 1P1 argument. The amendment to the regulation was made before the Human Rights Act 1998 came into force. The 1998 Act was not retrospective. So when the Act came into force the appellants were not entitled to HB and thus were not deprived of a 1P1 property. Mr Goudie's answer to this point is that the relevant decisions to refuse HB were made after the Act came into force. That misses the point. At the date when the Act came into force there was no entitlement to HB under the amended regulation and so there could be no 'possession'.

THE ULTRA VIRES POINT

[40] It is common ground that the amending regulations would be ultra vires and invalid if a committee called the Social Security Advisory Committee (the committee) was misled as to the effect of the proposed amendments into agreeing that a formal reference to it was unnecessary pursuant to s 173(1) of the Social Security Administration Act 1992. The machinery is described in detail in the judgment of Peter Gibson LJ in *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, [2003] ICR 405 and there is no need to repeat it here. In this case the only question is whether the committee was misled in the advice it was given which led to its decision not to have the draft regulations formally referred to it.

[41] Before I turn to the relevant parts of the documents leading up to the decision I should state the position before the amendment. The unamended reg 7 provided:

'The following persons shall be treated as if they were not liable to make payments in respect of a dwelling—(a) a person who resides with the person

a to whom he is liable to make payments in respect of the dwelling and either
... (ii) the tenancy or other agreement between them is other than on a
commercial basis ...'

[42] The relevant proposed change was therefore to widen the class of those
who were not entitled to HB. Prior to the amendment the exclusion applied to a
b person who both resided with [his landlord] *and* had an agreement not on a
commercial basis. After, the former condition was dropped, leaving just the *other
than commercial* test. Prior to the amendment the appellants did not reside with
their landlords and so the exclusion from HB did not apply to them even if the
arrangements were *other than commercial*.

[43] Before a meeting of the committee on 7 October 1998, it was given the
c following papers: (i) a note (I think prepared by the secretary to the committee);
(ii) the draft amending regulation; (iii) a letter from the Department of Social
Security (the department) of 2 September 1998 to the secretary of the committee;
(iv) a departmental note on comments received from the local authority
associations; (v) some comments made by the local authority associations. It was
not given (as probably would be better practice) the unamended regulation.

d [44] The letter of 2 September said:

"These regulations aim to simplify and clarify long standing Housing
Benefit provisions against abuse. Housing Benefit is generally available to
people on low incomes who have a genuine rent liability. However, some
e people and some organisations occasionally set out to exploit the social
security system, and construct rent liabilities whose primary purpose seems
to be to bring tenants within Housing Benefit. Successive governments have
sought to deny claimants access to Housing Benefit in these circumstances
and the current regulation 7(1) excludes from benefit people whose liabilities
have been "created to take advantage of the Housing Benefit scheme".
f However, local authorities have found these regulations increasingly
difficult to apply and interpret. In a recent Appeal Court hearing, involving
a determination that the liability of an Elder of the Jesus Fellowship Church
has been created to take advantage of the Housing Benefit scheme, the
judgment left local authority Housing Benefit departments with no clear test
to apply in such cases. The proposed amendment to regulation 7(1) seeks to
g provide such a test, and to make such determinations easier to understand
for both LA housing benefit personnel and for claimants. We propose to
make and lay the regulations as soon as is practicable with a commencement
date agreed with the Local Authority Associations. This proposed
amendment does not change the policy intention on who should be treated
h as not liable, but it does simplify interpretation of the regulation. It attempts
to achieve this in two ways. Firstly, it states the basic principle involved in
the regulation, which is that HB should not be payable where the substance
of the liability amounts to an abuse of the Housing Benefit scheme.
Secondly, it provides a list of the situations in which such a liability can be
j said to have arisen. Some of these categories are already contained in
Regulation 7, ie those whose liability is to a close relative with whom they
reside, and some joint tenants who were previously non-dependents
(sub-paragraphs (b) and (g)). However, we have included additional
categories to represent particular cases where a person has arranged his
affairs in such a way as to be liable to make payments for his accommodation
when he could have avoided such a situation and still been adequately

accommodated. Such arrangements are those that were meant to be covered by the so-called “contrived tenancy” provision in Regulation 7(1)(b), and they are the sorts of cases on which housing benefit departments seek guidance from DSS Headquarters on a daily basis. There should be no effect on genuine Housing Benefit claimants from this amendment. It is intended to be a simplification of the existing provision, that is clear to administrators and claimants alike. We would expect that any claimants affected by the amended provision would have been similarly affected by the current one. We hope, however, that the clearer wording and the explicit list will mean that not only will benefit be refused when people seek to exploit the benefit system, but that people who are not seeking to do so will receive their proper entitlement. To prevent LAs having to search for claims which *may* be affected, there is a saving provision for existing claimants which provides that the change does not become effective until the end of their current benefit period.’

[45] The note accompanying the papers said:

‘Attached at Annex A is a letter from the Department seeking the Committee’s approval to make the above regulations which would simplify and clarify the Housing Benefit provisions against abuse. This would be done by providing a test to allow local authorities to decide whether a rent liability had been constructed to bring the tenant within Housing Benefit and by making such determinations easier for all involved to understand. The proposals would not alter existing policy on non-liability for rent.’

[46] The form of the draft amended regulation read:

‘(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where the appropriate authority is satisfied that the substance of the liability amounts to an abuse of the housing benefit scheme established under Part VII of the Social Security Contributions and Benefits Act 1992.

(1A) Without prejudice to the generality of paragraph (1), persons falling within that paragraph include any person: (a) whose tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis.’

[47] The comments from the local authority associations included the following: ‘The added list is essential to avoid confusion and make the regulation “tighter” in certain cases.’

[48] The departmental note on the comments from the local authority associations included the following:

‘7(1B)(a) (referred to as 1A(j)) is not intended to tackle religious groups who live communally. Insofar as they seek to abuse the HB scheme by the terms of their residence, we would expect them to be caught by 1A(a) ie non-commercial arrangements.’

[49] The committee met on 7 October. The minutes record that it was concerned about a lack of definition of ‘abuse’ and that the wording was too general. There was no discussion about whether or not the overall effect might be to widen the excluded classes. Professor Ogus, a distinguished lawyer in this field and a member of the committee, particularly followed up after the meeting

a on the ambiguity of the word 'abuse'. A letter from the department to the secretary of the committee in dealing with this included the sentence: 'The new draft regulation is a clarification, not a change of direction.'

b [50] Mr Goudie contends that the committee was misled in much the same way as it was misled in *Howker's* case. In that case the department's practice was found to be that a proposed amendment to the regulations was specifically marked 'technical', 'neutral', 'adverse' or 'beneficial'. The amendment in question was given the indicator 'neutral' when the correct indicator should have been 'adverse'. The prior regulation was not supplied. The commissioner and Court of Appeal had little difficulty in holding that the committee had been misled.

c [51] Although there was no specific marking of 'neutral' here, Mr Goudie suggests that certain passages in the material supplied to the committee in the case here had the same effect. He particularly points to that part of the department's letter of 2 September saying that the proposed amendment 'does not change the policy intention on who should be treated as not liable', and the statement that there was 'clarification, not a change of direction'. He also d submits that the word 'abuse' in the papers was used merely to describe the conduct of those who tried artificially to arrange things so as to be entitled to HB. Thus, he submits, the committee did not appreciate that people such as his clients (whose arrangements are not made for the purpose of obtaining HB) were or might be excluded when they had been included before.

e [52] I reject that submission. I do so for two reasons. Firstly it seems to me to be clear that in general the committee were not told by implication that the proposals were wholly neutral. On the contrary there were clear indications that they might not be in some cases. The reference to 'a saving provision' in the letter of 2 September can only refer to this. Moreover the same letter explicitly referred to 'additional categories'. The local authority association's comment f about making the regulation 'tighter' shows that it too understood that the scope would be narrowed. And that comment was itself before the committee.

[53] Secondly it seems to me clear that the position of religious groups who lived communally was explicitly drawn to the committee's attention in the department's comments on the local authority associations observations. The committee was told that it was expected they would be caught by the g 'non-commercial arrangements' provision. True it is the same comment describes that as 'abuse' but I think it is clear that the term in context is not being used in a pejorative sense—in context it means those who as a matter of policy ought not to receive HB. That particularly appears, for instance, from the draft regulation itself which began with a general reference to 'abuse' in sub-para (1) h and went on to particularise instances in sub-para (1A).

[54] I therefore conclude that the committee was not misled and reject the ultra vires point.

[55] In the result I would dismiss the appeal.

j SIR WILLIAM ALDOUS.

[56] I have read the judgments of Peter Gibson and Jacob LJ. I agree that the appeal should be dismissed for the reasons they give.

PETER GIBSON LJ.

[57] I agree that this appeal should be dismissed. In deference to the careful arguments of Mr Goudie QC for the appellants, Mr Sales for the Secretary of

State and Mr Findlay for South Northamptonshire District Council, I will briefly state my reasons in my own words. a

[58] It is not in dispute that the appellants can only succeed if they can show that there has been a relevant error of law. Two errors of law are alleged by Mr Goudie. The first is that the Social Security Appeal Tribunal erred in law by weighing the evidence in a way that infringed the appellants' rights under the Human Rights Act 1998. The second is that Mr Commissioner Jacobs erred in law in not recognising that the amendments made in 1999 to reg 7 of the Housing Benefit (General) Regulations 1987, SI 1987/1971 were ultra vires because the Department of Social Security (the department) misled the Social Security Advisory Committee (the committee) in the course of the making of the new regulation. b
c

HUMAN RIGHTS

[59] On the first point, Mr Goudie submits that the tribunal, in applying the regulation and in determining whether or not the elders' tenancy agreements were 'other than on a commercial basis' discriminated against the appellants on the ground of their religious beliefs contrary to art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) read in conjunction with arts 8 and 9 or art 1 of the First Protocol to the convention (1P1). He argues that in making that determination, the tribunal was drawing an inference and had a discretion as to the weight to be given to the various primary facts. He says that the tribunal is obliged pursuant to s 6(1) of the 1998 Act to leave out of account, or give no weight to, any element of the relationship between the appellants and their landlords which suggested that the agreement was not on a commercial basis if that element existed as a result of the appellants' religious beliefs. d
e

[60] I am not able to accept that submission. If the tribunal were given a discretion, then it is not disputed that that discretion must be exercised conformably with the convention. However, it is plain that reg 7(1)(a) gives neither the local authority nor the tribunal any discretion at all. What has to be decided is a pure question of fact as to whether or not the tenancy agreements are or are not on a commercial basis. If a relevant factor has some relation to the appellants' religious beliefs, it is not for the local authority or tribunal to leave that factor out of account. That would be to distort the test. Mr Goudie was invited to indicate which of the factors which the tribunal helpfully listed as tending towards or against the commerciality of the tenancy agreements should, on his submission, be left out of account. The impracticality of such a blue pencil exercise was rapidly demonstrated and the result was wholly to distort the assessment required by the regulation. I might have understood the submission better if it was directed at a proposition that the regulation itself contravened the 1998 Act, but that was not Mr Goudie's submission, no doubt rightly. f
g
h

[61] Accordingly, I would reject Mr Goudie's first ground, even before one comes to the difficulties which he faces over establishing that the facts fell within the ambit of arts 8 or 9 or art 1P1 so as to be capable of bringing art 14, which has no independent effect, into play. I add too that the argument based on art 1P1 was not even put forward before the commissioner nor was it raised by the appellant's notice. I do not find it necessary to say anything further on those difficulties nor on the arguments of Mr Sales rebutting Mr Goudie's contentions. j

HOWKER'S CASE

a [62] Mr Goudie's second point was not raised before the tribunal because the decision of this court on which it was based, *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, [2003] ICR 405, came after the tribunal decision.

b [63] Mr Goudie submits that the committee was materially and seriously misled by comments made by the department to it over the scope of the proposed changes just as the committee was found to have been misled in *Howker's* case. He says that while the department did not expressly attach the indicator 'neutral' to the proposed amendment, that was the effect of what was said, the content not the categorisation being relevant.

c [64] I accept that some of the remarks made by the officials to the committee, for example that the amendments were merely to simplify and clarify the existing regulations, could have been better expressed. Nevertheless, I do not see the facts of the present case as being comparable with those in *Howker's* case. In the department's letter of 2 September 1998, it was stated that the proposed amendment included 'additional categories', that is to say categories additional to those already covered by reg 7. The reference to 'abuse' was not, to my mind, intended to define who should now become excluded from benefit. It was made plain (in the document headed SSAC 44/98 Annex C) to the committee that by the terms of their residence some religious groups living communally might be caught by reg 7(1)(a) because the tenancy agreements did not satisfy the test of commerciality. It is clear that members of the committee focussed specifically on the effect of the amendment. In my judgment the commissioner was right to conclude that the committee was not misled.

e [65] I too would dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Somerset-Leeke and another v Kay Trustees and another

[2003] EWHC 1243 (Ch)

CHANCERY DIVISION

JACOB J

1 MAY 2003

Costs – Security for costs – Claimant ordinarily resident out of the jurisdiction – Claimant resident in Monaco – Rules of procedure empowering court to order security for costs against such a claimant or appellant – Claimant providing no information as to assets in Monaco – Whether security for costs to be ordered – CPR 25.13.

The claimants brought an action against the defendants. The first claimant was resident in Monaco, having moved there well before any of the matters with which the case was concerned. An English judgment could be registered in Monaco, upon payment of a fee, and enforced by the Monegasque court. The defendants applied for an order for security for costs. Under CPR 25.13^a the court had a discretion to make such an order where, inter alia the claimant was resident outside the jurisdiction but not resident in any state where the Brussels and Lugano Conventions on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (as set out in the Schedules to the Civil Jurisdiction and Judgments Act 1982) (the enforcement conventions) applied, or where the claimant had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. The master refused the application and the defendants appealed, contending, inter alia, (i) that the first claimant had failed to provide any information that he had any assets in Monaco against which any order of the Monegasque court enforcing a High Court order could be operated and that it was incumbent upon him to disclose where his assets were; and (ii) that his move to Monaco had made it difficult to enforce an order against him.

Held – There was no general principle that, unless a claimant residing outside the jurisdiction in a country where the enforcement conventions did not apply disclosed where his assets were located, that security for costs would be ordered. In the instant case, to order security for costs against the first claimant would be a discriminatory exercise of the court's discretion, as domestic judgments could be enforced and registered in his country of residence just as well as in countries where the conventions applied. There was no evidence that the first claimant had, by moving countries, made it more difficult to recover costs against him. The appeal would therefore be dismissed (see [8], [10], [16], [17], below).

Nasser v United Bank of Kuwait [2002] 1 All ER 401 applied.

Notes

For security for costs, see 37 *Halsbury's Laws* (4th edn reissue) paras 834–850

^a CPR 25, so far as material, is set out at [2], [3], below

Cases referred to in judgment

- a** *AIMS Asset Management v Kazakhstan Investment Fund Ltd* [2002] EWHC 3225 (Ch), 22 May 2002, Ch D.
Nasser v United Bank of Kuwait [2001] EWCA Civ 556, [2002] 1 All ER 401, [2002] 1 WLR 1868.
- b** **Appeal**
Kay Trustees and Kay Consultants Ltd, the defendants to an action brought by Mr Somerset-Leeke and Brunel Trustees Ltd, appealed against the decision of Master Bowman whereby he refused the application of the defendants to order security for costs under CPR 25.12. The facts are set out in the judgment.
- c** *Justin Fenwick QC* and *David Lord* (instructed by *Tarlo Lyons*) for the defendants.
Catherine Newman QC and *Evan Ashfield* (instructed by *Evans Dodd*) for the claimants.

JACOB J.

- d** [1] This is an appeal from a decision of Master Bowman whereby he refused to order security for costs. There are two claimants, an individual, Mr Somerset-Leeke, and a company, Brunel Trustees Ltd. Mr Somerset-Leeke is resident in Monaco. He took up residence there in 1994, well before any of the matters with which this case is concerned. He moved there for tax purposes. That is accepted. The company is a trustee of a pension fund of which
- e** Mr Somerset-Leeke is the sole beneficiary.
- [2] The matter came before the master in what I think was a muddled and confusing state. CPR 25.13(1) provides:
- f** ‘The court may make an order for security for costs under rule 25.12 if—(a) it is satisfied, having regard to all the circumstances of the case that it is just to make such an order; and (b) (i) one or more of the conditions in paragraph (2) applies ...’

- Paragraph (2) sets out under heads (a) to (g) the conditions. Condition (a) is that the claimant is (1) resident out of the jurisdiction, but (2) not resident in a Brussels or Lugano state (putting it shortly) (see the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (as set out in Sch 3C to the 1982 Act)).
- g**

- [3] Ground (g) is that the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. Ground (c) is, in effect, a repeat of s 726 of the Companies Act 1985. It applies where the claimant is a company and there is reason to believe that it would be unable to pay the defendant's costs if ordered to do so. Ground (d) is worth noting in passing, that the claimant has changed his address since the claim was
- j** commenced with a view to evading the consequences of the litigation. Grounds (g) and (d) (which are clearly linked) are new to the CPR.

[4] The application was unsatisfactory because it did not identify which ground or grounds were being relied upon; it simply said security was being sought. If one went to the witness statement in support, that again did not refer especially to any of these grounds. From that unpromising beginning, it is not surprising quite what evidence was being relied upon by each side, and what

points were being run by each side. To some extent this uncertainty has remained in the course of the appeal before me. a

[5] In applications for security, the relevant ground should always be identified and the relevant evidence aimed at that ground. In fact in this case it seems to me that the defendants are running something of a *mélange* of the grounds. To some extent that is understandable because factors which can affect one ground may affect another ground too. But none the less is it essential to be clear which ground is being talked about and what factors are being used in support of that ground, both as a matter of law to establish that the ground exists, and secondly as a matter of fact to be taken into account in exercising a discretion. b

[6] I turn first to the position of Mr Somerset-Leeke and ground (a) that he is resident out of the jurisdiction and in Monaco which is not a convention country. That plainly brings in condition (a). But it is well settled that it is not enough simply to show that the condition is satisfied in order to get an order for security. There must be factors shown which justify the grant of security. Mance LJ put it this way in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556 at [58], [2002] 1 All ER 401 at [58], [2002] 1 WLR 1868: c

‘The exercise of discretion conferred by r 25.13(1), (2)(a)(i) raises, in my judgment, different considerations. That discretion must itself be exercised by the courts in a manner which is not discriminatory. In this context, at least, I consider that all personal claimants (or appellants) before the English courts must be regarded as the relevant class. It would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose or effect of protecting defendants or respondents to appeals against risks, to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Brussels or Lugano state. Potential difficulties or burdens of enforcement in states not parties to the Brussels or Lugano conventions are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantaged compared with residents within. The distinction in the rules based on considerations of enforcement cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement.’ d
e
f
g

[7] The evidence in this case about enforcement in Monaco is that it is essentially an administrative matter to get an English judgment registered in Monaco. There is a fee payable which depends upon the size of the judgment, but once that is paid, one can have, in effect, an order in a Monaco court which is enforceable against the individual in Monaco. h

[8] What is said is that Mr Somerset-Leeke has failed to provide any information that he has any assets in Monaco against which any order of the Monaco court enforcing the order of this court could be operated. It is said that it was incumbent upon Mr Somerset-Leeke to disclose where his assets were. In my judgment, that would be making a discriminatory basis for operating under rule (a). If Mr Somerset-Leeke had gone to a convention country, he would not have to show what assets he had and where they were for the purposes of ground (a). That is because the rationale for ground (a) is simply that you can get the judgment registered and put into force. That can be done just as well for Monaco j

a as in a Brussels or Lugano country, subject to the payment of the fee, as to which security has been offered or indeed provided.

[9] Reliance is placed upon a judgment of Mr Gabriel Moss QC, sitting as a deputy judge of this division, a case called *AIMS Asset Management v Kazakhstan Investment Fund Ltd* [2002] EWHC 3225 (Ch). He was concerned with a company which was incorporated in a non-convention country, namely the Cayman Islands. The evidence was that the company had no assets in the Cayman Islands and that all its assets were in Kazakhstan. Mr Moss rejected a submission that one should look at only the ability to enforce the judgment in the country of incorporation, namely the Cayman Islands. He said this:

c 'To interpret the provision in such a way that the risk of enforcement relates only to the place of residence of the counterclaiming company would, in my judgment, be absurd if, as in the present case, the place of incorporation is one which is no doubt simply convenient for tax and regulatory reasons. To say that the risk only relates to enforcement in that jurisdiction would be to give a completely unrealistic emphasis to the place of incorporation or residence ... The limit to the question relating to the risk of enforcement to the Cayman Islands alone would, in my judgment, would be to apply the discretion given by the CPR in a wholly unrealistic and impractical manner.'

[10] What is said here is that if Mr Somerset-Leeke in fact has his assets outside Monaco, then getting a judgment in Monaco would be no good. That, to my mind, is bringing in as a factor of discretion really the kind of concept involved in grounds (g) and (c). I am not saying that that kind of concept should not come in when considering how to exercise discretion under ground (a), but one must look at those factors along the lines of grounds (d) and (g). I do not quarrel with what Mr Moss said; it is evident that in that case the Cayman Islands was a shell place from which the assets were controlled, but one cannot elevate what Mr Moss did in that case to a general principle that any non Brussels/Lugano resident must indicate assets in his place of residence (or I suppose within Brussels/Lugano) failing which security will be ordered. That would be discriminatory.

[11] On the facts in this case Mr Somerset-Leeke has been resident in Monaco for now nine years. There is no challenge to the reason why he went there. There is evidence (before me and not before the master but to which there was no objection) to the effect that he has to show every three years that he is worth at least s250,000. There was thin, but none the less existing, evidence from Mr Somerset-Leeke's solicitor on instructions that there were ample assets in Monaco. There was a refusal by Mr Somerset-Leeke to indicate what his assets were and where they were, and there is now some evidence that there is a pension fund in this country worth about £250,000. Even apart from those matters I would not have ordered security because the application was, in effect, discriminatory. But those matters make it to my mind plain that this is not a case for security so far as Mr Somerset-Leeke is concerned.

[12] What then of the company? The procedural position in relation to this was even worse than in relation to the individual. No reference was made to ground (c); no direct evidence was put in about ground (c). There was, on the court file, a witness statement showing some old accounts of the company which indicated that the company itself would not be able to meet any order for costs against it without any support from Mr Somerset-Leeke. It is common ground and accepted that the company and Mr Somerset-Leeke are jointly and severally

liable, so all the defendants are looking for is anything that would not be paid by Mr Somerset-Leeke. I will assume for the moment that he has no assets other than those identified in the evidence. What is clear from the evidence is that this trustee company is acting for Mr Somerset-Leeke, in this sense, that it holds his pension fund. It is acting at his request and for his benefit. In those circumstances, if it incurs any costs, it will be liable, as one would expect, to reimburse him. a

[13] Evidence to that effect has been given. It is suggested that there should be a document in writing, it being a guarantee. If it is more than a guarantee, the company is acting in substance as Mr Somerset-Leeke's agent in these proceedings. It has recourse to a pension fund which is in this country £250,000, and in my judgment there is no case for an order for security against the company. b

[14] When the matter was before the master, the position was considerably more opaque. I have considerable doubt as to whether the master really should have dealt with a claim for security against the company. I say that because, the matter never having been advanced specifically against the company, there was no reasonable way in which the company could have put in the evidence which is now before me. It goes back to the fact that this application was inherently procedurally muddled. c
d

[15] As to ground (g), it was alleged that Mr Somerset-Leeke had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. The only step which can be pointed to is that he moved to Monaco and moved his assets out of this jurisdiction when he did so. There is no material which establishes that he did so in order to make it difficult to enforce an order for costs against him, nor is there evidence that where he moved his assets to would make it difficult to enforce an order for costs against him. There was a debate as to whether or not the moving had to be with a motive of making enforcement difficult. *Civil Procedure* (the White Book) suggests in para 25.13.18 that motive is not necessarily essential; that proof of specific intent merely makes the case stronger. e
f

[16] That is probably right. I do not think I have to decide it here because there is no material suggesting that it is difficult to proceed against Mr Somerset-Leeke or that he has moved his assets to somewhere where it is difficult to get at them. He has just moved countries. That alone is not evidence of making it more difficult to recover the money, particularly when he has moved to a country where judgments are recognised as of course. Accordingly, ground (g) considerations, in my judgment do not arise, either directly under ground (g) or as an exercise of discretion under ground (a). g

[17] This appeal is dismissed.

Appeal dismissed.

Victoria Parkin Barrister.

Ghaidan v Mendoza

[2004] UKHL 30

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD MILLETT, LORD RODGER OF EARLSFERRY AND BARONESS HALE OF RICHMOND

20, 21 APRIL, 21 JUNE 2004

Landlord and tenant – Rent restriction – Death of tenant – Homosexual partner – Whether surviving same-sex partner entitled to succeed to deceased partner's statutory tenancy as 'spouse' – Rent Act 1977, Sch 1, paras 2, 3(1) – Human Rights Act 1998, s 3, Sch 1, Pt I, arts 8, 14.

The defendant lived with W-J, his same-sex partner, from 1972 until the latter's death, which occurred after the Human Rights Act 1998 came into force. They lived together in the way that spouses lived together, save for their relationship being between two persons of the same sex. In 1983, W-J and the defendant moved into a flat owned by the claimant. W-J became the statutory tenant under the provisions of the Rent Act 1977. Following W-J's death, the claimant brought proceedings in the county court claiming possession. The judge held that the defendant did not succeed to the statutory tenancy of the flat as the surviving spouse of W-J within the meaning of para 2 of Sch 1 to the 1977 Act, but that he did become entitled to an assured tenancy of the flat by succession as a member of the original tenant's 'family' under para 3(1) of that schedule. That type of tenancy was less advantageous to the defendant. He appealed. The Court of Appeal allowed the appeal, holding that he was entitled to succeed to a tenancy of the flat as a statutory tenant. The claimant appealed. The issues which arose were whether para 2 of Sch 2 to the 1977 Act, as interpreted by a House of Lords authority, pre-dating the implementation of the 1998 Act, which had held that para 2(2) could not include persons in a same-sex relationship, was incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and if so, whether para 2(2) could be construed in a manner that rendered it compatible with the convention. That involved a consideration of whether para 2 fell within the ambit of the right to respect for a person's home under art 8 of the convention and whether the exclusion of same-sex partners from the succession to statutory tenancies constituted discrimination in the enjoyment of a convention right on any ground such as, inter alia, sex, race, colour, religion or 'other status' within the meaning of art 14.

Held – (Lord Millett dissenting) (1) Paragraph 2 of Sch 1 to the 1977 Act, which allowed the spouse of a protected tenant to succeed to the tenancy on the tenant's death, was to be read so that 'spouse' included the survivor of a same-sex partnership. The intention of Parliament in enacting s 3 of the 1998 Act was that, to an extent bounded only by what was 'possible', a court could modify the meaning, and hence the effect of primary and secondary legislation. Once it was accepted that s 3 might require the legislation to bear a meaning which departed from the unambiguous meaning that the legislation would otherwise bear, it became impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the

parliamentary draftsman in the statutory provision under consideration. It followed that the mere fact that the language under consideration was inconsistent with a convention-compliant meaning did not of itself make a convention-compliant interpretation under s 3 impossible. Nevertheless, Parliament could not have intended that in the discharge of that extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary s 3 sought to demarcate and preserve. The meaning imported by the application of s 3 had to be compatible with the underlying thrust of the legislation being construed. Nor could Parliament have intended that s 3 should require the courts to make decisions for which they were not equipped. There might be several ways of making a provision convention-compliant, and the choice might involve issues calling for legislative deliberation. In the instant case, no difficulty arose. Paragraph 2 of Sch 1 to the 1977 Act was unambiguous, but the social policy underlying the extension of security of tenure under para 2 to the survivor of couples living together as husband and wife was equally applicable to the survivor of homosexual couples living together in a close and stable relationship.

(2) Discrimination on grounds of sexual orientation was by common accord not acceptable as a basis for different legal treatment. Unless good reason existed, differences in legal treatment based on that ground were properly stigmatised as discriminatory. Marriage was no longer a prerequisite to protection under para 2. Nor was parenthood, the presence of children in the home, or procreative potential. The survivor was protected even if, by reasons of age, or otherwise, there was never any prospect of either member of the couple having a natural child. It followed that the difference in treatment of cohabiting homosexual partners did not pursue a legitimate aim. Accordingly, the appeal would be dismissed.

Decision of the Court of Appeal [2002] 3 FCR 591 affirmed.

Cases referred to in opinions

A v Secretary of State for the Home Dept [2002] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335, [2003] 2 WLR 564.

Bellinger v Bellinger [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467, [2003] 2 WLR 1174.

Cachia v Faluyi [2001] EWCA Civ 998, [2002] 1 All ER 192, [2001] 1 WLR 1966.

Chapman v UK (2001) 10 BHRC 48, ECt HR.

Dudgeon v UK (1981) 4 EHRR 149, [1981] ECHR 7525/76, ECt HR.

Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 1113, HL.

Fretté v France [2003] 2 FCR 39, ECt HR.

Goode v Martin [2001] EWCA Civ 1899, [2002] 1 All ER 620, [2002] 1 WLR 1828.

International Transport Roth GmbH v Secretary of State for the Home Dept [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344.

Karner v Austria (2003) 14 BHRC 674, ECt HR.

Litster v Forth Dry Dock and Engineering Co Ltd [1989] 1 All ER 1134, [1990] 1 AC 546, [1989] 2 WLR 634, HL.

Marleasing SA v La Comercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135, ECJ.

Marzari v Italy (1999) 28 EHRR CD 175, E Com HR.

- a* *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
Petrovic v Austria (1998) 4 BHRC 232, ECt HR.
Pickstone v Freemans plc [1988] 2 All ER 803, [1989] AC 66, [1988] 3 WLR 265, HL.
Pretty v UK (2002) 12 BHRC 149, ECt HR.
R (D) v Secretary of State for the Home Dept [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315.
- b* *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
R (on the application of Anderson) v Secretary of State for the Home Dept [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.
- c* *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577; *affg* [2002] EWHC 978 (Admin), [2002] 3 All ER 994.
R (on the application of Douglas) v North Tyneside Metropolitan BC [2003] EWCA Civ 1847, [2004] 1 All ER 709.
- d* *R (on the application of Erskine) v Lambeth London BC* [2003] EWHC 2479 (Admin), [2003] All ER (D) 227 (Oct).
R (on the application of FM) v Secretary of State for Health [2003] ACD 389.
R (on the application of H) v London North and East Region Mental Health Review Tribunal [2001] EWCA Civ 415, (2001) 61 BMLR 163, [2002] QB 1, [2001] 3 WLR 512.
- e* *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623.
R (on the application of Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 All ER 465, [2004] 2 WLR 800.
- f* *R (on the application of Uttley) v Secretary of State for the Home Dept* [2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590.
R (on the application of Van Hoogstraten) v Governor of Belmarsh Prison [2002] EWHC 1965 (Admin), [2003] 4 All ER 309, [2003] 1 WLR 263.
R (on the application of Wilkinson) v IRC [2003] EWCA Civ 814, [2003] 3 All ER 719, [2003] 1 WLR 2683; *affg* [2002] EWHC 182 (Admin), [2002] STC 347.
- g* *R (Sim) v Parole Board* [2003] EWHC 152 (Admin), [2003] 2 WLR 1374; *affd* [2003] EWCA Civ 1845, [2004] 2 WLR 1170.
R v A [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.
R v Carass [2001] EWCA Crim 2845, [2002] 1 WLR 1714.
R v DPP, ex p Kebeline, *R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
- h* *R v Hughes* [2002] UKPC 12, (2002) 12 BHRC 243, [2002] 2 AC 259, [2002] 2 WLR 1058.
R v Lambert [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206; *affg* [2001] 1 All ER 1014, [2002] QB 1112, [2001] 2 WLR 211, CA.
R v McR (2002) NIQB 58.
- i* *R v Offen* [2001] 2 All ER 154, [2001] 1 WLR 253, CA.
R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
Rojas v Berllaque (A-G for Gibraltar intervening) [2003] UKPC 76, [2004] 1 LRC 296, [2004] 1 WLR 201.
Roosli v Germany (1996) 85 DR 149, E Com HR.

- S (children: care plan), Re, Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720. a
- S v UK* (1986) 47 DR 274, E Com HR.
- Sheldrake v DPP* [2003] EWHC 273 (Admin), [2003] 2 All ER 497, [2003] 2 WLR 1629, DC.
- Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, HL.
- Vasquez v R, Neil v R* [1994] 3 All ER 674, [1994] 1 WLR 1304, PC. b
- Walden v Liechtenstein* App No 33916/96 (16 March 2000, unreported), ECt HR.
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.
- Yearwood v R* [2001] UKPC 31, [2001] 5 LRC 247. c

Cases referred to in list of authorities

- Abdulaziz v UK* (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
- Artico v Italy* (1980) 3 EHRR 1, [1980] ECHR 6694/74, ECt HR.
- Baker v State of Vermont* (1999) 744 A 2d 864, Vermont SC. d
- Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.
- Botta v Italy* (1998) 4 BHRC 81, ECt HR.
- Brock v Wollams* [1949] 1 All ER 715, [1949] 2 KB 388, CA.
- Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
- C v Secretary of State for the Home Dept* [2004] EWCA Civ 234, [2004] All ER (D) 78 (Mar), (2004) Times, 11 March. e
- Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084, [1979] 1 WLR 928, HL.
- Chamberlain v Surrey School District No 36* (2002) 221 DLR (4th) 156, Can SC.
- Chios Investment Property Co Ltd v Lopez* [1988] 1 EGLR 98, CA. f
- D and Kingdom of Sweden v Council of European Union* Joined cases C-122/99 P and C-125/99 P [2001] ECR I-4319, ECJ.
- De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675, PC.
- Dove for Judicial Review of the Scottish Ministers in Relation to St Mary's Episcopal Primary School, Dunblane* (14 December 2001, unreported), Ct of Sess. g
- Du Toit v Minister for Welfare and Population Development* (2002) 13 BHRC 187, SA Const Ct.
- Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503, [1975] 3 WLR 744, CA.
- East African Asians v UK* (1973) 3 EHRR 76, E Com HR. h
- Egan v Canada* [1995] 2 SCR 513, Can SC.
- Gammans v Ekins* [1950] 2 All ER 140, [1950] 2 KB 328, CA.
- Gaygusuz v Austria* (1997) 23 EHRR 364, [1996] ECHR 17371/90, ECt HR.
- GL v Italy* (2002) 34 EHRR 41, [2000] ECHR 22671/93, ECt HR.
- Goodridge v Dept of Public Health* 798 NE 2d 941, Mass SC. j
- Grant v South-West Trains Ltd* Case C-249/96 [1998] All ER (EC) 193, [1998] ICR 449, [1998] ECR I-621, ECJ.
- Halpern v A-G of Canada* (2003) 14 BHRC 687, Ont CA.
- Hatton v UK* (2003) 37 EHRR 611, [2003] ECHR 36022/97, ECt HR.
- Helby v Rafferty* [1978] 3 All ER 1016, [1979] 1 WLR 13, CA.

- Hirst v UK (No 2)* (2004) 16 BHRC 409, ECt HR.
- a** *Hoffmann v Austria* (1994) 17 EHRR 293, [1993] ECHR 12875/87, ECt HR.
- Hopkins v Secretary of State for Defence* [2004] EWHC 299 (Admin), [2004] All ER (D) 362 (Feb).
- Inze v Austria* (1988) 10 EHRR 394, [1987] ECHR 8695/79, ECt HR.
- James v UK* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.
- b** *Kjeldsen v Denmark* (1976) 1 EHRR 711, [1976] ECHR 5095/71, ECt HR.
- L and V v Austria* App No 39392/98 (9 January 2003, unreported), ECt HR.
- M v H* [1999] 2 SCR 3, Can SC.
- Maaouia v France* (2000) 9 BHRC 205, ECt HR.
- Marckx v Belgium* (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.
- Mata Estevez v Spain* App No 56501/00 (10 May 2001, unreported), ECt HR.
- c** *Matadeen v Pointu and Minister of Education and Science* [1998] 3 LRC 542, [1999] 1 AC 98, [1998] 3 WLR 18, PC.
- Meyne-Moskalczuk v Netherlands* App No 53002/99 (9 December 2003, unreported), ECt HR.
- Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501, [1999] 3 WLR 425, HL.
- d** *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHRC 127, SA Const Ct.
- National Union of Belgian Police v Belgium* (1975) 1 EHRR 578, [1975] ECHR 4464/70, ECt HR.
- e** *Pinder v UK* (1985) 7 EHRR 464, E Com HR.
- Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
- Prince Hans-Adam II of Liechtenstein v Germany* (2001) 11 BHRC 526, ECt HR.
- R (on the application of Prolife Alliance) v BBC* [2003] UKHL 23, [2003] 2 All ER 977, [2003] 2 WLR 1403.
- f** *R (on the application of Purja) v Ministry of Defence* [2003] EWCA Civ 1345, [2004] 1 WLR 289.
- R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2003] 3 All ER 784, [2004] 1 AC 357, [2003] 3 WLR 232.
- R (on the application of S) v Chief Constable of South Yorkshire Police, R (on the application of Marper) v Chief Constable of South Yorkshire Police* [2002] EWCA Civ 1275, [2003] 1 All ER 148, [2002] 1 WLR 3223.
- g** *Rasmussen v Denmark* (1985) 7 EHRR 371, [1984] ECHR 8777/79, ECt HR.
- Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 1055, [1999] ECHR 33290/96, ECt HR.
- h** *Satchwell v President of the Republic of South Africa* (2002) 13 BHRC 108, SA Const Ct.
- Schmidt v Germany* (1994) 18 EHRR 513, [1994] ECHR 13580/88, ECt HR.
- Secretary of State for the Home Dept v Rehman* [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153, [2001] 3 WLR 877.
- Sentges v Netherlands* App No 27677/02 (8 July 2003, unreported), ECt HR.
- j** *Shackell v UK* App No 45851/99 (27 April 2000, unreported), ECt HR.
- Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 04, [2002] HLR 639.
- SL v Austria* (2003) 37 EHRR 799, [2003] ECHR 45330/99, ECt HR.
- Smith and Grady v UK* (2000) 29 EHRR 493, [1999] ECHR 33985/96, ECt HR.
- Sporrong v Sweden* (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.

St Brice v Southwark London BC [2001] EWCA Civ 1138, [2002] LGR 117, sub nom *Southwark London BC v St Brice* [2002] 1 WLR 1537. a

Stubbings v UK (1996) 1 BHRC 316, ECt HR.

Sutherland v UK (1997) 24 EHRR CD 22, ECt HR.

Tyrer v UK (1978) 2 EHRR 1, [1978] ECHR 5856/72, ECt HR.

Van den Bouwhuijsen and Schuring v Netherlands App No 44658/98 (16 December 2003, unreported), ECt HR. b

Van der Mussele v Belgium (1984) 6 EHRR 163, [1983] ECHR 8919/80, ECt HR.

Vriend v Alberta (1998) 4 BHRC 140, Can SC.

Watson v Lucas [1980] 3 All ER 647, [1980] 1 WLR 1493, CA.

Williams v Williams [1970] 3 All ER 988, [1970] 1 WLR 1530, CA.

X v UK (1983) 32 DR 220, E Com HR.

Zehnalova v Czech Republic App No 38621/97 (14 May 2002, unreported), ECt HR. c

Appeal

The claimant, Ahmad Raja Ghaidan appealed from the decision of the Court of Appeal (Kennedy, Buxton and Keene LJ) ([2002] EWCA Civ 1533, [2002] 4 All ER 1162, [2003] Ch 380) whereby it had allowed an appeal by the defendant, Juan Godin-Mendoza, from the refusal of a county court judge to declare that he was entitled to succeed to a protected tenancy upon the death of his long-term homosexual partner, Hugh Wallwyn-James. The facts are set out in the opinion of Lord Nicholls of Birkenhead. d

Monica Carss-Frisk QC and *Jonathan Small* (instructed by *Hugh Cartwright & Amin*) for the claimant. e

Rabinder Singh QC and *Paul Staddon* (instructed by *Oliver Fisher*) for the defendant.

Philip Sales (instructed by the *Treasury Solicitor*) for the First Secretary of State, the intervenor. f

Their Lordships took time for consideration.

21 June 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD. g

[1] My Lords, on the death of a protected tenant of a dwelling house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. But marriage is not essential for this purpose. A person who was living with the original tenant 'as his or her wife or husband' is treated as the spouse of the original tenant: see para 2(2) of Sch 1 to the Rent Act 1977. In *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27 your Lordships' House decided this provision did not include persons in a same-sex relationship. The question raised by this appeal is whether this reading of para 2 can survive the coming into force of the Human Rights Act 1998. In *Fitzpatrick's* case the original tenant had died in 1994. h

[2] In the present case the original tenant died after the 1998 Act came into force on 2 October 2000. In April 1983 Mr Hugh Wallwyn-James was granted an oral residential tenancy of the basement flat at 17 Cresswell Gardens, London SW5. Until his death on 5 January 2001 he lived there in a stable and monogamous homosexual relationship with the defendant Mr Juan Godin-Mendoza. Mr Godin-Mendoza is still living there. After the death of Mr Wallwyn-James the j

a landlord, Mr Ahmad Ghaidan, brought proceedings in the West London County Court claiming possession of the flat. Judge Cowell held that on the death of Hugh Wallwyn-James, Mr Godin-Mendoza did not succeed to the tenancy of the flat as the surviving spouse of Hugh Wallwyn-James within the meaning of para 2 of Sch 1 to the 1977 Act, but that he did become entitled to an assured tenancy of the flat by succession as a member of the original tenant's 'family' under para 3(1) of that schedule.

b [3] Mr Godin-Mendoza appealed, and the Court of Appeal, comprising Kennedy, Buxton and Keene LJJ, allowed the appeal ([2002] EWCA Civ 1533, [2002] 4 All ER 1162, [2003] Ch 380). The court held he was entitled to succeed to a tenancy of the flat as a statutory tenant under para 2. From that decision Mr Ghaidan, the landlord, appealed to your Lordships' House.

c [4] I must first set out the relevant statutory provisions and then explain how the 1998 Act comes to be relevant in this case. Paragraphs 2 and 3 of Sch 1 to the 1977 Act provide:

d '2.—(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant ...

e 3.—(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.'

[5] On an ordinary reading of this language para 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot. That was decided in *Fitzpatrick's* case. The survivor of a homosexual couple may, in competition with other members of the original tenant's 'family', become entitled to an assured tenancy under para 3. But even if he does, as in the present case, this is less advantageous. Notably, so far as the present case is concerned, the rent payable under an assured tenancy is the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, and an assured tenant may be evicted for non-payment of rent without the court needing to be satisfied, as is essential in the case of a statutory tenancy, that it is reasonable to make a possession order. In these and some other respects the succession rights granted by the statute to the survivor of a homosexual couple in respect of the house where he or she is living are less favourable than the succession rights granted to the survivor of a heterosexual couple.

j [6] Mr Godin-Mendoza's claim is that this difference in treatment infringes art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) read in

conjunction with art 8. Article 8 does not require the state to provide security of tenure for members of a deceased tenant's family. Article 8 does not in terms give a right to be provided with a home: see *Chapman v UK* (2001) 10 BHRC 48 at 72 (para 99). It does not 'guarantee the right to have one's housing problem solved by the authorities': see *Marzari v Italy* (1999) 28 EHRR CD 175 at 179. But if the state makes legislative provision it must not be discriminatory. The provision must not draw a distinction on grounds such as sex or sexual orientation without good reason. Unless justified, a distinction founded on such grounds infringes the convention right embodied in art 14, as read with art 8. Mr Godin-Mendoza submits that the distinction drawn by para 2 of Sch 1 to the 1977 Act is drawn on the grounds of sexual orientation and that this difference in treatment lacks justification.

[7] That is the first step in Mr Godin-Mendoza's claim. That step would not, of itself, improve Mr Godin-Mendoza's status in his flat. The second step in his claim is to pray in aid the court's duty under s 3 of the 1998 Act to read and give effect to legislation in a way which is compliant with the convention rights. Here, it is said, s 3 requires the court to read para 2 so that it embraces couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship. So read, para 2 covers Mr Godin-Mendoza's position. Hence he is entitled to a declaration that on the death of Mr Wallwyn-James he succeeded to a statutory tenancy.

DISCRIMINATION

[8] The first of the two steps in Mr Godin-Mendoza's argument requires him to make good the proposition that, as interpreted in *Fitzpatrick's* case, para 2 of Sch 1 to the 1977 Act infringes his convention right under art 14 read in conjunction with art 8. Article 8 guarantees, among other matters, the right to respect for a person's home. Article 14 guarantees that the rights set out in the convention shall be secured 'without discrimination' on any grounds such as those stated in the non-exhaustive list in that article.

[9] It goes without saying that art 14 is an important article of the convention. Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. This has been clearly recognised by the European Court of Human Rights: see, for instance, *Fretté v France* [2003] 2 FCR 39 at 54 (para 32). Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory.

a [10] Unlike art 1 of the Twelfth Protocol, art 14 of the convention does not confer a free-standing right of non-discrimination. It does not confer a right of non-discrimination in respect of all laws. Article 14 is more limited in its scope. It precludes discrimination in the 'enjoyment of the rights and freedoms set forth in this Convention'. The court at Strasbourg has said this means that, for art 14 to be applicable, the facts at issue must 'fall within the ambit' of one or more of the convention rights. Article 14 comes into play whenever the subject matter of the disadvantage 'constitutes one of the modalities' of the exercise of a right guaranteed or whenever the measures complained of are 'linked' to the exercise of a right guaranteed: see *Petrovic v Austria* (1998) 4 BHRC 232 at 236, 237 (paras 22, 28).

c [11] These expressions are not free from difficulty. In *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 at [32]–[41], [2003] 3 All ER 577 at [32]–[41], Laws LJ drew attention to some difficulties existing in this area of the Strasbourg jurisprudence. In the Court of Appeal in the present case Buxton LJ appeared to adopt the approach, espoused in the leading textbook d Grosz, Beatson and Duffy *Human Rights: The 1998 Act and the European Convention* (2000) p 327 (para C14-10), that 'even the most tenuous link with another provision in the Convention will suffice for Article 14 to enter into play': [2002] 4 All ER 1162 at [9]. In your Lordships' House counsel for the First Secretary of State criticised this approach. He drew attention to later authorities questioning its correctness: *R (on the application of Erskine) v Lambeth London BC* [2003] EWHC e 2479 (Admin) at [21]–[22], [2003] All ER (D) 227 (Oct) at [21]–[22] per Mitting J ('it overstates the effect of the Strasbourg case law') and *R (on the application of Douglas) v North Tyneside Metropolitan BC* [2003] EWCA Civ 1847 at [53]–[54], [2004] 1 All ER 709 at [53]–[54] per Scott Baker LJ.

f [12] This is not a question calling for consideration on this appeal. It is common ground between all parties, and rightly so, that para 2 of Sch 1 to the 1977 Act is a provision which falls within the 'ambit' of the right to respect for a person's home guaranteed by art 8. It is, in other words, common ground that art 14 is engaged in the present case. This being so, and the point not having been fully argued, I prefer to leave open the question whether even the most tenuous link is sufficient to engage art 14.

g [13] In the present case para 2 of Sch 1 to the 1977 Act draws a dividing line between married couples and cohabiting heterosexual couples on the one hand and other members of the original tenant's family on the other hand. What is the rationale for this distinction? The rationale seems to be that, for the purposes of security of tenure, the survivor of such couples should be regarded as having a special claim to be treated in much the same way as the original tenant. The two h of them made their home together in the house in question, and their security of tenure in the house should not depend upon which of them dies first.

i [14] The history of the 1977 Act legislation is consistent with this appraisal. A widow, living with her husband, was accorded a privileged succession position in 1920. In 1980 a widower was accorded the like protection. In 1988 para 2(2) was added, by which the survivor of a cohabiting heterosexual couple was treated in the same way as a spouse of the original tenant.

[15] Miss Carss-Frisk QC submitted there is a relevant distinction between heterosexual partnerships and same-sex partnerships. The aim of the legislation is to provide protection for the traditional family. Same-sex partnerships cannot

be equated with family in the traditional sense. Same-sex partners are unable to have children with each other, and there is a reduced likelihood of children being a part of such a household.

[16] My difficulty with this submission is that there is no reason for believing these factual differences between heterosexual and homosexual couples have any bearing on why succession rights have been conferred on heterosexual couples but not homosexual couples. Protection of the traditional family unit may well be an important and legitimate aim in certain contexts. In certain contexts this may be a cogent reason justifying differential treatment: see *Karner v Austria* (2003) 14 BHRC 674 at 682 (para 40). But it is important to identify the element of the 'traditional family' which para 2, as it now stands, is seeking to protect. Marriage is not now a prerequisite to protection under para 2. The line drawn by Parliament is no longer drawn by reference to the status of marriage. Nor is parenthood, or the presence of children in the home, a precondition of security of tenure for the survivor of the original tenant. Nor is procreative potential a prerequisite. The survivor is protected even if, by reasons of age or otherwise, there was never any prospect of either member of the couple having a natural child.

[17] What remains, and it is all that remains, as the essential feature under para 2 is the cohabitation of a heterosexual couple. Security of tenure for the survivor of such a couple in the house where they live is, doubtless, an important and legitimate social aim. Such a couple share their lives and make their home together. Parliament may readily take the view that the survivor of them has a special claim to security of tenure even though they are unmarried. But the reason underlying this social policy, whereby the survivor of a cohabiting heterosexual couple has particular protection, is equally applicable to the survivor of a homosexual couple. A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context: see the discussion in *Fitzpatrick's case* [1999] 4 All ER 705 at 720, [2001] 1 AC 27 at 44.

[18] This being so, one looks in vain to find justification for the difference in treatment of homosexual and heterosexual couples. Such a difference in treatment can be justified only if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Here, the difference in treatment falls at the first hurdle: the absence of a legitimate aim. None has been suggested by the First Secretary of State, and none is apparent. In so far as admissibility decisions such as *S v UK* (1986) 47 DR 274 and *Roosli v Germany* (1996) 85 DR 149 adopted a different approach from that set out above, they must now be regarded as superseded by the recent decision of the European Court of Human Rights in *Karner's case*.

[19] For completeness I should add that arguments based on the extent of the discretionary area of judgment accorded to the legislature lead nowhere in this case. As noted in *Wilson v First County Trust Ltd* [2003] UKHL 40 at [70], [2003] 4 All ER 97 at [70], [2004] 1 AC 816 Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the

a legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons b said to constitute justification. The reasons must be cogent if such differential treatment is to be justified.

[20] In the present case the only suggested ground for according different treatment to the survivor of same-sex couples and opposite sex couples cannot withstand scrutiny. Rather, the present state of the law as set out in para 2 of c Sch 1 to the 1977 Act may properly be described as continuing adherence to the traditional regard for the position of surviving spouses, adapted in 1988 to take account of the widespread contemporary trend for men and women to cohabit outside marriage but not adapted to recognise the comparable position of cohabiting same-sex couples. I appreciate that the primary object of introducing d the regime of assured tenancies and assured shorthold tenancies in 1988 was to increase the number of properties available for renting in the private sector. But this policy objective of the Housing Act 1988 can afford no justification for amending para 2 so as to include cohabiting heterosexual partners but not cohabiting homosexual partners. This policy objective of the Act provides no reason for, on the one hand, extending to unmarried cohabiting heterosexual e partners the right to succeed to a statutory tenancy but, on the other hand, withholding that right from cohabiting homosexual partners. Paragraph 2 fails to attach sufficient importance to the convention rights of cohabiting homosexual couples.

[21] Miss Carss-Frisk advanced a further argument, based on the decisions of f the European Court of Human Rights in *Walden v Liechtenstein* App No 33916/96 (16 March 2000, unreported) and *Petrovic v Austria* (1998) 4 BHRC 232. In *Walden's* case the Liechtenstein Constitutional Court held that the unequal pension treatment afforded to married and unmarried couples was unconstitutional. The Constitutional Court did not set aside the existing g legislation, given the practical difficulties involved and given also that a comprehensive legal reform guaranteeing gender equality in social security law was in course of preparation. New legislation was enacted and came into force seven months later. The European Court of Human Rights summarily rejected an application complaining of this unequal treatment. The Constitutional Court's decision served the interests of legal certainty, and given the brevity of h the period during which the unconstitutional law remained applicable to the applicant the continued operation of the pension provisions was proportionate. In *Petrovic's* case the applicant was refused a grant of parental leave allowance in 1989. At that time parental leave allowance was available only to mothers. The applicant complained that this violated art 14 taken together with art 8. In j dismissing the application the court noted that, as society moved towards a more equal sharing of responsibilities for the upbringing of children, contracting states have extended allowances such as parental leave to fathers. Austrian law had evolved in this way, eligibility for parental leave allowance being extended to fathers in 1990. The Austrian legislature was not to be criticised for having introduced progressive legislation in a gradual manner.

[22] Miss Carss-Frisk submitted that, similarly here, society's attitude to cohabiting homosexual couples has evolved considerably in recent years. It was only in July 2003 that the European Court of Human Rights in *Karner's* case effectively overruled contrary decisions as already mentioned. The United Kingdom government responded speedily to the decision in *Karner's* case by including in two government Bills currently before Parliament, the Housing Bill and the Civil Partnership Bill, provisions which if enacted will have the effect of confirming on the face of legislation that the survivor of a cohabiting homosexual couple is to be treated in the same way as the survivor of a cohabiting homosexual couple for the purposes of para 2. The state should not be criticised for this gradual extension of the rights of cohabiting unmarried couples, first to heterosexual couples in 1988, and now more widely. The extension of para 2 to include homosexual couples would be at the expense of landlords, and in the interests of legal certainty this extension should be made prospectively by legislation and not retrospectively by judicial decision. Mr Wallwyn-James died more than two years before the decision in *Karner's* case.

[23] I am unable to accept this submission. Under the 1998 Act the compatibility of legislation with the convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force: see *Wilson's* case [2003] 4 All ER 97 at [62]. *Walden's* case and *Petrovic's* case concerned the margin of appreciation afforded to contracting states. In the present case the House is concerned with the interpretation and application of domestic legislation. In this context the domestic counterpart of a state's margin of appreciation is the discretionary area of judgment the court accords Parliament when reviewing legislation pursuant to its obligations under the 1998 Act. I have already set out my reasons for holding that in the present case the distinction drawn in the legislation between the position of heterosexual couples and homosexual couples falls outside that discretionary area.

[24] In my view, therefore, Mr Godin-Mendoza makes good the first step in his argument: para 2 of Sch 1 to the 1977 Act, construed without reference to s 3 of the 1998 Act, violates his convention right under art 14 taken together with art 8.

SECTION 3 OF THE 1998 ACT

[25] I turn next to the question whether s 3 of the 1998 Act requires the court to depart from the interpretation of para 2 enunciated in *Fitzpatrick's* case.

[26] Section 3 is a key section in the 1998 Act. It is one of the primary means by which convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in s 3, and the courts must give effect to this intention.

[27] Unfortunately, in making this provision for the interpretation of legislation, s 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with s 3(2) and s 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made convention-compliant by application of s 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep

a from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of s 3 gradually accumulates.

b [28], One tenable interpretation of the word 'possible' would be that s 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the convention rights.

c [29] This interpretation of s 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45 is an instance of this. The House read words into s 41 of the Youth d Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under art 6. The House did so even though the statutory language was not ambiguous.

e [30] From this it follows that the interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, s 3 requires a court f to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s 3.

g [31] On this the first point to be considered is how far, when enacting s 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since s 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes h impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of s 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, s 3 would be available to achieve convention-compliance. If he chose a different form of words, s 3 j would be impotent.

[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under s 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. It is also apt to require a court to read

in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation. a

[33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary s 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not convention-compliant. The meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that s 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation. b

[34] Both these features were present in *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291. There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837 s 29 of the Crime (Sentences) Act 1997 could not be read in a convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467 recognition of Mrs Bellinger as female for the purposes of s 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures. c

[35] In some cases difficult problems may arise. No difficulty arises in the present case. Paragraph 2 of Sch 1 to the 1977 Act is unambiguous. But the social policy underlying the 1988 extension of security of tenure under para 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of s 3 to para 2 has the effect that para 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading para 2 in this way would have the result that cohabiting heterosexual couples and cohabiting homosexual couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of para 2 and would do so consistently with the social policy underlying para 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters. d

[36] For these reasons I agree with the decision of the Court of Appeal. I would dismiss this appeal. e

LORD STEYN.

[37] My Lords, in my view the Court of Appeal ([2002] EWCA Civ 1533, [2002] 4 All ER 1162, [2003] Ch 380) came to the correct conclusion. I agree with the conclusions and reasons of my noble and learned friends Lord Nicholls of f

a Birkenhead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. In the light of those opinions, I will not comment on the case generally.

[38] I confine my remarks to the question whether it is possible under s 3(1) of the Human Rights Act 1998 to read and give effect to para 2(2) of Sch 1 to the Rent Act 1977 in a way which is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in b Sch 1 to the 1998 Act). In my view the interpretation adopted by the Court of Appeal under s 3(1) was a classic illustration of the permissible use of this provision. But it became clear during oral argument, and from a subsequent study of the case law and academic discussion on the correct interpretation of s 3(1), that the role of that provision in the remedial scheme of the 1998 Act is not always correctly understood. I would therefore wish to examine the position in c a general way.

[39] I attach an appendix to this opinion which lists cases where a breach of a convention right was found established, and the courts proceeded to consider whether to exercise their interpretative power under s 3 or to make a declaration of incompatibility under s 4. For the first and second lists (A and B) I am indebted to d the Constitutional Law Division of the Department for Constitutional Affairs but law report references and other information have been added. The third list (C) has been prepared by Laura Johnson, my judicial assistant, under my direction. It will be noted that in ten cases the courts used their interpretative power under s 3 and in 15 cases the courts made declarations of incompatibility under s 4. In five cases e in the second group the declarations of incompatibility were subsequently reversed on appeal: in four of those cases it was held that no breach was established and in the fifth case (*R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623) the exact basis for overturning the declaration of incompatibility may be a matter of debate. Given that under the 1998 Act the use of the interpretative power under s 3 is the principal f remedial measure, and that the making of a declaration of incompatibility is a measure of last resort, these statistics by themselves raise a question about the proper implementation of the 1998 Act. A study of the case law reinforces the need to pose the question whether the law has taken a wrong turning.

[40] My impression is that two factors are contributing to a misunderstanding g of the remedial scheme of the 1998 Act. First, there is the constant refrain that a judicial reading down, or reading in, under s 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.

h [41] The second factor may be an excessive concentration on linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a convention right may be removed by interpretation under s 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.

j [42] In enacting the 1998 Act Parliament legislated 'to bring rights home' from the European Court of Human Rights to be determined in the courts of the United Kingdom. That is what the White Paper said: see *Rights Brought Home: The Human Rights Bill* (Cm 3782) (October 1997) para 2.7. That is what Parliament was told. The mischief to be addressed was the fact that convention rights as set out in the European Convention, which Britain ratified in 1951, could not be

vindicated in our courts. Critical to this purpose was the enactment of effective remedial provisions. a

[43] The provisions adopted read as follows:

'3. *Interpretation of legislation.*—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. b

(2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility. c

4. *Declaration of incompatibility.*—(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility ...' d

If Parliament disagrees with an interpretation by the courts under s 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility.

[44] It is necessary to state what s 3(1), and in particular the word 'possible', does not mean. First, s 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two possible meanings. The word 'possible' in s 3(1) is used in a different and much stronger sense. Secondly, s 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the convention. Thirdly, the draftsman of the 1998 Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. e

[45] Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8) the Court of Justice of the European Communities defined this obligation as follows: f

'It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.' g

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of s 3(1) in the 1998 Act. h

[46] Parliament had before it the mischief and objective sought to be addressed, viz the need 'to bring rights home'. The linch-pin of the legislative scheme to achieve this purpose was s 3(1). Rights could only be effectively brought home if s 3(1) was the prime remedial measure, and s 4 a measure of last i

- a resort. How the system modelled on the EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention': see 585 HL Official Report (5th series) col 840 (5 February 1998) and 306 HC Official Report (6th series) col 778 (16 February 1998). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with convention rights. This is the remedial scheme which Parliament adopted.
- b

- [47] Three decisions of the House can be cited to illustrate the strength of the interpretative obligation under s 3(1). The first is *R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45 which concerned the so-called rape shield legislation. The problem was the blanket exclusion of prior sexual history between the complainant and an accused in s 41(1) of the Youth Justice and Criminal Evidence Act 1999, subject to narrow specific categories in the remainder of s 41. In subsequent decisions, and in academic literature, there has been discussion about differences of emphasis in the various opinions in *R v A*. What has been largely overlooked is the unanimous conclusion of the House. The House unanimously agreed on an interpretation under s 3 which would ensure that s 41 would be compatible with the convention. The formulation was by agreement set out in that case as follows (at [46]):
- c
- d

- e 'The effect of the decision today is that under s 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s 3 of the 1998 Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under art 6 of the convention. If this test is satisfied the evidence should not be excluded.'
- f

- This formulation was endorsed by Lord Slynn of Hadley (at [13]) in identical wording. The other Law Lords sitting in the case expressly approved the formulation set out at [46] of my opinion: see [2001] 3 All ER 1 at [110], [140], [163] per Lord Hope of Craighead, Lord Clyde, and Lord Hutton respectively. In so ruling the House rejected linguistic arguments in favour of a broader approach. In the subsequent decisions of the House in *Re S (children: care plan)*; *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467 which touched on the remedial structure of the 1998 Act, the decision of the House in the case of *R v A* was not questioned. And in the present case nobody suggested that *R v A* involved a heterodox exercise of the power under s 3.
- g
- h

- [48] The second and third decisions of the House are *Pickstone v Freemans plc* [1988] 2 All ER 803, [1989] AC 66 and *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134, [1990] 1 AC 546 which involve the interpretative obligation under EEC law. *Pickstone's* case concerned s 1(2) of the Equal Pay Act 1970 (as amended by s 8 of the Sex Discrimination Act 1975 and reg 2 of the Equal Pay (Amendment) Regulations 1983, SI 1983/1794), which implied into any contract without an equality clause one that modifies any term in a woman's contract which is less favourable than a term of a similar kind in the contract of a man:
- j

'(a) where the woman is employed on like work with a man in the same employment ... (b) where the woman is employed on work rated as equivalent with that of a man in the same employment ... (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment ...'

Lord Templeman observed ([1988] 2 All ER 803 at 813, [1989] AC 66 at 120–121):

'In my opinion there must be implied in para (c) after the word "applies" the words "as between the woman and the man with whom she claims equality". This construction is consistent with Community law. The employers' construction is inconsistent with Community law and creates a permitted form of discrimination without rhyme or reason.'

That was the ratio decidendi of the decision. *Litster's* case concerned regulations intended to implement an EC directive, the purpose of which was to protect the workers in an undertaking when its ownership was transferred. However, the regulations only protected those who were employed 'immediately before' the transfer. Having inquired into the purpose of the directive, the House of Lords interpreted the regulations by reading in additional words to protect workers not only if they were employed 'immediately before' the time of transfer, but also when they would have been so employed if they had not been unfairly dismissed by reason of the transfer: see [1989] 1 All ER 1134 at 1136, [1990] 1 AC 546 at 554 per Lord Keith of Kinkel. In both cases the House eschewed linguistic arguments in favour of a broad approach. *Pickstone's* case and *Litster's* case involved national legislation which implemented EC directives. The *Marleasing* case extended the scope of the interpretative obligation to unimplemented directives. *Pickstone's* case and *Litster's* case reinforce the approach to s 3(1) which prevailed in the House in the rape shield case.

[49] A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under s 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of s 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word 'possible' in s 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of s 3, to read or give effect to legislation in a way which is compatible with convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837. The House held that the Home Secretary was not competent under art 6 of the convention to decide on the tariff to be served by mandatory life sentence prisoners. The House found a s 3(1) interpretation not 'possible' and made a declaration under s 4. Interpretation could not provide a substitute scheme. *Bellinger's* case is another obvious example. As Lord Rodger of Earlsferry observed 'in relation to the validity of marriage, Parliament regards gender as fixed and immutable': see [2003] 2 All ER 593 at [83], [2003] 2 AC 467 at [83]. Section 3(1) of the 1998 Act could not be used.

a [50] Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where s 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under s 3(1) is the prime remedial remedy and that resort to s 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

b [51] I now return to the circumstances of the case before the House. Applying s 3 the Court of Appeal interpreted 'as his or her wife or husband' in the statute to mean 'as if they were his wife or husband'. While there has been some controversy about aspects of the reasoning of the Court of Appeal, I would endorse the reasoning of the Court of Appeal on the use of s 3(1) in this case. It was well within the power under this provision.

c [52] I would also dismiss the appeal.

d *Appendix to the Opinion of Lord Steyn*

A. Declarations of incompatibility made under s 4 of the Human Rights Act 1998

<i>e</i>	Case	Relevant convention provision	Provision declared incompatible
<i>f</i>	<i>R (on the application of H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)</i> [2001] EWCA Civ 415, (2001) 61 BMLR 163, [2002] QB 1	Article 5(1) and (4)	Mental Health Act 1983, s 73
<i>g</i>	<i>International Transport Roth GmbH v Secretary of State for the Home Dept</i> [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344	Article 6 and art 1 of the First Protocol	Penalty Scheme contained in Pt II of the Immigration and Asylum Act 1999
<i>h</i>	<i>R v McR</i> (2002) NIQB 58	Article 8	Offences Against the Person Act 1861, s 62

Case	Relevant convention provision	Provision declared incompatible	a
<i>R (on the application of Wilkinson) v IRC</i> [2003] EWCA Civ 814, [2003] 3 All ER 719, [2003] 1 WLR 2683	Article 14 when read in conjunction with art 1 of the First Protocol	Income and Corporation Taxes Act 1988, s 262	b
<i>R (on the application of Anderson) v Secretary of State for the Home Dept</i> [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837	Article 6(1)	Crime (Sentences) Act 1997, s 29	c
<i>R (D) v Secretary of State for the Home Dept</i> [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315	Article 5(4)	Mental Health Act 1983, s 74	d
<i>Blood and Tarbuck v Secretary of State for Health</i> Declaration by consent	Article 8 and/or art 8 when read with art 14	Human Fertilisation and Embryology Act 1990, s 28(6)(b)	e
<i>Bellinger v Bellinger</i> [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467	Articles 8 and 12	Matrimonial Causes Act 1973, s 11(c)	f
<i>R (on the application of FM) v Secretary of State for Health</i> [2003] ACD 389	Article 8	Mental Health Act 1983, ss 26(1) and 29	g
<i>R (Uttley) v Secretary of State for the Home Dept</i> [2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590	Article 7	Criminal Justice Act 1991, ss 33(2), 37(4)(a) and s 39	h
			i

B. Declarations of incompatibility overturned on appeal

a

b

c

d

e

f

g

h

j

Case	Convention provision	Provision declared incompatible	Overtaken: Court, date and reason
<i>R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions</i> [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295	Article 6	Sections 77, 78, 79 and paras 3 and 4 of Sch 6 to the Town and Country Planning Act 1990; ss 1, 3 and 23(4) of the Transport and Works Act 1992; ss 14(3)(a), 16(5)(a), 18(3)(a), 125 and paras 1, 7 and 8 of Pt 1 of Sch 1 to the Highways Act 1980; s 2 (3) and para 4 of Sch 1 to the Acquisition of Land Act 1981	House of Lords 9 May 2001. No incompatibility with art 6(1)
<i>Wilson v First County Trust Ltd</i> [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816	Article 6(1) and art 1 of the First Protocol	Consumer Credit Act 1974, s 127(3)	House of Lords 10 July 2003. Sections 3(1) and 4 did not apply to causes of action accruing before the 1998 Act came into force

Case	Convention provision	Provision declared incompatible	Overturned: Court, date and reason	a
<i>Matthews v Ministry of Defence</i> [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163	Article 6(1)	Crown Proceedings Act 1947, s 10	Court of Appeal 29 May 2002 ([2002] 3 All ER 513) and upheld on appeal by the House of Lords 13 February 2003. The claimant had no civil right to which art 6 might apply	b
<i>R (on the application of Hooper) v Secretary of State for Work and Pensions</i> [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623	Article 14 read together with art 8	Social Security Contributions and Benefits Act 1992, ss 36 and 37	The Court of Appeal 18 June 2003 Leave to appeal to the House of Lords granted	c
<i>A v Secretary of State for the Home Dept</i> [2002] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335	Article 5(1)	Anti-Terrorism, Crime and Security Act 2001, s 23	The Court of Appeal 25 October 2002. No incompatibility with the convention	d

a

b

c

d

e

f

g

h

j

C. Interpretations under s 3(1)

a

	Case	Convention provision	Provision in issue	Interpretation adopted
b	<i>R v Offen</i> [2001] 2 All ER 154, [2001] 1 WLR 253	Articles 3, 5, 7	Crime (Sentences) Act 1997, s 2	The imposition of an automatic life sentence as required by s 2 could be disproportionate if the defendant poses no risk to the public, thereby breaching arts 3 and 5. The phrase ' <i>exceptional circumstances</i> ' was to be given a less restrictive interpretation
c				
d				
e	<i>R v A</i> [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45	Article 6	Youth Justice and Criminal Evidence Act 1999, s 41	Prior sexual contact between the complainant and the defendant could be relevant to the issue of consent. The blanket exclusion of this evidence in s 41 was disproportionate. By applying s 3, the test of admissibility was whether the evidential material was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under art 6
f				
g				
h				
j				

Case	Convention provision	Provision in issue	Interpretation adopted	a
<i>Cachia v Faluyi</i> [2001] EWCA Civ 998, [2002] 1 All ER 192, [2001] 1 WLR 1966	Article 6(1)	Fatal Accidents Act 1976, s 2(3)	The restriction that ' <i>not more than one action shall lie for and in respect of the same subject matter of complaint</i> ' served no legitimate purpose and was a procedural quirk. 'Action' was therefore interpreted as 'served process' to enable claimants, whose writs had been issued but not served, to issue a new claim	b c d
<i>R v Lambert</i> [2001] 1 All ER 1014, [2002] QB 1112	Article 6	Misuse of Drugs Act 1971, s 28	The legal burden of proof placed on the defendant pursuant to the ordinary meaning of the phrase ' <i>if he proves</i> ' in the s 28 defences was incompatible with art 6. Accordingly it is to be read as though it says ' <i>to give sufficient evidence</i> '	e f
<i>Goode v Martin</i> [2001] EWCA Civ 1899, [2002] 1 All ER 620, [2002] 1 WLR 1828	Article 6	CPR 17.4(2)	To comply with art 6(1), the rule should be read as though it contains the words in italics: 'The court may allow an amendment whose effect will be to add ... a new claim, but only if the new claim arises out of the same facts or substantially the same facts as <i>are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings</i> '	g h j

<i>a</i>	Case	Convention provision	Provision in issue	Interpretation adopted
<i>b</i>	<p><i>R v Çarass</i> [2001] EWCA Crim 2845, [2002] 1 WLR 1714</p>	Article 6(2)	Insolvency Act 1986, s 206	<p>There is no justification for imposing a legal rather than evidential burden of proof on a defendant accused of concealing debts in anticipation of winding up a company, who raises a defence under s 206(4). Accordingly 'prove' is to be read as 'adduce sufficient evidence'</p>
<i>e</i>	<p><i>R (on the application of Van Hoogstraten) v Governor of Belmarsh Prison</i> [2002] EWHC 1965 (Admin), [2003] 4 All ER 309, [2003] 1 WLR 263</p>	Article 6	Prison Rules 1999, s 2(1)	<p>Reading the rule compatibly with s 3 of the 1998 Act, a prisoner's legal adviser, defined in s 2(1) as 'his counsel or solicitor, and includes a clerk acting on behalf of his solicitor' must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant and therefore includes an Italian 'avvocato' who falls within the definition of 'EEC lawyer' in the European Communities (Services of Lawyers) Order 1978, SI 1978/1910</p>

Case	Convention provision	Provision in issue	Interpretation adopted	a
<i>Sheldrake v DPP</i> [2003] EWHC 273 (Admin), [2003] 2 All ER 497, [2003] 2 WLR 1629	Article 6(2)	Road Traffic Act 1988, s 5(1)(b) and (2)	The s 5(2) defence to the offence of driving while under the influence of alcohol over the prescribed limit, which requires the defendant to meet the legal burden of proving that there was no likelihood of his driving the vehicle while over the limit, is to be read down as imposing only an evidential burden on the defendant	b c d
<i>R (Sim) v Parole Board</i> [2003] EWHC 152 (Admin), [2003] 2 WLR 1374	Article 5	Criminal Justice Act 1991, s 44A(4)	In order to be compatible with art 5, s 44A(4) should be read as requiring the Parole Board to direct a recalled prisoner's release unless it is positively satisfied that the interests of the public require that his confinement should continue	e f
<i>R (on the application of Middleton) v West Somerset Coroner</i> [2004] UKHL 10, [2004] 2 All ER 465, [2004] 2 WLR 800	Article 2	Coroners Act 1988, s 11(5)(b)(ii); Coroners Rules 1944, r 36(1)(b)	'How' in the phrase 'how, when and where the deceased came by his death' is to be read in a broad sense, to mean 'by what means and in what circumstances' rather than simply 'by what means'	g h j

LORD MILLETT.

a [53] My Lords, paras 2 and 3 of Sch 1 to the Rent Act 1977 as amended by the Housing Act 1988 provide:

‘2.—(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant ...

3.—(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant’s family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy ...’

d [54] As my noble and learned friend Lord Nicholls of Birkenhead has observed, and as this House decided in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27, on an ordinary reading of para 2(2) the survivor of two persons of the opposite sex living together as man and wife in a dwelling house which is subject to the Rent Acts has a statutory right to succeed to the statutory tenancy of the deceased tenant; but the survivor of two persons of the same sex living together in similar circumstances has no such right. He or she merely has a right, in competition with other members of the deceased tenant’s family, to claim an assured tenancy; but not only is an assured tenancy less advantageous than a statutory tenancy but the survivor’s entitlement, if disputed by other members of the late tenant’s family, is at the discretion of the court.

e [55] I agree with all my noble and learned friends, whose speeches I have had the advantage of reading in draft, that such discriminatory treatment of homosexual couples is incompatible with their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and cannot be justified by any identifiable legitimate aim. I am, moreover, satisfied by the powerful and convincing speech of my noble and learned friend Baroness Hale of Richmond that for the reasons she gives such treatment is not only incompatible with the convention but is unacceptable in a modern democratic society at the beginning of the twenty-first century. This is not to say that it was always, or even until fairly recently, unacceptable; but times change, and with them society’s perceptions change also (a commonplace usually dignified by being rendered in Latin).

g [56] It follows that, unless the court can apply s 3 of the 1998 Act to extend the reach of para 2(2) to the survivor of a couple of the same sex, it must consider making a declaration of incompatibility under s 4. The making of such a declaration is in the court’s discretion (s 4 provides only that the court ‘may’ make one); and it may be a matter for debate whether it would be appropriate to do so at a time when not merely has the government announced its intention to bring forward corrective legislation in due course (as in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467) but Parliament is currently engaged in

enacting remedial legislation. It is, however, unnecessary to enter upon this question, for there is a clear majority in favour of the view that s 3 can be applied to interpret para 2(2) in a way which renders legislative intervention unnecessary.

[57] I have the misfortune to be unable to agree with this conclusion. I have given long and anxious consideration to the question whether, in the interests of unanimity, I should suppress my dissent, but I have come to the conclusion that I should not. The question is of great constitutional importance, for it goes to the relationship between the legislature and the judiciary, and hence ultimately to the supremacy of Parliament. Sections 3 and 4 of the 1998 Act were carefully crafted to preserve the existing constitutional doctrine, and any application of the ambit of s 3 beyond its proper scope subverts it. This is not to say that the doctrine of parliamentary supremacy is sacrosanct, but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well-meaning.

[58] Sections 3 and 4 of the 1998 Act, so far as material, provide as follows:

'3. Interpretation of legislation.—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights ...'

4. Declaration of incompatibility.—(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility ...'

(6) A declaration under this section ("a declaration of incompatibility")—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given ...'

[59] Several points may be made at the outset. First, the requirement in s 3 is obligatory. In *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373 Lord Cooke of Thorndon described the section as 'a strong adjuration' by Parliament to read and give effect to legislation in a way which is compatible with convention rights. With respect, it is more than this. It is a command. Legislation 'must' be read and given effect to in a way which is compatible with convention rights. There is no residual discretion to disobey the obligation which the section imposes.

[60] Secondly, the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the convention. Ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way which would put the United Kingdom in breach of its international obligations. This presumption will often be sufficient to enable the court to interpret the statute in a way which will make it compatible with the convention without recourse to s 3. It is only where this is not the case that s 3 comes into play. When it does, it obliges the court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principles and presumptions.

[61] This is a difficult exercise, for it is one which the courts have not hitherto been accustomed to perform, and where they must accordingly establish their own ground rules for the first time. It is also dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and

a trespass upon the prerogative of Parliament in what will almost invariably be a good cause.

[62] Thirdly, there are limits to the extent to which s 3 may be applied to render existing legislation compatible with the convention. The presence of s 4 alone shows this to be the case, for it presupposes the existence of cases where the offending legislation cannot be rendered compatible with the convention by the

b application of s 3.

[63] There are two limitations to its application which are expressed in s 3 itself. In the first place, the exercise which the court is called on to perform is still one of interpretation, not legislation (legislation must be 'read and given effect to'). Section 3 is in marked contrast with the provisions in the constitutions of former colonial territories in relation to existing laws which are incompatible with constitutional rights. Such provisions commonly authorise the court to construe such laws 'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution'.

d [64] This is a quasi-legislative power, not a purely interpretative one; for the court is not constrained by the language of the statute in question, which it may modify (ie amend) in order to bring it into conformity with the constitution. In *R v Hughes* [2002] UKPC 12, (2002) 12 BHRC 243, [2002] 2 AC 259 the Privy Council deleted (ie repealed) express words in the statute. In doing so it exercised a legislative, not an interpretative, power. Such a power is appropriate where the constitution (particularly one based on the separation of powers) is the supreme law, and where statutes inconsistent with the constitution are to the extent of the inconsistency automatically rendered void by the constitution. A finding of inconsistency may leave a lacuna in the statute book which in many cases must be filled without delay if chaos is to be avoided and which can be filled only by the exercise of a legislative power. But it is not appropriate in the United Kingdom, which has no written constitution and where the prevailing constitutional doctrine is based on the supremacy of Parliament rather than the separation of powers. Accordingly s 4(6) provides that legislation which is incompatible with a convention right is not thereby rendered void; nor is it invalidated by the making of a declaration of incompatibility. It continues in full force and effect unless and until it is repealed or amended by Parliament, which can decide whether to change the law and if so from what date and whether retrospectively or not.

[65] In some cases (*Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291 and *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837 are examples) it would have been necessary to repeal the statutory scheme and substitute another. This is obviously impossible without legislation, and cannot be achieved by resort to s 3. That is not the present case. In other cases (*Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467 is an example) questions of social policy have arisen which ought properly to be left to Parliament and not decided by the judges. I shall return to this point later.

[66] In the second place, s 3 requires the court to read legislation in a way which is compatible with the convention only 'so far as it is possible to do so'. It must, therefore, be possible, by a process of interpretation alone, to read the offending statute in a way which is compatible with the convention.

[67] This does not mean that it is necessary to identify an ambiguity or absurdity in the statute (in the sense of being open to more than one interpretation) before giving it an abnormal meaning in order to bring it into conformity with a convention right: see *R v A* [2001] UKHL 25 at [44], [108], [2001] 3 All ER 1 at [44], [108], [2002] 1 AC 45 per Lord Steyn and Lord Hope of Craighead respectively. I respectfully agree with my noble and learned friend Lord Nicholls of Birkenhead that even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, s 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must 'strive to find a possible interpretation compatible with convention rights' see *R v A* at [44] per Lord Steyn (my emphasis). But it is not entitled to give it an impossible one, however much it would wish to do so.

[68] In my view s 3 does not entitle the court to supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute. As Lord Nicholls said in *Rojas v Berllaque (A-G for Gibraltar intervening)* [2003] UKPC 76 at [24], [2004] 1 LRC 296 at [24], [2004] 1 WLR 201: 'There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution.' This is more likely to be the case in the United Kingdom where the court's role is exclusively interpretative than in those territories (which include Gibraltar) where it is quasi-legislative.

[69] I doubt that the principles which I have endeavoured to state would be disputed; disagreement is likely to lie in their application in a particular case. So it may be helpful if I give some examples of the way in which I see s 3 as operating.

[70] In the course of his helpful argument counsel for the Secretary of State, who did not resist the application of s 3, acknowledged that it could not be used to read 'black' as meaning 'white'. That must be correct. Words cannot mean their opposite; 'black' cannot mean 'not black'. But they may include their opposite. In some contexts it may be possible to read 'black' as meaning 'black or white'; in other contexts it may be impossible to do so. It all depends on whether 'blackness' is the essential feature of the statutory scheme; and while the court may look behind the words of the statute they cannot be disregarded or given no weight, for they are the medium by which Parliament expresses its intention.

[71] Again, 'red, blue or green' cannot be read as meaning 'red, blue, green or yellow'; the specification of three only of the four primary colours indicates a deliberate omission of the fourth (unless, of course, this can be shown to be an error). Section 3 cannot be used to supply the missing colour, for this would be not to interpret the statutory language but to contradict it.

[72] The limits on the application of s 3 may thus be in part at least linguistic, as in the examples I have given, but they may also be derived from a consideration of the legislative history of the offending statute. Thus, while it may be possible to read 'cats' as meaning 'cats or dogs' (on the footing that the essential concept is that of domestic pets generally rather than felines

- a particularly), it would obviously not be possible to read 'Siamese cats' as meaning 'Siamese cats or dogs'. The particularity of the expression 'Siamese cats' would preclude its extension to other species of cat, let alone dogs. But suppose the statute merely said 'cats', and that this was the result of successive amendments to the statute as originally enacted. If this had said 'Siamese cats', and had twice been amended, first to read 'Siamese or Persian cats' and then to read simply
- b 'cats', it would not, in my opinion, be possible to read the word 'cats' as including 'dogs'; the legislative history would demonstrate that, while Parliament had successively widened the scope of the statute, it had consistently legislated in relation to felines, and had left its possible extension to other domestic pets for future consideration. Reading the word 'cats' as meaning 'cats or dogs' in these circumstances would be to usurp the function of Parliament.

- c [73] In *R v A* [2001] 3 All ER 1 the offending statute had laid down an elaborate scheme to prevent the defendant to a charge of rape from adducing certain kinds of evidence at his trial. Read without qualification this could exclude logically relevant evidence favourable to the accused and deny him a fair trial contrary to
- d art 6 of the convention. The House read the statute as subject to the implied proviso that evidence or questioning which was required to ensure a fair trial should not be treated as inadmissible. The House supplied a missing qualification which significantly limited the operation of the statute but which did not contradict any of its fundamental features. As Lord Steyn observed (at [45]) it would be unrealistic to suppose that Parliament, if alerted to the problem, would
- e have wished to deny an accused person the right to put forward a full and complete defence by advancing truly probative material.

- [74] For my own part, I have no difficulty with the conclusion which the House reached in that case. The qualification which it supplied glossed but did not contradict anything in the relevant statute. Neither expressly nor implicitly
- f did the statute require logically probative evidence to be excluded if its exclusion would have the effect of denying the accused a fair trial. The meaning of the statute was not ambiguous, and in the absence of s 3 the proviso could not have been implied. But if it had been expressed it would not have made the statute self-contradictory or produced a nonsense.

- g [75] Lord Hope, who had more difficulty in the application of s 3, observed that compatibility was to be achieved only so far as this was possible, and that it would plainly not be possible if the legislation contained provisions which expressly contradicted the meaning which the enactment would have to be given to make it compatible. He added that the same result must follow if they did so by necessary implication, as this too was a means of identifying the plain
- h intention of Parliament. Lord Steyn said the same in *Anderson's case* [2002] 4 All ER 1089 at [59] (my emphasis): 'Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute' citing Lord Nicholls in *Re S* [2002] 2 All ER 192 at [41] in support.

- i [76] I respectfully agree with this approach, though I would add a caveat. I do not understand the word 'implication' as entitling the court to imply words which would render the statute incompatible with the convention; that would be entirely contrary to the spirit of s 3. They mean only that the incompatibility need not be explicit; but if not then it must be implicit, that is to say manifest on the face of the statute.

[77] It is obvious that, if para 2(2) of Sch 1 to the Rent Act 1977 as amended had referred expressly to 'a person of the opposite sex' who was living with the original tenant as his or her husband or wife, it would not be possible to bring the paragraph into conformity with the convention by resort to s 3. The question is whether the words 'of the opposite sex' are implicit; for if they are, then the same result must follow. Reading the paragraph as referring to persons whether of the same or opposite sex would equally contradict the legislative intent in either case. I agree that the operation of s 3 does not depend critically upon the form of words found in the statute; the court is not engaged in a parlour game. But it does depend upon identifying the essential features of the legislative scheme; and these must be gathered in part at least from the words that Parliament has chosen to use. Drawing the line between the express and the implicit would be to engage in precisely that form of semantic lottery to which the majority rightly object.

[78] In the present case both the language of para 2(2) and its legislative history show that the essential feature of the relationship which Parliament had in contemplation was an open relationship between persons of the opposite sex. I take the language first. Paragraph 2(1) provides that 'the surviving spouse' of the deceased tenant shall succeed to the statutory tenancy. The word 'spouse' means a party to a lawful marriage. It may refer indifferently to a lawfully wedded husband or a lawfully wedded wife, and to this extent is not gender-specific. But it is gender-specific in relation to the other party to the relationship. Marriage is the lawful union of a man and a woman. It is a legal relationship between persons of the opposite sex. A man's spouse must be a woman; a woman's spouse must be a man. This is of the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented. Although it may be brought to an end as a legal relationship only by death or an order of the court, its demise as a factual relationship will usually have ended long before that.

[79] Another basic feature of marriage is that it is an openly acknowledged relationship. From the earliest times marriage has involved a public commitment by the parties to each other. Whether attended by elaborate ceremonial or relatively informal, and whether religious or secular, its essence consists of a public acknowledgment of mutual commitment. Even primitive societies demand this, because the relationship does not concern only the immediate parties to it. The law may enable them to dispense with formalities, but not with public commitment. In some Polynesian societies, it is said, young men and women marry by the simple process of taking a meal together in public.

[80] Paragraph 2(2) provides that a person who was living with the original tenant 'as his or her wife or husband' shall be treated as 'the spouse of the original tenant'. Mathematically there are four possibilities: 'his wife', 'her wife', 'her husband' and 'his husband'. But two of these are nonsense. A man cannot have a husband; and a woman cannot have a wife. In order to be treated as the spouse of the original tenant, a person must have been living openly with the tenant as his wife or her husband. In any given case, of course, only one person can qualify. If the tenant was a man, that person must have been his wife or have lived with him as his wife; if a woman, he must have been her husband or lived with her as such. The paragraph is gender-specific.

[81] It seems clear that Parliament contemplated an open relationship, whether legal (para 2(1)) or de facto (para 2(2)), the essential feature of which is that, unlike other relationships, it subsists and can subsist only between persons

a of the opposite sex. A loving relationship between persons of the same sex may share many of the features of a *de facto* marriage. It may, as Baroness Hale describes it, be 'marriage-like'; but it is not even *de facto* a marriage, because it lacks the defining feature of marriage.

[82] In my opinion the words 'of the opposite sex' are unmistakably implicit. Although not expressed in terms, they are manifest on the face of the statute. The parties are not required merely to live together but to do so *as husband and wife*. They are not merely given the same rights as married persons but are treated as if they *were* married persons. If the draftsman had inserted the words 'being of the opposite sex' expressly he would have produced a comical tautology. If he had inserted the words 'whether of the same or opposite sex' he would have produced a self-contradictory nonsense. Persons cannot be or be treated as married to each other or live together as husband and wife unless they are of the opposite sex. It is noticeable that, now that Parliament is introducing remedial legislation, it has not sought to do anything as silly as to treat same sex relationships as marriages, whether legal or *de facto*. It pays them the respect to which they are entitled by treating them as conceptually different but entitled to equality of treatment.

[83] I turn to the legislative history. As originally enacted, the 1977 Act provided, as had earlier Rent Acts, that on the death of a statutory tenant without a widow but leaving a member of his family living with him at his death, that person should become a statutory tenant by succession. If there was more than one such person then, in the absence of agreement between them, the court should decide which of them would become the statutory tenant. If the tenant left a widow who was residing in the dwelling house at his death, however, she had a right to a statutory tenancy in priority to other members of his family.

[84] It is an important feature of this legislation that the widow succeeded to the tenancy by virtue of her status, much as she would succeed to her late husband's estate on intestacy. She merely had to produce her marriage certificate. She did not have to prove that the marriage was happy, or stable, or long-lasting, or that the parties had been faithful to each other. The marriage could have been unhappy, tempestuous, or very recent; she could have been unfaithful; her husband could have begun divorce proceedings. Provided that she was living in the dwelling house (not necessarily with her husband) at the date of the tenant's death and he was still her husband, she was entitled to become the statutory tenant. She did not have to prove that she deserved to do so. Merit did not come into it.

[85] The primacy given to the widow's claim was not, of course, at the expense of the landlord. She was a member of the tenant's family, and if she was the only member of his family who was residing in the dwelling house when he died she would be entitled to a statutory tenancy anyway. It was only when there was more than one member of his family who qualified that her priority was of any significance; and this was at the expense of the others. Even then hers would normally be the most deserving claim. This provides the key to an understanding of the legislative policy behind the Rent Acts. The widow was to succeed by virtue of her status alone; she was not to be required to prove that she was more deserving than (say) her mother-in-law. Parliament sought to avoid provoking bitter and unseemly family disputes over the succession. A similar policy informs the law governing intestate succession. A statutory tenancy was the creature of statute. It was merely 'a status of irremovability'; it was not property. It did not

form part of a deceased tenant's estate and could not pass under his will or on his intestacy. But Parliament could determine what should happen on the tenant's death; and in effect it provided for it to pass to his widow in much the same way as if it were part of his estate and he had died intestate.

[86] Unfortunately, as originally enacted the 1977 Act conferred the right on the tenant's widow, and the Court of Appeal held that this was gender-specific. Paragraph 2(1) applied only where the tenancy was in the husband's name and he predeceased his wife. It did not apply in the converse, though much less common, case where the tenancy was in the wife's name and she predeceased her husband. Today, of course, s 3 of the 1998 Act would permit this to be corrected. 'Widow' cannot mean 'widower' but it can mean 'widow or widower'. Reading in the words 'or widower' would not contradict the express terms of the statute or create a nonsense. Parliament had failed to include the less common case (perhaps because it overlooked it or thought that it had provided for it), but it had not manifested an intention to exclude it.

[87] Parliament responded promptly. In 1980 it amended the 1977 Act by substituting 'surviving spouse' for 'widow', producing para 2(1) in its present form. For the reasons I have mentioned, this did not prejudice the landlord. It merely meant that, like the widow, the widower could succeed by virtue of his status without having to prove that he was more deserving than (say) his stepson.

[88] In 1988, however, Parliament made two changes of greater significance. The first was the consequence of a policy decision to introduce more flexibility into the housing market by phasing out statutory tenancies. No more statutory tenancies were to be created in future; they would be replaced by assured tenancies. Paragraph 3 was amended so that, on the death of a statutory tenant leaving a member of his or her family residing in the dwelling house, he or she would become an assured tenant but not a statutory tenant.

[89] Parliament did not, however, alter the right of a surviving spouse to become a statutory tenant in the place of the deceased tenant. This must, I think, have been due to a reluctance to enact what might be seen as retrospective legislation. The wife or husband of a statutory tenant had a vested right to succeed to the tenancy on the tenant's death. He or she had more than a hope of succession, for there was nothing the tenant could do to prevent it. To the extent that this might be thought to run counter to the policy to phase out statutory tenancies, it should be recalled that the surviving spouse's claim arose only on the death of a statutory tenant. Eventually there would be no more statutory tenancies, and para 2 would become a dead letter. The same aversion to retrospective legislation was not, however, seen as applying, or as applying with the same force, to the claims of other members of the tenant's family.

[90] The present case is concerned with the second change: the introduction of para 2(2). This was compelled by changes in society. Couples are increasingly living together openly as man and wife without actually marrying. It is possible that this will become the norm rather than the exception. To extend the privileges of marriage to those who choose not to marry was formerly highly controversial; it was thought by many to undermine the status of marriage. It is less controversial today. By 1988 Parliament considered that it was sufficiently acceptable to enact it in legislation.

[91] By enacting para 2(2), therefore, Parliament was responding to changes in society. The timing of such a response is, under our constitutional arrangements, peculiarly a matter for the legislature and not the judiciary. Parliament's policy,

- a however, had not changed. The survivor, whether a spouse or merely treated as a spouse, should still have the right to succeed to the statutory tenancy by virtue of his or her status. The difference was that he or she no longer had to prove that the relationship was recognised by law; it was sufficient that it existed in fact. The claimant no longer had to produce a marriage certificate; it was sufficient that he or she and the deceased tenant had lived openly together as husband and wife.
- b This probably was seen as entrenching on the landlord's rights, for it must have been far from clear in 1988 that the 'common law wife' or husband was a member of the other party's family. But landlords do not ask to see their tenants' marriage certificates; and the encroachment, if any, was easily justifiable.

- [92] The expression 'living together as man and wife' or 'as husband and wife' is in general use and well understood. It does not mean living together as lovers whether of the same or the opposite sex. It connotes persons who have openly set up home together as man and wife. While other factors may be significant where the question arises between the parties themselves, in a context such as the present it must depend largely if not exclusively on outward appearances. It cannot depend on the relationship being a happy, or long-lasting, or stable one.
- d This would be contrary to the Parliament's long-standing policy: the survivor must succeed by virtue of his or her status. He or she is to be treated as having been the spouse of the original tenant because that is what, to all intents and purposes and to all outward appearances, the claimant was. This is, of course, not to say that they must hold themselves out as husband and wife: couples who live together as husband and wife rarely do so. It means only that they must appear to the outside world as if they were husband and wife.
- e

- [93] There is, indeed, a paradox at the heart of modern society. For centuries the civil and canon law, the common law of Europe as it has been called, did not require any form of religious or secular ceremony to constitute a marriage. Persons who openly set up home together and lived together as man and wife were presumed to be married; and if they had consummated the marriage they were married; marriage was by habit and repute. The combined effect of the Council of Trent and the Marriage Acts put an end to all that. But there is nothing new in treating men and women who live openly together as husband and wife as if they were married; it is a reversion to an older tradition.
- f

- g [94] By 1988 Parliament, therefore, had successively widened the scope of para 2(1). First applying only to the tenant's widow, it was extended first to his or her surviving spouse and later to a person who had lived with the tenant as his or her spouse though without actually contracting a legally binding marriage. The common feature of all these relationships is that they are open relationships between persons of the opposite sex. Persons who set up home together may be husband and wife or live together as husband and wife; they may be lovers; or brother and sister; or friends; or fellow students; or share a common economic interest; or one may be economically dependent on the other. But Parliament did not extend the right to persons who set up home together; but only to those who did so *as husband and wife*.
- h

- j [95] Couples of the same sex can no more live together as husband and wife than they can live together as brother and sister. To extend the paragraph to persons who set up home as lovers would have been a major category extension. It would have been highly controversial in 1988 and was not then required by the convention. The practice of contracting states was far from uniform; and Parliament was entitled to take the view that any further extension of para (2)

could wait for another day. One step at a time is a defensible legislative policy which the courts should respect. Housing Acts come before Parliament with some frequency; and Parliament was entitled to take the view that the question could be revisited without any great delay. It is just as important for legislatures not to proceed faster than society can accept as it is for judges; and under our constitutional arrangements the pace of change is for Parliament. a

[96] Parliament, as I have said, is now considering corrective legislation in the Civil Partnerships Bill currently before the House in its legislative capacity. The Bill creates a new legal relationship, called a civil partnership, which the persons of the same sex may enter into by registering themselves as civil partners. It inserts the words 'or surviving civil partner' after the words 'surviving spouse' in para 2(1), and adds a new para (2)(b): '... a person who was living with the original tenant as if they were civil partners shall be treated as the civil partner of the original tenant.' b
c

[97] There will thus be four categories of relationship covered if the Bill becomes law: (i) spouses, ie married persons (necessarily being persons of the opposite sex); (ii) persons who live together as husband and wife who are to be treated as if they were married (and who must therefore also be of the opposite sex); (iii) civil partners (who must be of the same sex) who are given the same rights as but are not treated as if they were married persons; and (iv) persons who live together as if they were civil partners without having registered their relationship, who are treated as if they had done so. This is a rational and sensible scheme which does not involve pretending that couples of the same sex can marry or be treated as if they had done so. d
e

[98] Among the matters which Parliament will have had to consider in debating the Civil Partnerships Bill are: (i) which statutes to amend by extending their reach to civil partners and persons living together as civil partners; (ii) whether such statutes should extend to unregistered civil partnerships in every case or whether in some cases it would be appropriate to require the parties to register their relationship before taking the benefits of the statute; (iii) whether the Bill should be retrospective to any and what extent; and (iv) from what date should the new provisions come into force. Presumably some time must elapse before a system of registration can be established: should unregistered civil partners have to wait until it is? These, and no doubt other matters, are questions of policy for the legislature. f
g

[99] All this will be foreclosed by the majority. By what is claimed to be a process of interpretation of an existing statute framed in gender-specific terms, and enacted at a time when homosexual relationships were not recognised by law, it is proposed to treat persons of the same sex living together as if they were living together as husband and wife and then to treat such persons as if they were lawfully married. It is to be left unclear as from what date this change in the law has taken place. If we were to decide this question we would be usurping the function of Parliament; and if we were to say that it was from the time when the European Court of Human Rights decided that such discrimination was unlawful we would be transferring the legislative power from Parliament to that court. It is, in my view, consonant with the convention for the contracting states to take time to consider its implications and to bring their laws into conformity with it. They do not demand retrospective legislation. h
j

[100] Worse still, in support of their conclusion that the existing discrimination is incompatible with the convention, there is a tendency in some

a of the speeches of the majority to refer to loving, stable and long-lasting homosexual relationships. It is left wholly unclear whether qualification for the successive tenancy is confined to couples enjoying such a relationship or, consistently with the legislative policy which Parliament has hitherto adopted, is dependent on status and not merit.

b [101] In my opinion all these questions are essentially questions of social policy which should be left to Parliament. For the reasons I have endeavoured to state it is in my view not open to the courts to foreclose them by adopting an interpretation of the existing legislation which it not only does not bear but which is manifestly inconsistent with it.

[102] I would allow the appeal.

c **LORD RODGER OF EARLSFERRY.**

[103] My Lords, I have had the advantage of considering the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Steyn and Baroness Hale of Richmond, in draft. I agree with them and would accordingly dismiss the appeal. In view of the importance of the issue, I add some observations on s 3 of the Human Rights Act 1998.

d [104] Section 3, which, as Lord Hoffmann remarked in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 413, [2000] 2 AC 115 at 132, enacts the principle of legality as a rule of construction, provides:

e '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

f (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

g In *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373 Lord Cooke of Thorndon described s 3(1) as 'a strong adjuration' by Parliament to read and give effect to legislation compatibly with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). Nevertheless, the opening words of sub-s (1) show that there are limits to the obligation. That is reflected in sub-s (2)(b) and (c) as well as in the next section, s 4, which applies in those cases where a higher court is satisfied that, despite s 3(1), a provision is to be regarded as incompatible with a convention right. In that event the court may make a declaration of incompatibility. While it is therefore clear that there are limits to the obligation in s 3(1), they are not spelled out. In a number of cases your Lordships' House has taken tentative steps towards identifying those limits.

j The matter calls for further consideration in this case.

[105] In addressing the question, it is useful to bear in mind s 6(1) and (2):

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted

differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.'

Subsection (3) goes on to define 'public authority' as including a court.

[106] Inevitably, when s 3 comes to be considered by a court, the focus is on the approach which s 3(1) requires the court to adopt when reading a statutory provision that, on a conventional interpretation, would be incompatible with a convention right. Nevertheless, the section is not aimed exclusively, or indeed mainly, at the courts. In contrast to s 4—which applies in terms only to 'a court' of the level of the High Court or above—and in contrast also to s 6—which applies only to public authorities—s 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government, but the section is not confined to them. The broad sweep of s 3(1) is indeed crucial to the working of the 1998 Act. It is the means by which Parliament intends that people should be afforded the benefit of their convention rights—'so far as it is possible', without the need for any further intervention by Parliament. In *R v A* [2001] UKHL 25 at [44], [2001] 3 All ER 1 at [44], [2002] 1 AC 45 and in his speech today, Lord Steyn has referred to what ministers told Parliament about how, they anticipated, the obligation in s 3(1) would work in practice. However that may be, s 3(1) requires public authorities of all kinds to read their statutory powers and duties in the light of convention rights and, so far as possible, to give effect to them in a way which is compatible with the convention rights of the people concerned. In practice, even before the 1998 Act came into force, many public authorities had reviewed the legislation affecting them so as to be in a position to comply with this obligation from the date of commencement. This was a wise precaution. Once the 1998 Act came into force, whenever, by virtue of s 3(1), a provision could be read in a way which was compatible with convention rights, that was the meaning which Parliament intended that it should bear. For all purposes, that meaning, and no other, is the 'true' meaning of the provision in our law.

[107] The second point to notice is that, so far as possible, legislation must be 'read and given effect' compatibly with convention rights. The use of the two expressions, 'read' and 'given effect', is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, s 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the

a local authority will be in breach of art 14 in relation to the other article concerned and, in terms of s 3(1), will have failed to give effect to the legislation in a way which is compatible with convention rights. So, even though the heading of s 3 is 'Interpretation of legislation', the content of the section actually goes beyond interpretation to cover the way that legislation is given effect.

[108] Next, the Act discloses one clear limit to s 3(1). It is not concerned with b provisions which, properly interpreted, impose an unavoidable obligation to act in a particular way. This can be seen from a comparison of paras (a) and (b) of s 6(2). According to para (a), s 6(1) does not apply, and a public authority therefore acts lawfully, if, as a result of primary legislation, 'the authority could not have acted differently'. An example might be a provision requiring a local c authority to dismiss an application if the applicant failed to take a particular step within seven days. Even if this results in the violation of a convention right, the local authority must dismiss the application and, in doing so, it acts lawfully: it cannot act differently in terms of the legislation. By para (b), on the other hand, the public authority also acts lawfully if, in the case of one or more provisions of d primary or secondary legislation 'which cannot be read or given effect in a way to give effect to or enforce those provisions. Paragraph (b) echoes the language of s 3(1) and therefore deals with the (different) situation where, in terms of s 3(1), it has not proved possible to read and give effect to a provision in a way which is compatible with convention rights. In that situation, as s 3(2)(b) provides, the validity, continuing operation and enforcement of the legislation are not affected e and so it is lawful for a public authority to act in terms of the legislation. In that case too, s 6(2) disappplies s 6(1).

[109] If incompatible provisions that require a public authority to act in a particular way, and leave it with no option to act differently, do not fall within the scope of s 3(1), this can only be because, by definition, it is not possible to read f them or give effect to them in a way which is compatible with convention rights. This makes sense. If a provision requires the public authority to take a particular step which is, of its very nature, incompatible with convention rights, then no process of interpretation can remove the obligation or change the nature of the step that has to be taken. Nor can the public authority give effect to the obligation by doing anything other than taking the step which the Act requires of g it. In such cases, only Parliament can remove the incompatibility if it decides to repeal or amend the provision. The most that a higher court can do is to make a declaration of incompatibility under s 4.

[110] What excludes such provisions from the scope of s 3(1) is not any mere h matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision. So from s 6(2)(a) and (b) one can tell that, however powerful the obligation in s 3(1), it does j not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that *x* is to happen into one saying that *x* is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament. In *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA

Civ 158, [2003] QB 728, [2002] 3 WLR 344 for instance, the Court of Appeal held that it was impossible for the court to use the interpretative obligation in s 3(1) in effect to recreate the fixed penalty scheme enacted by Parliament so as to turn it into a scheme that was compatible with art 6. As Simon Brown LJ observed (at [66]) it would have involved turning the scheme inside out—something that the court could not do. Only Parliament, not the courts, could create a wholly different scheme so as to provide an acceptable alternative means of immigration control.

[111] Another illustration of this limitation on the obligation under s 3(1) is to be found in the decision of your Lordships' House in *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837. Section 29 of the Crime (Sentences) Act 1997 provided that 'if recommended to do so by the Parole Board, the Secretary of State may ... release on licence' certain life prisoners, viz convicted murderers. The House was satisfied that it was incompatible with the convention rights of Mr Anderson, who had been convicted of murder, for the power to release him to lie with the Home Secretary rather than with a judicial body. Counsel for Anderson submitted accordingly that, under s 3(1) of the 1998 Act, s 29 of the 1997 Act could be read and given effect in a manner which would be compatible with his convention rights. In effect, this would have amounted to reading the section in such a way as to deprive the Home Secretary of the express power to release him. The House rejected this submission since it was clear that, under s 29, the power of release and the power to determine how long a convicted murderer should remain in prison for punitive purposes were to lie with the Home Secretary and with no one else. In these circumstances, in the words of Lord Bingham of Cornhill ([2002] 4 All ER 1089 at [30]):

'To read s 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by s 3 of the 1998 Act ...'

The 'judicial vandalism' would lie not in any linguistic changes, whether great or small, which the court might make in interpreting s 29 but in the fact that any reading of s 29 which negated the explicit power of the Secretary of State to decide on the release date for murderers would be as drastic as changing black into white. It would remove the very core and essence, the 'pith and substance' of the measure that Parliament had enacted—to use the familiar phrase of Lord Watson (in a different context) in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580 at 587. Section 3(1) gives the courts no power to go that far. In these circumstances the House made a declaration of incompatibility, which left it to the minister and ultimately to Parliament to decide whether to remedy the incompatibility by amending or repealing s 29 and, if so, how.

[112] In reaching this conclusion Lord Bingham had regard to the well-known words of Lord Nicholls of Birkenhead in *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10 at [39], [2002] 2 All ER 192 at [39], [2002] 2 AC 291 where the relevant distinction is drawn:

'The 1998 Act reserves the amendment of primary legislation to Parliament. By this means the 1998 Act seeks to preserve Parliamentary sovereignty. The 1998 Act maintains the constitutional boundary.

- a Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.'

b Whatever can be done by way of interpretation must be done by the courts and anyone else who is affected by the legislation in question. The rest is left to Parliament and amounts to amendment of the legislation. As Lord Nicholls pointed out, it is by no means easy to decide in the abstract where the boundary lies between robust interpretation and amendment, but, he added (at [40]):

- c 'For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on convention rights is not stated in express terms.'
- d

- [113] The problem facing the House in *Re S* was, in some ways, the opposite of the problem that was to come before the House in *Anderson's* case. In the earlier case, the interpretation of the Children Act 1989 which the Court of Appeal had adopted in reliance on arts 6 and 8 of the convention did not involve removing any power from a statutory body. Rather, in the view of the House, the starring system devised by the Court of Appeal involved conferring on the courts a power to supervise the way in which local authorities discharged their parental responsibilities under final care orders. This was to depart substantially from 'a cardinal principle' of the 1989 Act, that the courts are not empowered to intervene in the way local authorities discharge their responsibilities under such orders (at [42]). Lord Nicholls, with whom all the other members of the House agreed, went on to hold (at [43]) that the innovation made by the Court of Appeal 'passes well beyond the boundary of interpretation'. There was no provision in the 1989 Act that lent itself to the interpretation that Parliament was conferring this supervisory function on the court. On the contrary, conferring such a function was inconsistent in an important respect with the scheme of the Act: 'It would constitute amendment of the Children Act, not its interpretation.' In that situation it was not possible to 'read in' to the Act or any of its provisions a power to set up such a system. That would be to produce a meaning that departed substantially from a fundamental feature of the Act and so crossed the boundary between interpretation and amendment.
- e
- f
- g
- h

- [114] Again, it is important to notice that the problem identified by the House did not derive from any perceived difficulty in finding language to frame a power to require a report on the progress of the local authority; rather, the problem was that, however the courts might frame the power, they would be introducing something which was not to be found in the 1989 Act—and, more particularly, something which was actually inconsistent with one of its cardinal principles. If such a change to the Act was to be made, Parliament would have to make it.
- i

[115] In the second passage from his speech in *Re S* which I have quoted at [112], above, Lord Nicholls made the further point that a departure from a fundamental feature of an Act of Parliament may be more readily treated as crossing the boundary into the realm of amendment where it has important

practical repercussions which the court is not equipped to evaluate. It appears to me that difficult questions may also arise where, even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions of that kind. In effect these powers or duties, if sufficiently far-reaching, would be beyond the scope of the legislation enacted by Parliament. If that is right, the answer to such questions cannot be clear-cut and will involve matters of degree which cannot be determined in the abstract but only by considering the particular legislation in issue. In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change.

[116] Although he was disagreeing with the other members of the House on the interpretation point, the approach of Lord Hope in *R v A* [2001] 3 All ER 1 at [109], is similar to the reasoning of Lord Nicholls in *Re S*. In Lord Hope's view, 'the entire structure of s 41' of the Youth Justice and Criminal Evidence Act 1999 contradicted the idea of reading into it a new provision entitling the court to give leave for evidence to be led of the complainant's previous sexual behaviour with the accused whenever this was required to ensure a fair trial. It seemed to him that 'it would not be possible' to read in such a provision 'without contradicting the plain intention of Parliament' in s 41(2) to forbid the exercise of such a discretion unless the court is satisfied as to the matters identified by that subsection. In his view Parliament had taken a deliberate decision not to follow examples to be found elsewhere of provisions giving the court an overriding discretion to admit such evidence. In the phraseology of Lord Nicholls in *Re S*, for Lord Hope this was a 'cardinal principle' of s 41 and it was not open to the courts to read the section in such a way as to depart substantially from it.

[117] It was in this context that Lord Hope expressed the view ([2001] 3 All ER 1 at [108]) that it will not be possible to achieve compatibility with convention rights by using s 3(1) 'if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible' or, indeed, if the legislation contains provisions which do so by necessary implication. Lord Hope repeated this observation in *R v Lambert* [2001] UKHL 37 at [79], [2001] 3 All ER 577 at [79], [2002] 2 AC 545, and, for the reasons I have already given, I agree with it. But this is not to say that, where a provision can be read compatibly with the convention without contradicting any principle that it enshrines or the principles of the legislation as a whole, such an interpretation is not possible simply because it may involve reading into the provision words which go further than the specific words used by the draftsman.

[118] When Parliament provided that, 'so far as it is possible to do so', legislation must be read and given effect compatibly with convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation 'as far as possible, in the light of the wording and the purpose of the [Community] directive in order to achieve the result pursued by the latter': *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8) (my emphasis). Both *Pickstone v Freemans plc* [1988] 2

a All ER 803, [1989] AC 66 and *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134, [1990] 1 AC 546 show how, long before 1998, this House had found it possible to read words into domestic regulations so as to give them a construction which accorded with the provisions of the underlying Community directive. As Lord Oliver of Aylmerton noted in *Litster's* case [1989] 1 All ER 1134 at 1453, [1990] 1 AC 546 at 577, *Pickstone's* case had established that—

b 'the greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom's treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations ...'

c Lord Oliver was satisfied that the implication which he judged appropriate in that case was entirely consistent with the general scheme of the domestic regulations and was necessary if they were effectively to fulfil their purpose of giving effect to the provisions of the directive.

d [119] Your Lordships are also familiar with the exercise which has to be carried out under some Caribbean constitutions to bring existing laws into conformity with the rights guaranteed by the constitution. In *R v Lambert* [2001] 3 All ER 577 at [85], [86], Lord Hope cites two examples, *Vasquez v R*, *Neil v R* [1994] 3 All ER 674, [1994] 1 WLR 1304 and *Yearwood v R* [2001] UKPC 31, [2001] 5 LRC 247. Both of them show how far the Privy Council has been prepared to go in substituting very different words for the words of the relevant provision in order to bring it into conformity with the relevant rights guaranteed by the constitution. Such cases are instructive in suggesting that, where the court finds it possible to read a provision in a way which is compatible with convention rights, such a reading may involve a considerable departure from the actual words.

f [120] In other respects, however, the Privy Council decisions may not provide a sure guide to the approach to be adopted under s 3(1). They are all concerned with constitutions that are the supreme law, with which other laws must conform on pain of invalidity. Clearly, that applies irrespective of whether the effect of the constitution is to make the whole, or only part, of a law invalid and also irrespective of the legislature's intention in enacting the law. The typical constitution, or constitutional Order in Council, contains a provision to the effect that existing laws are to be 'construed with such modifications adaptations qualifications and exceptions as may be necessary to bring them into conformity with' the constitution. I have taken these words from s 134(1) of the Constitution of Belize, which was under consideration in *Vasquez v R*. The language of such provisions may be thought to go even further than the language of s 3(1) of the 1998 Act, especially in saying that existing laws are to be construed with such modifications etc 'as may be necessary' to bring them into conformity with the constitution. In particular, since the constitution is supreme, the necessary modifications to a law may well involve making what, in the present context, would properly be regarded as amendments to the legislation. I refer in particular to the judgment of Lord Nicholls in *Rojas v Berllaque (A-G for Gibraltar intervening)* [2003] UKPC 76 at [24], [2004] 1 LRC 296 at [24], [2004] 1 WLR 201 where, in relation to a similar 'far-reaching obligation on courts' in Gibraltar, he said:

'The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution.'

He added:

'There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution.'

By contrast, the 1998 Act deliberately maintains the sovereignty of Parliament and s 3(1) is framed accordingly. For that reason, the Privy Council authorities should be treated with some caution since they are the product of constitutional systems which differ from that of the United Kingdom in this important respect.

[121] For present purposes, it is sufficient to notice that cases such as *Pickstone's* case and *Litster's* case suggest that, in terms of s 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with convention rights. When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

[122] When Housman addressed the meeting of the Classical Association in Cambridge in 1921 [see *Proceedings of the Classical Association* XVIII (1921) pp 67–84], he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with convention rights, the implication is a legitimate exercise of the powers conferred by s 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect. For this reason, in the Community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed

a about its exact form. See, for example, Lord Keith of Kinkel and Lord Oliver in *Pickstone v Freemans plc* [1988] 2 All ER 803 at 807, 817, [1989] AC 66 at 112, 126.

[123] Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by s 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with convention rights. The statute book is the work of many different hands in different Parliaments over hundreds of years and, even today, two different draftsmen might choose different language to express the same proposition. In enacting s 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words. Equally, it cannot have been the intention of Parliament to place a premium on the skill of those called on to think up a neat way round the draftsman's language. Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

[124] Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because s 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf *R v Lambert* [2001] 3 All ER 577 at [80] per Lord Hope. It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it.

[125] My Lords, in the light of that discussion, I can deal fairly briefly with the particular provisions with which the House is concerned in the present case, paras 2 and 3 of Sch 1 to the Rent Act 1977. The House considered them in detail in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27 which concerned the claim by the survivor of a long-term homosexual relationship to be treated as 'the surviving spouse' of the original tenant in terms of para 2. The House unanimously rejected that claim, but, by a majority, held that he fell to be considered as 'a member of the original tenant's family' in terms of para 3. So he was entitled to an assured tenancy rather than a statutory tenancy.

[126] In reaching the conclusion that the appellant should be regarded as a member of the original tenant's family, the majority identified the characteristics of such a person for the purposes of the 1977 Act. Lord Nicholls put the matter in this way ([1999] 4 All ER 705 at 720, [2001] 1 AC 27 at 44):

'The question calling for decision in the present case is a question of statutory interpretation. It is whether a same-sex partner is capable of being a member of the other partner's family for the purposes of the Rent Act legislation. I am in no doubt that this question should be answered affirmatively. A man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same-sex relationships as in heterosexual relationships. In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that the difference is material for present purposes. As already emphasised, the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house.'

Lord Slynn of Hadley and Lord Clyde reasoned to similar effect: [1999] 4 All ER 705 at 714–715, 728, [2001] 1 AC 27 at 38–39, 51–52 respectively.

[127] Of course, some homosexual relationships of the type described by Lord Nicholls will have lasted longer and will have been happier than others. The same goes for the equivalent long-term heterosexual relationships. What these passages make clear, however, is that a long-term homosexual relationship is to be treated as being the same as a long-term heterosexual relationship in all respects save in sexual terms. There is no material difference between them, so far as membership of the original tenant's family is concerned for the purposes of the Rent Act. As Lord Nicholls pointed out ([1999] 4 All ER 705 at 718, [2001] 1 AC 27 at 42) the wife is a member of her husband's family and the husband is a member of his wife's family. Therefore, the only reason why the House held that a homosexual partner could not be regarded as 'the surviving spouse' of the original tenant in terms of para 2(1) was that the extended definition of 'spouse' in para 2(2) ('a person who was living with the original tenant as his or her wife or husband') was framed in a way that connoted a relationship between two persons of opposite sexes. That must be the starting point of any consideration of the matter in the present case.

[128] For the reasons which Lord Nicholls has given in his speech, I am satisfied that treating the survivors of long-term homosexual partnerships less favourably than the survivors of long-term heterosexual partnerships for purposes of the 1977 Act violates their right under art 14 in relation to art 8(1) of the convention. Nor, in respectful disagreement with Lord Millett on this particular point, can I discern any principle underlying the Act as a whole, or

- a Sch 1 in particular, which requires that only the survivor of a long-term heterosexual relationship should be treated as a statutory tenant. All that seems to have happened is that, when Sch 1 was amended in 1988, Parliament chose to extend the concept of 'spouse' to someone who had lived with the original tenant in a long-term heterosexual relationship, but did not go any further. As was recognised in *Fitzpatrick's* case, society has moved on since 1988. In this
- b particular context, even if there once was, there is no longer any reason in principle for not including within the concept of 'spouse' someone who had lived with the original tenant in an equivalent long-term, but homosexual, relationship. To interpret para 2 so as to include such a person would, of course, involve extending the reach of para 2(2), but it would not contradict any cardinal principle of the 1977 Act. On the contrary, it would simply be a modest
- c development of the extension of the concept of 'spouse' which Parliament itself made when it enacted para 2(2) in 1988. The position might well have been different if Parliament had not enacted para 2(2) and had continued to confine the right to succeed to the husband or wife of the original tenant. But that bridge was crossed in 1988. So the fact that the partners in a homosexual relationship are not,
- d and indeed cannot be, married is not to be regarded as a critical factor limiting the way that para 2(2) may be interpreted under s 3(1) of the 1998 Act. Nor is there any reason to fear that the proposed interpretation would entail far-reaching practical repercussions which the House is not in a position to evaluate. Certainly, counsel for the Secretary of State, who made submissions in favour of interpreting para 2(2) in this way, did not foresee any such problems.
- e [129] Accordingly, in reliance on s 3(1) of the 1998 Act I would interpret para 2(2) as providing that, for the purposes of para 2, a person, whether of the same or of the opposite sex, who was living with the original tenant in a long-term relationship shall be treated as the spouse of the original tenant. By this means it is possible to read and give effect to para 2 in a way which is compatible
- f with the respondent's arts 8(1) and 14 convention rights.

BARONESS HALE OF RICHMOND.

- [130] My Lords, it is not so very long ago in this country that people might be refused access to a so-called 'public' bar because of their sex or the colour of their
- g skin; that a woman might automatically be paid three-quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a 'no blacks' notice in her window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made: to whether he or she would be a
- h fit and proper person to have a drink with others in a bar, to how well she might do the job, to how good a tenant or lodger he might be. It was wrong because it depended on stereotypical assumptions about what a woman or a black person might be like, assumptions which had nothing to do with the qualities of the individual involved: even if there were any reason to believe that more women than men made bad customers this was no justification for discriminating against
- j all women. It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about.

[131] When this country legislated to ban both race and sex discrimination, there were some who thought such matters trivial, but of course they were not trivial to the people concerned. Still less trivial are the rights and freedoms set out in the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The state's duty under art 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.

[132] Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v UK* (2002) 12 BHRC 149 at 184 (para 65). Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an underclass, but an underclass with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.

[133] It is common ground that five questions arise in an art 14 inquiry, based on the approach of Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [20], [2002] 4 All ER 1136 at [20], [2003] 1 WLR 617 as amplified in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) at [52], [2002] 3 All ER 994 at [52] affirmed [2003] EWCA Civ 797, [2003] 3 All ER 577. The original four questions were: (i) Do the facts fall within the ambit of one or more of the convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable, ie did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

[134] The additional question is whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in art 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.

[135] It is common ground that one of the convention rights is engaged here. Everyone has the right to respect for their home. This does not mean that the state—or anyone else—has to supply everyone with a home. Nor does it mean

a that the state has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or an analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified. There is no need for us to express a view on the degree to which a convention right must be engaged in order to bring art 14⁴ into play. On any view, that threshold is crossed here.

b [136] It is also common ground that there is a difference in treatment in respect of that right between the respondent and the survivor of an opposite sex relationship. It is also common ground that sexual orientation is one of the grounds covered by art 14 on which, like race and sex, a difference in treatment is particularly suspect. For the reasons given earlier, the grounds put forward to justify it require careful scrutiny.

c [137] The parties differ on whether the survivors of unmarried heterosexual and homosexual couples are indeed in an analogous situation and therefore on whether the basis of the difference in treatment is sexual orientation or something else. But it is impossible to see what else the difference can be based on if not the difference in sexual orientation. Everything which has been d suggested to make a difference between the appellant and other surviving partners comes down to the fact that he was of the same sex as the deceased tenant. It is the decisive factor.

e [138] We are not here concerned with a difference in treatment between married and unmarried couples. The European Court of Human Rights accepts that the protection of the 'traditional family' is in principle a legitimate aim: see *Karner v Austria* (2003) 14 BHRC 674 at 682 (para 40). The traditional family is constituted by marriage. The convention itself, in art 12, singles out the married family for special protection by guaranteeing to everyone the right to marry and found a family. Had para 2 of Sch 1 to the Rent Act 1977 stopped at protecting the surviving spouse, it might have been easier to say that a homosexual couple f were not in an analogous situation. But it did not. It extended the protection to survivors of a relationship which was not marriage but was sufficiently like marriage to qualify for the same protection. It has therefore to be asked whether opposite and same-sex survivors are in an analogous situation for this purpose.

g [139] There are several modern statutes which extend a particular benefit or a particular burden, granted to or imposed upon the parties to a marriage, to people who are or were living together 'as husband and wife': see eg s 62(1) of the Family Law Act 1996 and s 137(1) of the Social Security Contributions and Benefits Act 1992. Working out whether a particular couple are or were in such a relationship is not always easy. It is a matter of judgment in which several h factors are taken into account. Holding themselves out as married is one of these, and if a heterosexual couple do so, it is likely that they will be held to be living together as such. But it is not a prerequisite in the other private and public law contexts and I see no reason why it should be in this one. What matters most is the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial interdependence. Homosexual relationships can have exactly j the same qualities of intimacy, stability and interdependence that heterosexual relationships do.

[140] It has not been suggested to us that the nature of the sexual intimacies each enjoys is a relevant difference. Nor can the possibility of holding oneself out as a legally married couple be a relevant difference here. Homosexuals cannot hold themselves out as legally married, but they can if they wish present

themselves to the world as if they were married. Many now go through ceremonies of commitment which have the same social and emotional purpose as wedding ceremonies—to declare the strength and permanence of their commitment to one another, their families and friends. If the Civil Partnership Bill now before Parliament becomes law, an equivalent status will be available to them. a

[141] The relevant difference which has been urged upon us is that a heterosexual couple may have children together whereas a homosexual couple cannot. But this too cannot be a relevant difference in determining whether a relationship can be considered marriage-like for the purpose of the 1977 Act. First, the capacity to bear or beget children has never been a prerequisite of a valid marriage in English law. Henry VIII would not otherwise have had the problems he did. Even the capacity to consummate the marriage only matters if one of the parties thinks it matters: if they are both content the marriage is valid. A marriage, let alone a relationship analogous to marriage, can exist without either the presence or the possibility of children from that relationship. Secondly, however, the presence of children is a relevant factor in deciding whether a relationship is marriage-like but if the couple are bringing up children together, it is unlikely to matter whether or not they are the biological children of both parties. Both married and unmarried couples, both homosexual and heterosexual, may bring up children together. One or both may have children from another relationship: this is not at all uncommon in lesbian relationships and the court may grant them a shared residence order so that they may share parental responsibility. A lesbian couple may have children by donor insemination who are brought up as the children of them both: it is not uncommon for each of them to bear a child in this way. A gay or lesbian couple may foster other people's children. When the relevant sections of the Adoption and Children Act 2002 are brought into force, they will be able to adopt: this means that they will indeed have a child together in the eyes of the law. Thirdly, however, there is absolutely no reason to think that the protection given by the 1977 Act to the surviving partner's home was given for the sake of the couple's children. Statutes usually make it plain if they wish to protect minor children. These days, the succession is likely to take place after any children have grown up and left home. Children, whether adult or minor, who are still living in the home may succeed as members of the family under para 3 of Sch 1. It is the longstanding social and economic interdependence, which may or may not be the product of having brought up children together, that qualifies for the protection of the Act. In the days when the tenant was likely to be a man with a dependent wife, it was understandable that preference was given to the widow over anyone else in the family. But in 1980 that preference was extended to widowers, whether or not they were dependent upon the deceased wife. In 1988 it was extended to the survivor of unmarried marriage-like relationships, again irrespective of sex or financial dependence. b
c
d
e
f
g
h

[142] Homosexual couples can have exactly the same sort of interdependent couple relationship as heterosexuals can. Sexual 'orientation' defines the sort of person with whom one wishes to have sexual relations. It requires another person to express itself. Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the i

a essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.

[143] It follows that a homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple's relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation. It requires an objective justification if it is to comply with art 14. Whatever the scope for a 'discretionary area of judgment' in these cases may be, there has to be a legitimate aim before a difference in treatment can be justified. But what could be the legitimate aim of singling out heterosexual couples for more favourable treatment than homosexual couples?

b It cannot be the *protection* of the traditional family. The traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a traditional family. What is really meant by the 'protection' of the traditional family is the *encouragement* of people to form traditional families and the *discouragement* of people from forming others. There are many reasons why it might be legitimate to encourage people to marry and to discourage them from living together without marrying. These reasons might have justified the Act in stopping short at marriage. Once it went beyond marriage to unmarried relationships, the aim would have to be encouraging one sort of unmarried relationship and discouraging another. The Act does distinguish between unmarried but marriage-like relationships and more transient liaisons. It is easy to see how that might pursue a legitimate aim and easier still to see how it might justify singling out the survivor for preferential succession rights. But, as Buxton LJ ([2002] 4 All ER 1162 at [21]) pointed out, it is difficult to see how heterosexuals will be encouraged to form and maintain such marriage-like relationships by the knowledge that the equivalent benefit is being denied to homosexuals.

c The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to 'everyone', including homosexuals, by art 8 since *Dudgeon v UK* (1981) 4 EHRR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships of the sort which qualify the survivor to succeed to the home. Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern.

d [144] I have used the term 'marriage-like' to describe the sort of relationship which meets the statutory test of living together 'as husband and wife'. Once upon a time it might have been difficult to apply those words to a same-sex relationship because both in law and in reality the roles of the husband and wife were so different and those differences were defined by their genders. That is no longer the case. The law now differentiates between husband and wife in only a very few and unimportant respects. Husbands and wives decide for themselves who will go out to work and who will do the homework and child care. Mostly each does some of each. The roles are inter-changeable. There is thus no difficulty in applying the term 'marriage-like' to same-sex relationships. With the greatest respect to my noble and learned friend, Lord Millett, I also see no difficulty in

applying the term 'as husband and wife' to persons of the same sex living together in such a relationship. As Mr Sales, for the Secretary of State, said in argument, this is not even a marginal case. It is well within the bounds of what is possible under s 3(1) of the Human Rights Act 1998. If it is possible so to interpret the term in order to make it compliant with convention rights, it is our duty under s 3(1) so to do. a

[145] Hence I agree that this appeal should be dismissed for the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead. I also agree with the opinions of my noble and learned friends, Lord Steyn and Lord Rodger of Earlsferry, on the scope and application of s 3 of the 1998 Act. b

Appeal dismissed.

Dilys Tausz Barrister.

a

Yorkshire Bank plc v Tinsley

[2004] EWCA Civ 816

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, RIX AND LONGMORE LJ

b

17, 18 MAY, 25 JUNE 2004

Equity – Undue influence – Undue influence or misrepresentation – Effect of undue influence – Mortgage entered into by husband and wife voidable as against husband for undue influence – Lender fixed with constructive notice – Whether replacement mortgage with same lender over different property voidable.

c

The defendant and her husband purchased a property (the first property) by means of a mortgage advance in 1988 in their joint names. They created second 'all moneys' charges over the first property in favour of the claimant bank in 1988 and 1991 to secure the husband's business debts. In 1994 the defendant began divorce proceedings. The husband persuaded the defendant to deal with the financial aspects of the divorce by the exchange of the first property for a second, smaller, property owned by friends and the payment of a cash sum which he proposed would be used to redeem the indebtedness secured on the first property and allow the defendant to own the second property free of mortgage. However, the indebtedness under the first mortgage and the charges in favour of the bank exceeded the first property's value. The bank consented to the exchange transaction on condition that the defendant execute a new all moneys charge in its favour over the second property in substitution for the 1988 and 1991 mortgages on the first property and securing all the husband's current and future liabilities. On that basis the exchange transaction took place. In 1997 the bank required the discharge of the husband's indebtedness and in 2001 commenced possession proceedings. The judge found that the 1988 and 1991 mortgages over the first property had been procured from the defendant by the husband by an abuse of his position of trust and confidence amounting to undue influence, that the bank had been put on inquiry but had taken no steps to satisfy itself that the defendant had entered freely into the 1988 mortgage and so held that the 1988 and 1991 mortgages were voidable as against the husband for undue influence and against the bank, which had had constructive notice. However, he held that those findings of undue influence did not affect the validity of the 1994 mortgage over the second property. The defendant appealed.

h

Held – Where a mortgage or guarantee was voidable for undue influence as against a husband and against a bank, a replacement mortgage would itself be voidable, at any rate if the replacement mortgage were taken out as a condition of discharging the earlier voidable mortgage, even if undue influence were not operative at the time of such replacement, and even if there were a new contract rather than a mere variation of an old contract. If a bank was deemed to have notice of the voidability of a charge, that notice was deemed to arise when the charge was given. Where a replacement or substitute mortgage was made with the same lender there was no reason why the constructive notice should invariably be deemed to have disappeared when the earlier mortgage was discharged. In the instant case, the bank had required the 1994 charge on the

j

second property to be granted as a condition of the release of the charge on the first property. The appeal would accordingly be allowed (see [18]–[22], [24], [26], [28], [34], [35], [37]–[39], below).

Crowe v Ballard (1790) 1 Ves Jun 215, *Kempson v Ashbee* (1874) LR 10 Ch App 15 and *Royal Bank of Scotland v Etridge* (No 2), *Barclays Bank plc v Coleman*, *Bank of Scotland v Bennett*, *Kenyon-Brown v Desmond Banks & Co* (a firm) [2001] 4 All ER 449 applied.

Notes

For undue influence, and relief against third parties, see 31 *Halsbury's Laws* (4th edn) (2003 reissue) paras 839–841, 859.

Cases referred to in judgments

Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1983] 1 All ER 944, [1983] 1 WLR 87; *aff'd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

Barclays Bank plc v O'Brien [1993] 4 All ER 417, [1994] 1 AC 180, [1993] 3 WLR 786, HL.

Crowe v Ballard (1790) 1 Ves Jun 215, 30 ER 308.

Kempson v Ashbee (1874) LR 10 Ch App 15, DC.

Royal Bank of Scotland v Etridge (No 2), *Barclays Bank plc v Coleman*, *Bank of Scotland v Bennett*, *Kenyon-Brown v Desmond Banks & Co* (a firm) [2001] UKHL 44, [2001] 4 All ER 449, [2002] 2 AC 773, [2001] 3 WLR 1021.

UCB Corporate Services Ltd v Williams [2002] EWCA Civ 555, [2002] 3 FCR 448.

Appeal

The defendant, Pamela Tinsley, appealed from the decision of Judge Moseley QC in the Warrington County Court on 3 October 2003 making a possession order over leasehold property known as 113 London Road, Stockton Heath in favour of the claimant mortgagee, Yorkshire Bank plc. The facts are set out in the judgment of Longmore LJ.

Peter Knox (instructed by *Freemans*) for Mrs Tinsley.

Alex Hall Taylor, who did not appear below (instructed by *Addleshaw Goddard*, Leeds) for Yorkshire.

Cur adv vult

25 June 2004. The following judgments were delivered.

LONGMORE LJ (giving the first judgment at the invitation of Peter Gibson LJ).

[1] This is an appeal which raises an undecided point about second or subsequent mortgages given in circumstances when an earlier mortgage is, for some reason, a voidable security. I can gratefully take the facts from the judgment of Judge Moseley given at Warrington before he made his order of 3 October 2003.

FACTS

[2] Mr and Mrs Tinsley married on 18 September 1982. They first lived at a house in Hughes Street in Warrington and then moved in 1984 to 16 Lumbrook Road, Appleton, for which they paid £20,000 with the help of a mortgage from

a the Halifax Building Society. Mrs Tinsley contributed some money of her own to the purchase. On 10 February 1988 they sold the house in Lumbrook Road and bought 'Hillcrest' in Grappenhall for £68,000 with the assistance of a Halifax mortgage in the amount of £40,000.

b [3] Mr Tinsley was a self-employed electrician who also acquired light industrial buildings in the area which he converted into units, either renting them out or selling them. Some of these units were at Parkdale and acquired in 1984. In 1988 he acquired a building at the Bridgefoot Business Centre for £210,000 with the help of a loan from Yorkshire Bank plc (Yorkshire). Yorkshire required a mortgage over both the industrial buildings and over Hillcrest. Mr and Mrs Tinsley executed an 'all moneys' mortgage over Hillcrest on 10 February 1988 which the judge called 'the 1988 mortgage'. This was a second mortgage ranking after the Halifax mortgage and constituted security for all Mr Tinsley's current and future borrowings.

d [4] In 1990 Mr Tinsley told Mrs Tinsley that he had a large tax bill to pay and it would be necessary to remortgage Hillcrest. A mortgage was procured from the Confederation Bank to secure a loan of £90,000 which sufficed to pay off the Halifax mortgage. The 1988 mortgage with Yorkshire was discharged at the same time and replaced by what the judge called 'the 1991 mortgage'. This was, again, a second mortgage and likewise constituted security for all Mr Tinsley's current and future borrowings.

e [5] In 1992 the marriage began to disintegrate. On 21 December 1993 Mrs Tinsley discovered that her husband had committed adultery. On 17 March 1994 she consulted Mr Hadfield of Colin Watson & Co who noted that the matrimonial home was on the market. She informed him in May 1994 that the house was mortgaged to the Confederation Bank and on 23 May she filed a divorce petition. In June 1994 Mr Tinsley left Hillcrest and went to live with friends called Foden at 113 London Road in Stockton Heath, a long leasehold property divided into two flats. On 16 August 1994 Mr Hadfield recorded that Mrs Tinsley had told him that the Bridgefoot units had been bought in 1988 and that the matrimonial home had then been charged. Mr Hadfield communicated with the Confederation Bank and found that they required £101,496.25 to redeem their mortgage on Hillcrest; he also checked with the Land Registry and found that there was a second charge in favour of Yorkshire. On 14 September he told Mrs Tinsley that he had written to Yorkshire to find out the amount needed to repay their charge.

g [6] Mrs Tinsley had filed her affidavit of means on 6 September 1994; on 20 September Warrington County Court ordered Mr Tinsley to file his affidavit within 28 days of service of their order so to do. On 17 October Mr Hadfield had to apply for a penal notice as Mr Tinsley had failed to serve his affidavit of means. He never did so; instead he persuaded Mrs Tinsley to deal with the financial aspects of the divorce without further involvement from Colin Watson & Co. What was arranged was that Mr and Mrs Tinsley would exchange Hillcrest for 113 London Road plus about £110,000. Mr Tinsley said this would redeem the mortgage on Hillcrest and that Mrs Tinsley would be able to have 113 London Road free of mortgage. The conveyancing would be in the hands of Mr Jordan of the solicitors Riley & Co who was a golfing partner of Mr Tinsley. This did not appeal to Yorkshire, however; they insisted that they would have to have a mortgage on 113 London Road. It is not clear when

or how this insistence was communicated to Mrs Tinsley but it was around the time that the county court issued its decree nisi on 23 November 1994.

[7] Completion on the exchange transaction took place on 8 and 9 December 1994 when Mrs Tinsley attended the office of Mr Jordan who appears to have been acting for Mr Tinsley, Mrs Tinsley and Yorkshire. Mr Tinsley never told Mr Jordan that he and his wife were getting divorced. Hillcrest was transferred to Mr Brian Foden for £160,000; 113 London Road was transferred to Mrs Tinsley for £45,000. The sum due to the Confederation Bank was paid out of the resulting £115,000 and Mr Tinsley received most of the balance of about £5,000. Mrs Tinsley signed a new mortgage in favour of Yorkshire over 113 London Road; this mortgage was, again, an all moneys mortgage securing Mr Tinsley's current and future liabilities.

[8] When Mrs Tinsley next saw Mr Hadfield and explained all this to him on 29 December 1994 he recorded that Mr Tinsley had told Mrs Tinsley that he intended to purchase his own property and would then transfer the Yorkshire charge to that property. That never happened. Mr Tinsley went into a downward spiral. He left England for Germany but later returned and from time to time according to the Bank's records occupied the flat at 113 London Road which was not occupied by Mrs Tinsley.

[9] Mr Hadfield tried to rescue the position by asking Yorkshire how much they would require to release their charge on 113 London Road. On 11 October 1995 they said that they required £60,000. But in June 1996 Mrs Tinsley said that everything was fine and that she did not want to rock the boat. Accordingly no order was ever made in the ancillary proceedings for relief in connection with the divorce which had been made absolute in January 1995. In October 1997 Yorkshire required Mr Tinsley to discharge his indebtedness and on 14 January 1998 served a demand for £286,348.29 on both Mr and Mrs Tinsley. In the same month they said they would release the charge on 113 London Road for £75,000. The units were sold for about £216,000 later that year. On 2 January 2001 Yorkshire (to whom I shall now refer as 'the Bank') began possession proceedings on the basis of a sum of £147,063.98 currently due. Those proceedings have culminated in Judge Moseley's order for possession of 3 October 2003.

ISSUES AND THE JUDGE'S DECISION

[10] The judge skilfully distilled the issues from what he called Mrs Tinsley's elaborately pleaded and argued case. They were: (1) whether the 1988 and 1991 mortgages were void or voidable as against Mr Tinsley and, more importantly, the Bank for that species of mistake known as non est factum, misrepresentation or undue influence; (2) whether the 1994 mortgage was itself likewise void or voidable for non est factum or misrepresentation (undue influence no longer being alleged in relation to that mortgage which was executed shortly before the decree nisi was made); (3) if (as the judge was to hold) it was not itself void or voidable for either of those reasons, whether it was nevertheless voidable because it was a replacement of or substitute for the voidable mortgages of 1988 and 1991; (4) whether the 1994 mortgage was voidable as an unconscionable bargain either as against Mr Tinsley with the Bank having notice of such unconscionability or directly as against the Bank.

[11] The judge held that the pleas of non est factum and misrepresentation in relation to all the mortgages failed on the facts as against Mr Tinsley and as

a against the Bank which, in any event, had no constructive notice of such matters; he held, however, that the 1988 and 1991 mortgages were voidable as against Mr Tinsley for undue influence and that, since the Bank had constructive notice of that undue influence, they were voidable as against the Bank also. The Bank do not challenge the judge's decision on this matter which he expressed as follows (para 15):

b 'I have no reason to reject Mrs Tinsley's case that she reposed trust and confidence in her husband. Moreover the transaction is not readily explicable by the relationship of the parties. Mrs Tinsley had put money of her own into the acquisition of 16 Lumbrook Road and the proceeds of sale of that property were being used in part to finance the purchase of Hillcrest. The mortgage in favour of the Bank was in an unlimited amount and was, I infer, created partly to finance the acquisition of the Bridgefoot units which were to be vested in the husband alone. Those facts seem to me to be sufficient to throw the burden of proof on the husband and since there is no evidence to displace that burden in my view a finding of abuse by Mr Tinsley of his position of trust and confidence is justified. Since whenever a wife offers to stand surety for her husband the lender is put on inquiry, the Bank was in my view put on inquiry and since there is no evidence at all of any steps which the Bank took to satisfy itself that Mrs Tinsley had entered freely into the transaction, I accept that the 1988 mortgage would have been liable to have been set aside as against the Bank for undue influence of which it had constructive knowledge.'

e He reached the same conclusion about the 1991 mortgage.

[12] In relation to the third issue, the judge held that Mrs Tinsley's success on undue influence in relation to the 1988 and 1991 mortgages could not be transferred to the 1994 mortgage which was 'on a different property altogether', viz 113 London Road, not Hillcrest. This was despite the fact that Mrs Tinsley was unaware of her right to set aside the mortgages of 1988 and 1991. He recorded the admission of Mr Knox for Mrs Tinsley that there was no authority for his proposition that the original invalidity affected the new mortgage and he rejected further arguments based on what Mr Knox said were analogous principles of tracing and a mortgagee being entitled to the fruits of the mortgaged property. He also held that the case was not analogous to the case of a misrepresentation giving a right to avoid not only an original contract but also a contract as varied.

[13] The judge then considered whether the 1994 mortgage was an unconscionable bargain. He set out the requirements of the doctrine by reference to *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 All ER 944, [1983] 1 WLR 87. Paragraph 7-114 of the current (29th) edition of *Chitty on Contracts* is in very similar terms. He held that, although Mrs Tinsley was a poor and ignorant person for the purposes of the doctrine, Mr Tinsley had not exploited her in a morally culpable manner in 1994 nor was the transaction itself overreaching or oppressive because it was 'the best that could be achieved in the circumstances'. He also held that, even if the bargain were unconscionable, the Bank had no constructive notice of that unconscionability. He said:

'... since the Bank in the present case knew that the transaction was a conveyancing transaction in which Mrs Tinsley was represented by a

solicitor who had a duty to her to give her appropriate advice, the Bank was not bound to receive a report from the solicitor and was entitled to assume that appropriate advice had been given.' a

[14] Since it is accepted by the Bank that they had constructive notice of the undue influence affecting the 1988 and 1991 mortgages, it is convenient to go straight to the third (or substitution) issue. b

1994 MORTGAGE AS SUBSTITUTE FOR EARLIER VOIDABLE MORTGAGES

[15] Mr Knox submitted: (1) the 1994 mortgage on 113 London Road was only executed because the Bank had what was supposed to be a valid charge on Hillcrest; now that it could be seen that the charge on Hillcrest was a voidable charge, any substitution for that charge must also be a voidable charge unless Mrs Tinsley, knowing that the charge was voidable, chose to affirm it (election) or by her conduct led the Bank to alter their position (estoppel); (2) there was in fact authority supporting the argument, found subsequent to the trial by Mr Knox's pupil, in the form of *Crowe v Ballard* (1790) 1 Ves Jun 215, 30 ER 308 and *Kempson v Ashbee* (1874) LR 10 Ch App 15. c

[16] Mr Hall Taylor (who did not appear for the Bank below) submitted: (1) the doctrine of constructive notice was artificial at the best of times, see *Royal Bank of Scotland v Etridge (No 2)*, *Barclays Bank plc v Coleman*, *Bank of Scotland v Bennett*, *Kenyon-Brown v Desmond Banks & Co (a firm)* [2001] UKHL 44 at [34]–[43], [2001] 4 All ER 449 at [34]–[43], [2002] 2 AC 773 per Lord Nicholls of Birkenhead; it should not be extended beyond its proper bounds; (2) it would be intolerable if banks, on applications for every remortgage, had to ascertain whether previous mortgages were tainted by undue influence or any other defect; (3) this was the case even if it was the same bank who had granted the previous mortgages (perhaps many years earlier); (4) in such circumstances a bank granting a subsequent mortgage should only be fixed with notice if it actually (rather than constructively) knew of the relevant vitiating factor; (5) the newly-found authorities dealt with affirmation rather than substitution; the 1994 mortgage was a new and different contract not a mere variation of the earlier ones. d

[17] As far as I am aware this is the first case in which this court has had to consider the enforceability of a subsequent mortgage in the circumstance of an earlier voidable mortgage. So it is sensible to consider the question as a matter of principle. e

PRINCIPLE

[18] It would be natural to expect that if, without more, an obligation incurred between two or three parties is legally ineffective in any way, any new obligation arising out of the release of such earlier obligation would be legally ineffective in a similar way. It may not be easy to find authority for such a broad proposition but, in principle 'nothing will come of nothing' as King Lear observed. As far as void contracts are concerned there can be little question that that must be the law. Of course contracts induced by fraud or misrepresentation or contracts which are unconscionable bargains are voidable rather than void but, in the absence of third party reliance, that cannot constitute a difference of principle. A substitute contract will often come into existence in a different factual context from an earlier contract and that factual context may show that the second contract is not a true substitute for the first. f

a But if the factual situations are materially similar and, if it is a condition of the rescission or release of the original void or voidable bargain that the parties enter into a new bargain, that new bargain must be as open to attack as the old one. No doubt the question is partly (if not mainly) a question of construction of the new contract but it is too simplistic to say, as Mr Hall Taylor did say, that a misrepresentation will suffice to avoid a varied contract but never suffice to avoid a new contract. One approach, where no fresh misrepresentation is made at the time of the substitute contract, would be to ask if the original representation is to be deemed to be repeated when the new contract is made. That is the approach for contracts of insurance where (save for life insurance) each renewal constitutes a fresh contract: see 22 *Halsbury's Laws* (3rd edn) para 484 (Sir William McNair), repeated 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 165 (Professor Merkin) where it is, however, pointed out that if a misrepresented fact has become correct before renewal the misrepresentation will no longer be operative.

d [19] So also, in my judgment, it must be for undue influence. If a mortgage or guarantee is voidable for undue influence as against a husband and against a bank, a replacement mortgage, even if undue influence is not operative at the time of such replacement, will itself be voidable, at any rate if the replacement mortgage is taken out as a condition of discharging an earlier voidable mortgage. This should be the case even if there is a new contract rather than a mere variation of an old contract.

e [20] Even if Mr Hall Taylor is right to submit that there is an element of artificiality in the doctrine of constructive notice as applied to banks in *Etridge* (No 2), this principle is not an extension of it. If a bank is deemed to have notice of the voidability of a charge, that notice is deemed to arise when the charge is given. That itself may be a long time ago; whether there is a remortgage on the same property, a substitute mortgage on a different property or a single continuing mortgage may be no more than a historical accident (there is, for example, in the present case, no obvious explanation for the replacement of the 1988 mortgage by the 1991 mortgage).

f [21] Of course if a replacement or substitute mortgage is made with a different lender, that different lender cannot be deemed to be aware of matters of which the first lender is deemed to be aware. But if the lender is the same there is no reason why the constructive notice should invariably be deemed to have disappeared when the earlier mortgage is discharged. Mr Hall Taylor's submission that on a remortgage the charge should only be voidable if the bank is actually (rather than constructively) aware of the undue influence has no support in the jurisprudence and such voidability would seldom arise in practice on the facts.

g [22] There is no doubt on the facts of this appeal that the Bank did require the 1994 charge on 113 London Road to be granted as a condition of the release of the charge on Hillcrest. The judge recorded Mrs Tinsley's case before him as being that she was told by her husband that the money raised by the exchange of Hillcrest with 113 London Road would be sufficient to redeem the only mortgage of which she claimed to be aware (viz the Confederation Bank mortgage) and that she would become the owner of 113 London Road free of mortgage. He continued:

'Whatever Mrs Tinsley may have understood, there were clearly difficulties in proceeding with the transaction as proposed. Hillcrest was

not only subject to the Confederation Bank mortgage but also to the Yorkshire Bank mortgage or possibly mortgages (ie the 1988 and 1991 mortgages). The value of Hillcrest, at least as shown in the transfer, was £160,000. The debt to Confederation Bank exceeded £100,000, and Mr Tinsley's debts to Yorkshire Bank exceeded the balance. So it was most unlikely that the exchange transaction could proceed without the consent of Yorkshire Bank. That consent was forthcoming, but only on condition that Mrs Tinsley executed a mortgage in the bank's favour of 113 London Road in substitution for the 1988 and 1991 mortgages on Hillcrest.'

On these findings it seems to me that Mrs Tinsley must, on principle, be entitled to succeed in her defence to the claim for possession, quite apart from authority.

AUTHORITY

[23] In fact the authorities found by Mr Knox's pupil are of some assistance although they relate to bonds rather than charges and the first is redolent of the indulgence of eighteenth-century Chancery judges to expectant heirs. In *Crowe v Ballard* (1790) 1 Ves Jun 215, 30 ER 308 Crowe was the expectant heir to a legacy with a life tenant and in 1777 asked Ballard to sell his expectancy on his behalf. Ballard claimed to have sold to Toft for £350, but had in fact bought the expectancy himself and advanced £310 to Crowe. In 1780 the life tenant was dying and Crowe applied to Ballard to repurchase the legacy. Ballard revealed he was the purchaser but was only prepared to resell the legacy if Crowe made a post-obit bond to pay him (Ballard) £1,800 after the death of Crowe's father. The bond falsely recited that it was given in consideration of a debt of £900. Crowe's father died in 1782 and Crowe gave Ballard a new bond for £1,800 with 5% interest. He paid the interest on that bond until 1787 when he offered to pay the money originally due with interest if the bond were released. Ballard refused and brought an action on the bond whereupon Crowe filed a bill for delivery up of the bond on repayment of the money originally advanced. Sir John Scott S-G for Crowe said that the only argument that could be urged was that the 1782 bond and the subsequent payment of interest over a four-year period were a 'confirmation' of the original transaction. Mr Mansfield for Ballard agreed saying ((1790) 1 Ves Jun 215 at 217, 30 ER 308 at 309): 'It is not now a question, what would be the proper justice between the parties, if it had stood upon the original transaction without anything intervening to alter or confirm it.' In other words his argument was that the 1782 bond was a new contract and not affected by Ballard's original unconscionable conduct.

[24] Finding for Crowe, Lord Thurlow LC doubted whether the word 'confirmation' was correctly used but held, in any event, that the 1782 bond could not be such a 'confirmation'. He said ((1790) 1 Ves Jun 215 at 220, 30 ER 308 at 310-311):

'... I have attended formerly to the reason of that word "confirmation"; and have been at a loss for the principle, upon which the Courts have spoken of such transactions as these, subsequent to the demand arising, as a confirmation. I know, if a gentleman of honor and fortune feels himself bound in honor by the circumstances of a bargain, however disadvantageous, not to rescind it, and, knowing the case, declares, when of full age, not under the terror of distress, that he thinks proper to give a

- a new bond; the circumstance of an honorary engagement, attended with money actually advanced, is sufficient to maintain the possessor of the new bond. But if a man gives a new bond under an idea, that the old one may be enforced against him, at what time is that a confirmation ... What I go upon is, that the second bond was not given freely, but upon a consideration, that in his mind carried with it a value, it ought not, and was derived from a fraudulent consideration.'
- b

So here, the 1994 mortgage was given upon a consideration that in the mind of Mrs Tinsley (and no doubt Mr Jordan) carried with it a value which it ought not, viz the discharge of the earlier mortgage which was obtained by undue influence.

- c [25] *Kempson v Ashbee* (1874) LR 10 Ch App 15 was a case of undue influence exerted by a stepfather on his stepdaughter. Ashbee lent money to Sladden (the stepfather) in 1857 taking a promissory note from Miss Kempson, the stepdaughter, to repay £450 with interest. Miss Kempson was 20 at the time and living with Sladden and her mother; she had initially refused to give such a bond but at length 'consented, on account, as she stated, of Sladden's
- d ungovernable temper, and the many violent scenes ... which she had to go through'. She signed the bond in the presence of Ashbee's solicitor who said he had explained the nature of the bond and was not aware that she was under age. In 1859 and now of age she signed a second bond securing the payment of £600 and interest alleged to be due for principal interest and costs in respect of the
- e previous loan. In 1866 Ashbee obtained judgment against Sladden but agreed not to issue execution if he could get Miss Kempson to sign another bond for the whole amount due on the judgment. This time, now 29, she signed a bond for £705 and interest. In 1872 Miss Kempson's uncle offered to compound the matter but Ashbee refused and sued Miss Kempson, who filed a bill to set aside the bonds of both 1859 and 1866. Bacon V-C declared both bonds fraudulent as
- f against Ashbee and restrained him from further prosecuting his action at law. The Court of Appeal in Chancery upheld that decision. Lord Cairns LC said that the 1859 bond was clearly unenforceable but was prepared to proceed on the assumption that, in the absence of the 1859 bond, the 1866 bond might have been held not to have been given under undue influence. He said (at 20-21):
- g 'The bond was given, as the Plaintiff's evidence shews, under clear pressure. Here was a creditor saying he would insist on his rights against her and her step-father unless there was a new bond for the sum already due, with arrears of interest, and she was ignorant of the fact that she had only to apply to this Court to get the previous bond declared mere waste
- h paper. Is it possible that this can be held to be a confirmation of the first bond? To constitute a confirmation there must be knowledge of the invalidity of the document. But here there was no knowledge of the invalidity. This bond was inseparably connected with the bond of 1859 ... and therefore those who are interested under the bond of 1866 are unable
- j to hold it.'

James and Mellish LJ agreed.

[26] In the present case the 1994 mortgage is likewise inseparable from the 1991 (and the 1988) mortgage and since the Bank is fixed with constructive notice of the invalidity of those mortgages so must it be fixed with notice of the comparable invalidity of the 1994 mortgage.

[27] The judge was not referred to these authorities. Mr Hall Taylor submitted in his skeleton argument that they could be distinguished because in both cases the unconscionability or the undue influence was still operative at the time of the bond sued upon. I do not so read the cases. Lord Cairns LC's statement that the bond was given under clear pressure was a statement of fact not a conclusion leading to the legal consequence that the bond could be set aside for that reason. That would be contrary to the earlier part of his judgment in which he proceeds on the basis that, on its own, the 1866 bond might not have been held to be given under undue influence. The cases do not appear to have received much attention in the textbooks but Spencer Bower, Turner and Sutton *Actionable Non-Disclosure* (2nd edn, 1990) p 570 (para 22.25, note 1) regards *Kempson's* case as a case which decided that advice about the invalidity of the prior agreement should have been given.

[28] I would, therefore, allow this appeal on the substitution issue and discharge the order for possession granted to the Bank.

UNCONSCIONABLE BARGAIN

[29] This makes it unnecessary to consider Mr Knox's alternative arguments about unconscionable bargain and I do not do so. I would only say that, even if I had been prepared to reverse the judge's findings on that matter and hold that the bargain was unconscionable, I would have had difficulty in agreeing with the judge's further conclusion that the Bank did not have constructive notice merely because they knew that Mr Jordan had been retained in the matter. The events of this case occurred before the decision of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449 but that case holds that it is not sufficient in a case of this kind for a bank to know that a solicitor has been retained. Banks must take further steps to satisfy themselves that the solicitor has been instructed to give independent advice on the transaction to the wife: see [2001] 4 All ER 449 at [54]–[56], [80] per Lord Nicholls. That is all the more important when the bank knows, as the Bank did know by reason of their dealing with Mr Hadfield, that the wife was in the process of becoming divorced from her husband.

PETER GIBSON LJ.

[30] The primary and, in the event, the determinative issue on this appeal, the substitution issue, arises from the following facts found by the judge: (1) Mr and Mrs Tinsley purchased Hillcrest in 1988 in their joint names (para 2(3) of the judgment); (2) they mortgaged Hillcrest in 1988 and 1991 to Yorkshire Bank plc (the Bank) to secure Mr Tinsley's business debts (paras 2(3) and 3); (3) each of those mortgages was procured from Mrs Tinsley by an abuse by Mr Tinsley of his position of trust and confidence amounting to undue influence (para 15); (4) the Bank was put on inquiry but took no steps to satisfy itself that Mrs Tinsley entered freely into the 1988 mortgage transaction (para 15); (5) the same applied to the 1991 mortgage (para 16); (6) in 1994 the Bank required, as a condition of its consent to the exchange transaction, that Mrs Tinsley execute a mortgage to it of 113 London Road in substitution for the 1988 and 1991 mortgages, the new mortgage again securing Mr Tinsley's business debts (paras 5, 22 and 30(2)).

[31] It is not in dispute on this appeal that on those facts Mrs Tinsley had the right to set aside the 1988 and 1991 mortgages while they subsisted. Nor is it in

a dispute that neither Mrs Tinsley nor the Bank in fact knew that she had that right. Had she known, she could have required payment to herself of half the proceeds of sale of Hillcrest free of any mortgage to the Bank and that would have been enough to purchase 113 London Road without granting a mortgage to the Bank. Had the Bank known that the mortgages were voidable, it would not have been in a position to insist on Mrs Tinsley granting a mortgage to it of 113 London Road.

b [32] Is the 1994 mortgage liable to be set aside because of its connection with the voidable mortgages? The conscience of the Bank had been affected while the 1988 and 1991 mortgages subsisted because it had constructive notice of the equitable wrong done by Mr Tinsley to Mrs Tinsley. Why should the Bank's conscience not continue to be affected when it had made its consent to the exchange transaction conditional on Mrs Tinsley giving the Bank a mortgage of 113 London Road in substitution for the voidable mortgages? The Bank insisted on the substitution and thereby it connected inseparably the new mortgage to the earlier mortgages.

c [33] Mr Hall Taylor for the Bank submitted that to hold that the 1994 mortgage was voidable on that account was unsupported by authority and an unjustifiable over-extension of equitable principles. He pointed to the practical difficulties facing a lender if it was put on inquiry in relation to a prior transaction about which it may know nothing and which it may be unable to investigate.

d [34] As Longmore LJ has pointed out, there is some authority in *Crowe v Ballard* (1790) 1 Ves Jun 215, 30 ER 308 and *Kempson v Ashbee* (1874) LR 10 Ch App 15 which supports the submission of Mr Knox for Mrs Tinsley that in circumstances such as the present an inseparable connection between an earlier invalid transaction and a later transaction will invalidate the latter. Here, as Mr Knox says, the mortgage of 113 London Road is inseparably connected with the earlier mortgages and so with the undue influence of which the Bank is taken to have notice.

e [35] I would be reluctant to reach a decision which would cause significant practical difficulties for lenders in property transactions, but I am not persuaded that we are doing any such thing in allowing this appeal. It is rightly not suggested that a lender should be put on inquiry about previous transactions to which the lender is not a party. But if the same lender was the mortgagee in the prior voidable mortgage and requires the discharge of the prior mortgage and the grant to it of a new mortgage, I can see no sufficient objection to holding the new mortgage taken in substitution for the earlier mortgage also to be voidable. The lender should know from its own records whether or not it protected itself in the earlier mortgage transaction. If for some reason it does not know I do not see why it should not be able to protect itself in much the same way as the law now requires lenders to do in order to avoid being on constructive notice of an equitable wrong to a wife by taking steps to ensure that the wife receives independent advice on the transaction into which she is to enter with the lender: see *Barclays Bank plc v O'Brien* [1993] 4 All ER 417, [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge (No 2)*, *Barclays Bank plc v Coleman*, *Bank of Scotland v Bennett*, *Kenyon-Brown v Desmond Banks & Co (a firm)* [2001] UKHL 44, [2001] 4 All ER 449, [2002] 2 AC 773. That transaction in a case such as the present necessarily includes the discharge of the prior mortgage, and it will be for the independent adviser to give advice about that.

[36] In the present case the Bank knew that a solicitor, Mr Jordan, had been retained to act for Mrs Tinsley. Let me assume that despite Mr Jordan's connection with Mr Tinsley Mr Jordan was acting as an independent adviser for Mrs Tinsley. If the Bank had ascertained that Mr Jordan had been retained to advise her on the 1994 transaction, it would have been entitled to assume that she had been competently advised by her solicitor. However, I cannot accept the judge's view that it is implicit in a case where a solicitor is retained to act for a wife in a conveyancing transaction that the retainer of the solicitor extends to advising the wife about the practical implications of the proposed transaction. With respect to the judge, Lord Scott of Foscote's speech in *Etridge (No 2)* lends no support to that view. Lord Scott (at [171]) makes clear that the lender requires 'confirmation that the solicitor's instructions do extend to advising her about the nature and effect of the transaction'. He went on to say that subject to that confirmation the lender is entitled to believe that the solicitor will have advised adequately. Without that confirmation, the lender is not justified in assuming that the solicitor's instructions extend to advising the wife about the nature and effect of the transaction. I am also unable to accept that the judge correctly distinguished this court's decision in *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2002] 3 FCR 448.

[37] For these as well as the reasons given by Longmore LJ I too would allow this appeal.

RIX LJ.

[38] I agree with the judgments of both Longmore and Peter Gibson LJJ.

[39] In particular, I would underline the points that the 1994 mortgage was inseparably connected with the 1988 and 1991 mortgages and that there was nothing to render the past abuse by Mr Tinsley amounting to undue influence, of which the Bank had constructive notice, to cease to be operative in connection with the 1994 mortgage. As a result, the mere fact that there was no new and additional inequity in relation to the 1994 mortgage is not determinative, for the inequity of the earlier transactions had not been cured: as *Crowe v Ballard* (1790) 1 Ves Jun 215, 30 ER 308 and *Kempson v Ashbee* (1874) LR 10 Ch App 15 illustrate.

Appeal allowed.

Kate O'Hanlon Barrister.

R (on the application of Gibson and another) v Winchester Crown Court

[2004] EWHC 361 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

LORD WOOLF CJ, ROSE LJ AND ROYCE J

24 FEBRUARY 2004

Criminal law – Committal – Remand in custody – Custody time limits – Extension of time limits – Judge finding prosecution failing to act with all due diligence – Judge nevertheless extending custody time limits because no suitable courtroom available – Whether judge able to grant extension when prosecution not acting with all due diligence when that failure not cause of delay – Whether inability of state to provide suitable judge or courtroom for trial ground for extension – Test to be applied when judicially reviewing decision of judge to extend custody time limit – Prosecution of Offences Act 1985, s 22(3).

The claimants were charged with murder on 13 May 2003 and remanded in custody. As the custody time limits were due to expire on 11 November 2003, and the trial, which had to be heard by a High Court judge, was fixed to begin on 9 June 2004, the prosecution applied for an extension. The resident judge at the defendant Crown Court extended the custody time limit until 10 June having considered s 22(3)^a of the Prosecution of Offences Act 1985, which provided that custody time limits should not be extended unless the judge was satisfied '(a) that the need for the extension was due to (i) the illness or absence of ... a judge ... (iii) some other good and sufficient cause; and (b) that the prosecution had acted with all due diligence and expedition'. The judge concluded that although the prosecution had not acted with all due diligence and expedition, the failure on their part had no causative effect. In his reasons he stated that the need for the extension arose because of the limited resources available to the court. He explained that the court in which the trial was to take place had been occupied for the best part of a year with a complex fraud case. He recognised that the effect of granting the application was to more than double the statutory time limit, but decided that there was good and sufficient cause to grant the extension sought. The claimants applied for judicial review. They submitted (i) that as the two limbs of s 22(3) were linked by the word 'and', unless in any particular case both requirements were met, there was no power in the court to extend the custody time limits; and (ii) that the lack of availability of a court room or judge should be ignored. An issue also arose as to the test to be applied on the judicial review application.

Held – (1) Adopting a purposive approach to the legislation, although the provisions in s 22(3)(a) and (b) requiring the prosecution, when seeking an extension of custody time limits, to show that there was good and sufficient reason for permitting an extension and that they had acted with all due expedition were linked, the court was not obliged to refuse the extension where the delay had had no effect on the ability of the prosecution and the defence to be ready for

^a Section 22(3), so far as material, is set out at [9], below

trial on a pre-determined trial date. Parliament could not have had in mind that a failure on the part of the prosecution at an early stage of the proceedings which caused no delay, and would never cause any delay to the hearing, still would amount to a contravention of the requirement that the prosecution should act with due expedition. In a situation of that sort, for there to be no ability for the prosecution to obtain an extension could result in significant injustice and could be counterproductive so far as the defence were concerned (see [28], [42], [50], below); *R v Leeds Crown Court, ex p Bagoutie* (1999) Times, 31 May applied; *R v Central Criminal Court, ex p Bennett* (1999) Times, 25 January not followed.

(2) The availability of resources, whether courtrooms, judges or other resources, were a relevant consideration. The courts could not ignore the fact that available resources were limited and that occasions would occur when pressures on the court would be more intense than they usually were. Nevertheless if the courts and the parties failed to overcome any such difficulties they might debar the court from extending the custody time limits. The sort of matters that had to be balanced by a judge in deciding whether there was good and sufficient cause for an extension included the possibility of moving the trial to another venue. He would also be entitled to take into account the difficulties that existed with regard to the listing of cases before High Court judges bearing in mind that although expedition was important so was the quality of justice that would be provided at trial. Thus it would be necessary to evaluate the importance of the judge of the required calibre being available (see [29], [31], [32], [44], [45], and [50], below); dicta of May LJ at [11], [21], [22] in *R (on the application of Bannister) v Guildford Crown Court* [2004] EWHC 221 (Admin), [2004] All ER (D) 229 (Feb) explained.

(3) The approach to be used by courts hearing applications for judicial review of extensions of custody time limits was one of rigorous scrutiny since such applications affected the human rights of the defendants. However, unless the High Court could come to the conclusion that the judge had wrongly exercised his discretion, it should not interfere. In the instant case, the judge had taken into account all the right considerations and had come to the correct conclusion. It followed that the applications would be dismissed (see [38], [39], [41], [48], [49], [50], below).

Notes

For custody time limits in the Crown Court, see Supp to 11(2) *Halsbury's Laws* (4th edn reissue) paras 853 and 854.

For the Prosecution of Offences Act 1985, s 22, see 12 *Halsbury's Statutes*.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R (Crane) v Chelmsford Crown Court [2001] EWHC 1115 (Admin), [2002] Crim LR 485.

R (Geoghegan) v Birmingham Crown Court [2003] EWHC 2353 (Admin).

R (on the application of Bannister) v Guildford Crown Court [2004] EWHC 221 (Admin), [2004] All ER (D) 229 (Feb), DC.

R (on the application of Collinson) v Hull Crown Court [2001] EWHC 284 (Admin).

- a** *R (on the application of Dawson) v Newcastle-upon-Tyne Crown Court* [2003] EWHC 3297 (Admin), [2004] All ER (D) 144 (Jan).
- R (on the application of Haque) v Central Criminal Court* [2003] EWHC 2457 (Admin), [2004] Crim LR 298.
- R v Blair*, *R v Taylor* (7 October 1998, unreported), Crown Ct.
- R v Central Criminal Court*, *ex p Abu-Wardeh* [1997] 1 All ER 159, [1998] 1 WLR 1083, DC.
- b** *R v Central Criminal Court*, *ex p Bennett* (1999) Times, 25 January, DC.
- R v Crown Court at Manchester*, *ex p McDonald*, *R v Crown Court at Leeds*, *ex p Hunt*, *R v Crown Court at Winchester*, *ex p Forbes*, *R v Crown Court at Leeds*, *ex p Wilson* [1999] 1 All ER 805, [1999] 1 WLR 841, DC.
- c** *R v DPP*, *ex p Kebeline*, *R v DPP*, *ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
- R v Governor of Winchester Prison*, *ex p Roddie* [1991] 2 All ER 931, [1991] 1 WLR 303, DC.
- R v Kingston Crown Court*, *ex p Bell* (2000) 164 JP 633.
- R v Leeds Crown Court*, *ex p Bagoutie* (1999) Times, 31 May, DC.
- d** *R v Leeds Crown Court*, *ex p Briggs* (No 1) [1998] 2 Cr App R 413, DC.
- R v Luton Crown Court*, *ex p Neaves* [1992] Crim LR 721, DC.
- R v Morin* [1992] 1 SCR 771, Can SC.
- Stögmüller v Austria* (1969) 1 EHRR 155, [1969] ECHR 1602/62, ECt HR.
- W v Switzerland* (1994) 17 EHRR 60, [1993] ECHR 14379/88, ECt HR.
- e** *Wemhoff v Germany* (1968) 1 EHRR 55, [1968] ECHR 2122/64, ECt HR.
- Zimmermann v Switzerland* (1984) 6 EHRR 17, ECt HR.

Cases referred to in skeleton arguments

- A-G's Ref* (No 2 of 2001) [2003] UKHL 68, [2004] 1 All ER 1049, [2004] 2 WLR 1.
- f** *Dyer (Procurator Fiscal, Linlithgow) v Watson*, *K v Lord Advocate* [2002] UKPC D1, [2002] 4 All ER 1, [2004] 1 AC 379, [2002] 3 WLR 1488.
- Medicaments and Related Classes of Goods* (No 2), *Re* [2001] ICR 564, [2001] 1 WLR 700, CA.
- Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.
- g** *R (on the application of Ellis) v Chief Constable of Essex Police* [2003] EWHC 1321 (Admin), [2003] 2 FLR 566, DC.
- R (on the application of Rippe) v Crown Court at Chelmsford* [2001] EWHC Admin 1115, [2002] Crim LR 485.
- R v Crown Court at Birmingham*, *ex p Bell* [1997] 2 Cr App R 363, DC.
- h** *R v Crown Court at Leeds*, *ex p Briggs* (No 2) [1998] 2 Cr App R 424, DC.
- R v Leeds Crown Court*, *ex p Redfearn* [1998] COD 437, DC.
- R v Maidstone Crown Court*, *ex p Freeman* (25 October 1994, unreported) DC.
- R v Norwich Crown Court*, *ex p Cox* (1992) 97 Cr App R 145, DC.

j Application for judicial review

Leslie Gordon Gibson and David Gibson applied for judicial review of the decision of Judge Brodrick at the Winchester Crown Court made on 11 November 2003, whereby he extended the custody time limits applicable in the claimants' cases until 10 June 2004. The Department for Constitutional Affairs and the Crown Prosecution Service appeared as interested parties. The facts are set out in the judgment of Lord Woolf CJ.

John Lofthouse (instructed by *Peach Grey & Co*, Southampton) for the first claimant. a

James Leonard (instructed by *Sharman & Co*, Southampton) for the second claimant.

Anthony Hacking QC (instructed by the *Crown Prosecution Service Winchester and Southampton Trials Unit*, Eastleigh) for the Crown Prosecution Service.

David Perry (instructed by the *Treasury Solicitor*) for the Department for Constitutional Affairs. b

LORD WOOLF CJ.

[1] So as to avoid defendants being held in custody for unnecessarily long periods of time Parliament enacted legislation limiting time that defendants may be kept in custody (custody time limits). However, the legislation gave the court power to extend those limits. That power is the subject to review by this court. Thus the present cases have been heard today. c

[2] The ability of the court to extend time is of importance to defendants. It is also important to the administration of justice and it is important to the public. There have already been a great number of decisions reviewing the power of the court to extend time. However this application for judicial review makes it clear that there is need for further clarification. In the hope that that clarification should be provided by the judgments given today, this court has been specially constituted. It consists of Rose LJ (the Vice-President of the Court of Appeal (Criminal Division)), Royce J and myself. Our consideration of the present cases should not however be treated as an encouragement for further attempts to obtain clarification as to the extent of the court's discretion to extend custody time limits. Decisions as to custody time limits are closely related to the listing of the trials and the listing of trials is a judicial function for which the resident judge and the presiding judges of the relevant area have responsibility. d

THE FACTS

[3] The facts giving rise to the present proceedings are as follows. The claimant, Leslie Gordon Gibson, and his son David, who is now also a claimant, are charged with the murder of David's wife, Belinda in February 2002. No body or trace of a body has been found. There is no witness who has seen a body or witnessed the alleged murder. The murder trial is now fixed for 9 June 2004 before a High Court judge. It is accepted that it is a case which requires the attention of a High Court judge and the number of High Court judges is limited. e

[4] The claimants were first arrested on 9 May 2002. They were given bail. They were interviewed a number of times. On 13 May 2003 they were both charged with murder. They have been in custody ever since. The plea and directions hearing was held on 14 July 2003. On 5 November 2003 the prosecution applied to extend the custody time limit for each claimant, otherwise the limit would have expired at midnight on 11 November 2003. Earlier that day Judge Brodrick, the resident judge at the Crown Court at Winchester, extended the custody time limit under s 22(3) of the Prosecution of Offences Act 1985 until 10 June 2004. It is to be noted that, notwithstanding that extension, it will be within a year and month of the claimants being arrested and charged with murder that the trial will commence. f

[5] In extending the time for the custody time limit until 10 June 2004, the judge granted an extension of 211 days, or one month more than the statutory custody time limit, which is 182 days. As the judge indicated, the effect of the g

a extension will be to double the statutory time limit and then add a month. That must be a matter of very grave concern.

b [6] In giving his reasons for permitting that extension the judge referred to the fact that court no 1 in the Crown Court at Winchester, which is the place where the trial is due to take place, had been occupied for the best part of a year with a complex fraud case which was transferred there from Bournemouth. The defendant in that case could not properly be tried at Bournemouth because he was too well known. The judge also referred to the fact that in November 2003 there were 30 outstanding murders and 40 outstanding rape or child sex cases. He added:

c '... this court has not simply sat back and allowed the outstanding murder and other cases to get completely out of control. We have done our best with the limited resources available, and we have endeavoured to try to keep matters within bounds, not, I am bound to say, entirely successfully, but that is not entirely surprising when you lose a court for the length of time that I have lost court no 1.'

d Judge Brodrick as the resident judge in the Crown Court at Winchester is very familiar with the conditions which apply with regard to arranging the lists at that court for which he has overall responsibility subject to the supervision of the presiding judges of the Western Circuit. It is also right, as Mr Lofthouse who appeared on behalf of Leslie Gibson has stressed, that the judge exercised great care in dealing with the application before him. His ruling is expressed with considerable clarity and deals with the issues with remarkable skill, bearing in mind that it was given immediately after the hearing.

e [7] The conclusion to which the judge came was that the prosecution had not acted with all due diligence and expedition, but that that failure on their part had no causative effect. However, in accordance with the statutory provisions, there was good and sufficient cause to grant the extension to which I have referred.

THE LAW

g [8] The statutory provisions which the judge had to apply have been amended. They have been amended so as to provide specific examples of what constitutes a good and sufficient cause. The 1985 Act empowered the Secretary of State to make provision by regulations. The terms of the power which is conferred on the Secretary of State are very broad. They are the subject of specific arguments to which I will need to refer hereafter.

h [9] The amendments which have been made to the 1985 Act were first the result of s 71 of the Criminal Procedure and Investigations Act 1996; and secondly of s 43 of the Crime and Disorder Act 1998. As originally enacted, s 22(3) of the 1985 Act, which is the critical subsection, was in the following terms:

j 'The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend, that limit if it is satisfied—(a) that there is good and sufficient cause for doing so; and (b) that the prosecution has acted with all due expedition.' (My emphasis.)

The 1998 Act's amendment resulted in s 22(3) now providing:

'The appropriate court may, at any time before the expiry of a time limit imposed by the regulations extend, or further extend, that limit; but the court shall not do so unless it is satisfied—(a) that the need for the extension is due to—(i) the illness or absence of the accused, a necessary witness, a

judge or a magistrate; (ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or (iii) some other good and sufficient cause; and (b) that the prosecution has acted with all due diligence and expedition.' (My emphasis.) a

The amendments do not materially affect the working of the provision but sub-para (i) and (ii) do clarify the type of matters that can be 'good and sufficient cause' but they do not cut down the ambit of (iii) as the word 'other' makes clear. b

[10] The appropriate time limit in respect of the claimants was 182 days. If the time limit is exceeded without being extended, the consequence is that a defendant is entitled to bail, subject to s 25 of the Criminal Justice and Public Order Act 1994. That makes an exception in the cases of murder or rape, after a previous conviction for such an offence. The court is not able to require sureties or any deposit or security, and, following the grant of bail, the accused may not be arrested without a warrant merely on the ground that the police officer believes that he is unlikely to surrender to custody. However, it is open to the court granting bail to impose conditions as to curfew, residence or reporting to a police station etc. The rule that actual or feared breach of such conditions is a ground for arrest without a warrant applies to an accused bailed on the expiry of a time limit, just as it applies to an accused granted bail in other circumstances. c

[11] A leading case in respect of custody time limits and the philosophy behind custody time limits is the decision of this court in *R v Crown Court at Manchester, ex p McDonald*, *R v Crown Court at Leeds, ex p Hunt*, *R v Crown Court at Winchester, ex p Forbes*, *R v Crown Court at Leeds, ex p Wilson* [1999] 1 All ER 805, [1999] 1 WLR 841. That court (Lord Bingham of Cornhill CJ and Collins J) looked into the provisions as to custody time limits in some detail. In the course of giving the judgment of the court Lord Bingham CJ indicated that the 1985 Act and the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299 have three overriding purposes: (1) to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; (2) to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and (3) to invest the court with a power and a duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial. As the court made clear, these are all very important objectives. Any judge making a decision on the extension of custody time limits must be careful to give full weight to all three of the 'overriding purposes'. I would respectfully strongly indorse the philosophy indicated in that part of Lord Bingham CJ's judgment. d

[12] The judgment went on to give certain guidance to which it is desirable to refer. In dealing with the need for expedition Lord Bingham CJ said ([1999] 1 All ER 805 at 809, [1999] 1 WLR 841 at 846): e

'In any application to the court for an order extending custody time limits beyond the maximum period laid down in the regulations it is for the prosecution to satisfy the court on the balance of probabilities that both the statutory conditions in s 22(3) are met. If, but only if, the court is so satisfied does the court have a discretion to extend the custody time limit. If it is not satisfied it may not do so. If it is satisfied it may, but need not, do so.' f

[13] A little later Lord Bingham CJ added ([1999] 1 All ER 805 at 809, [1999] 1 WLR 841 at 847): g

a "The condition in s 22(3)(b) that the prosecution should have acted with all
due expedition poses little difficulty of interpretation. The condition looks
to the conduct of the prosecuting authority (police, solicitors, counsel). To
satisfy the court that this condition is met the prosecution need not show
that every stage of preparation of the case has been accomplished as quickly
and efficiently as humanly possible. That would be an impossible standard
b to meet, particularly when the court which reviews the history of the case
enjoys the immeasurable benefit of hindsight. Nor should the history be
approached on the unreal assumption that all involved on the prosecution
side have been able to give the case in question their undivided attention.
What the court must require is such diligence and expedition as would be
c shown by a competent prosecutor conscious of his duty to bring the case to
trial as quickly as reasonably and fairly possible. In considering whether that
standard is met, the court will of course have regard to the nature and
complexity of the case, the extent of preparation necessary, the conduct
(whether co-operative or obstructive) of the defence, the extent to which the
d prosecutor is dependent on the co-operation of others outside his control
and other matters directly and genuinely bearing on the preparation of the
case for trial. It would be undesirable and unhelpful to attempt to compile a
list of matters which it may be relevant to consider in deciding whether this
condition is met. In deciding whether the condition is met, however, the
court must bear in mind that the [then] period of 112 days specified in the
regulations is a maximum, not a target; and that it is a period applicable in all
e cases.'

[14] Lord Bingham CJ indicated the approach in respect of good and sufficient
cause. He stressed that this was very much a matter for the judgment of the court
on the facts of any particular case. He then said ([1999] 1 All ER 805 at 810, [1999]
1 WLR 841 at 848):

f "The courts have held, although reluctantly, that the unavailability of a
suitable judge or a suitable courtroom within the maximum period specified in
the regulations may, in special cases and on appropriate facts, amount to good
and sufficient cause for granting an extension of the custody time limit ...'

g [15] He referred to a judgment of Auld LJ in *R v Central Criminal Court, ex p
Abu-Wardeh* [1997] 1 All ER 159, [1998] 1 WLR 1083 and cited a passage therefrom
([1997] 1 All ER 159 at 166, [1998] 1 WLR 1083 at 1090):

h 'After much hesitation, I have come to the view that there is no indication
in s 22(3), considered alone or in its statutory context, that the words "good
... cause" should be construed in any stricter sense than that the suggested
cause must be a reason for postponement of the trial and, for that reason, an
extension of the custody time limit. In applications based on unavailability
of a judge or courtroom, as on any other cause, the judge has another means
of ensuring that it does not subvert the statutory purpose of speedy trial for
j those in custody. It is to examine the circumstances rigorously to determine
whether the cause is also "sufficient" for any extension and, if so, for the
length of extension sought. As the authorities to which I have referred make
plain, each case must be decided by the judge hearing the application on its
own facts. On such an issue, the issue of sufficiency, I consider that the judge
is entitled to have regard to the nature of the case and any particular
limitations that that may impose on the status and seniority of the judge to try

it and to the difficulty of making such a judge available. He must decide in the circumstances whether any such difficulty is a sufficient cause for an extension and, if so, for one of the length sought.’ a

[16] Lord Bingham CJ then went on to adopt the observations of Toulson J when sitting in the Crown Court at Winchester (with which we are here concerned), which provide some background to the very issue which is before this court. He cites from the judgment of Toulson J, who was then one of the presiding judges, in *R v Blair*, *R v Taylor* (7 October 1998, unreported) as follows ([1999] 1 All ER 805 at 811, [1999] 1 WLR 841 at 848–849): b

‘Wearing my hat as presiding judge of this circuit I am all too aware of the difficulties faced by listing officers in present circumstances, but at the same time I have to apply the statutory provisions. If the difficulties of providing a judge and a courtroom are too readily accepted as both a good and a sufficient reason for extending custody time limits, there is a real danger that the purpose of the statutory provisions would be undermined. These are provisions expressly designed to protect the liberty of the citizen, assumed at the present stage not to be guilty. Of course the decision to place him in custody involves a balance of his interests against those of the public; but to keep him in custody beyond the time reasonably necessary for his case to be prepared for trial, for administrative reasons which are essentially unconnected with his case, is another matter altogether. There is no redress against that mischief for somebody who at the end of the day is found to be innocent, and those are all no doubt factors which Parliament had in mind in laying down the provisions that it did. In construing and applying statutory provisions which impose a custody time limit, but create an exception, one must be very careful that the exception is not allowed to grow so as to emasculate the primary provision. Of course there may be situations where the particular case can only be tried by a particular class of judge, where such a judge is only going to be available at a particular trial centre for a particular time, where other similar cases are already awaiting trial, and where there is no reasonable alternative but to make the defendant wait because the case cannot readily be transferred to another court centre. I am wholly familiar with these problems as they presently affect this circuit. But in this case we have a case which is serious, but not of exceptional complexity. It can be tried by any circuit judge. It is not estimated to take more than three weeks at worst. Yet I am being asked to extend the 16-week time limit by an additional 17 weeks. If I reached that decision in this case on that ground it seems to me that it is virtually saying that in any case, regardless of what level of judge may try it, listing difficulties may be regarded as a just and sufficient cause for extending the statutory period by a very large margin indeed. I recoil from that, because it seems to me that to do so would indeed be to defeat the statutory purpose.’ c
d
e
f
g
h

[17] Having made those references to domestic cases, Lord Bingham CJ went on to deal with two decisions of the European Court of Human Rights, *Wemhoff v Germany* (1968) 1 EHRR 55, and *Stögmüller v Austria* (1969) 1 EHRR 155, as to which it is not necessary for me to repeat what he says. He then referred to *Zimmermann v Switzerland* (1984) 6 EHRR 17 and said ([1999] 1 All ER 805 at 812–813, [1999] 1 WLR 841 at 850): j

‘*Zimmermann v Switzerland* ... was not a case under art 5(3) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms

1950] but art 6(1). It concerned an administrative law appeal which the Swiss Federal Court took 3 years to determine. The European Court held that the Federal Court's excessive workload and its chronic backlog provided no more than a partial excuse for the delay which had occurred. In *W v Switzerland* (1994) 17 EHRR 60 a defendant was held in custody for just over four years between the date of his arrest and that of his conviction. A majority of the European Court held that there was no violation of art 5(3), because of the complexity of the case, the scope of the investigation and the conduct of the defendant himself. It is appropriate that we should bear in mind this jurisprudence of the European Court when considering the effect of our own domestic legislation and applying it. We do not, however, find anything in these European cases which in any way throws doubt on the English law as we have attempted to summarise it. It would indeed appear that the term of 112 days prescribed by the regulations imposes what is, by international standards, an exacting standard. Any application for the extension of custody time limits will call for careful consideration, and many will call for rigorous scrutiny. When ruling on such an application the court should not only state its decision, but also its reasons for reaching that decision and, if an extension is granted, for holding the conditions in s 22(3) to be fulfilled: see *R v Leeds Crown Court, ex p Briggs (No 1)* [1998] 2 Cr App R 413 ... In a case where an extension is granted, it is particularly important that the defendant should know why; but even when an extension is refused, the prosecution is entitled to know the reasons for the refusal. We would, however, emphasise that where a court has heard full argument and given its ruling, whether for or against an extension, this court will be most reluctant to disturb that decision. This court has no role whatever in deciding whether, in any case, an extension should be granted or not. Its only role, as in any other application for judicial review, is to see whether the decision in question is open to successful challenge on any of the familiar grounds which support an application for judicial review.'

[18] In support of this appeal Mr Lofthouse has identified four issues, of which the first two have been primarily the subject of his argument. The first issue he describes as 'whether having found lack of due diligence and expedition the judge had jurisdiction to extend the limits'. I would refer to that as 'the issue as to construction'.

[19] Issue 2 he identifies as—

'whether the inability of the state to provide a suitable judge and/or courtroom for trial before 9 June is an admissible ground for an extension either under s 22(3)(a)(i) or (iii) either at all or for so long an extension.'

I will describe that as 'the resources issue'.

[20] Issues 3 and 4 are as follows: 'Whether the test in judicial review on issue 2 is the conventional test' (I would describe that as 'the issue as to the intensity of review') and 'whether the extension should have been granted applying either the *Wednesbury* test (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) or a more intense approach on judicial review' (this I will refer to as 'the merits issue').

THE CONSTRUCTION ISSUE

[21] Mr Lofthouse submits that, prior to the decision of this court in *R v Leeds Crown Court, ex p Bagoutie* (1999) *Times*, 31 May, it was generally accepted that

failure on the part of the prosecution to show all due diligence and expedition is fatal to an application to extend the custody time limits irrespective of whether the lack of all due diligence and expedition has any impact on the need for an extension. The argument is based upon the language of the statutory provision, and in particular to the fact that the two limbs in the section are linked by the word 'and'. He submits that they are two separate requirements. Unless in any particular case both requirements are met, there is no power in the court to extend the custody time limits. a
b

[22] In relation to that issue he relies on the decision of this court, presided over by Otton LJ, in *R v Central Criminal Court, ex p Bennett* (1999) Times, 25 January, of which we have a transcript. In that case the court was concerned with an application in respect of a decision by a judge which undoubtedly was not satisfactorily reasoned. Otton LJ criticised the judgment in these terms: c

'I have no doubt that the judge fell into error in reaching the conclusion that he did upon the basis of the reasoning he adopted. Although he acknowledged the necessity to consider sub-para (a) separately from sub-para (b) he did exactly the opposite. He went on to consider sub-s (b) in the light of sub-s (a) and the concession by the defence that there was good and sufficient cause for doing so be [sic] virtue of the indisposition of the principal prosecution witness. It was no more permissible when considering whether the prosecution had acted with all expedition to take into account whether there was a good and sufficient cause for doing so than to take account of the fact whether the prosecution had or had not acted with all due expedition. In other words, the fact that the trial could not have gone ahead in any event because of the alleged victim's illness was an irrelevant consideration when deciding whether the prosecution had acted with all due expedition.'

Having drawn attention to that aspect of the case, this court took the unusual course of granting certiorari in respect of the decision of the court below, but refused mandamus in respect of the right to bail, which normally would be expected to follow from the quashing of a decision of the judge extending a time limit. However, that apart, it seems to me that, quite clearly in that case, Otton LJ took the view that the requirements contained in the statutory provisions have both to be fulfilled in order for a custody time limit to be extended. It is therefore a decision to which Mr Lofthouse attaches considerable importance. He indicates that it is supported by earlier decisions in *R v Governor of Winchester Prison, ex p Roddie* [1991] 2 All ER 931, [1991] 1 WLR 303 and *R v Luton Crown Court, ex p Neaves* [1992] Crim LR 721. f
g

[23] Mr Perry, who intervenes on behalf of the Department for Constitutional Affairs on this appeal, accepts that the result in *Ex p Bennett* was right on the facts of that case, but he challenges the extent to which the earlier authorities provided any support for the view the court took as to the interpretation of the section of the Act. h

[24] The decision in *Ex p Bennett* certainly provides authority which this court could follow as to the construction of the statute. However, the approach to the construction of the statute was considered by this court in *Ex p Bagoutie*. In giving the judgment of the court, Lord Bingham CJ adopted a different approach as appears from the following passages in his judgment: j

'14. Much argument before the judge and before us has been based on the decision of this court in *R v Crown Court at Manchester, ex p McDonald*, *R v Crown Court at Leeds, ex p Hunt*, *R v Crown Court at Winchester, ex p Forbes*, *R v Crown*

Court at Leeds, ex p Wilson [1999] 1 All ER 805, [1999] 1 WLR 841. There is, as it seems to me at least, nothing in that judgment which the court should now seek to vary, modify or retract, assuming that it were open to the court to do so. It is unnecessary for present purposes to make further reference to reg 5(3) of the 1987 regulations, as amended, save to point out that it is that regulation which provides a maximum period of custody between the time when an accused is committed for trial and the start of the trial of 112 days. It is s 22(3) which enables a court at any time before the expiry of a time limit imposed by the regulation to extend or further extend that limit if it is satisfied (a) that there is good and sufficient cause for doing so, and (b) that the prosecution has acted with all due expedition. The court made plain in *Ex p McDonald*, as indeed is plain on the face of the statute, that when seeking an extension or a further extension of a custody time limit the Crown must show that there is good and sufficient reason for making the extension and that it has acted with all due expedition. What, however, was not made plain in *Ex p McDonald* (because the question did not arise) is that these two provisions are in my judgment linked. It is not in doubt that the Crown must show proper grounds for keeping a defendant in prison awaiting trial for a period longer than the statutory maximum. But the Crown must also show that such an extension is not sought because it has shown insufficient vigour in preparing the case for trial. Put crudely, the prosecution cannot prepare for trial in a dilatory and negligent manner and then come to the court to seek an extension of the custody time limit because the prosecution is not ready for trial. Nor, if the effect of its dilatoriness is to put the defence in a position where the defence is not ready for the trial can the Crown seek an extension and show that it has acted with all due expedition. It is in the ordinary way the business of the prosecution to be ready. If therefore the Crown is seeking an extension of the time limit it must show that the need for the extension does not arise from lack of due expedition or due diligence on its part. It seems clear to me, however, that the requirement of due expedition or due diligence or both is not a disciplinary provision. It is not there to punish prosecutors for administrative lapses; it is there to protect defendants by ensuring that they are kept in prison awaiting trial no longer than is justifiable. That is why due expedition is called for. The court is not in my view obliged to refuse the extension of a custody time limit because the prosecution is shown to have been guilty of avoidable delay where that delay has had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a predetermined trial date.

15. This construction has been resisted by counsel representing the claimants, although it has been broadly supported by counsel for the Crown. It has been resisted on two substantial grounds. First, as a matter of statutory construction, it is submitted that whether one looks at s 22(3) as it now stands or whether one looks at s 22(3) as it will be when an amendment takes effect, it is plain that these are two separate conditions stipulated to stand alone, independently, and imposing two requirements, each of which the Crown must satisfy.

16. For my part I do not derive that intention from the language of the subsection as it stands or from the subsection in its amended form. It seems to me plain that Parliament has intended to insist that prosecutors cannot seek extensions where the need for the extension is attributable to their own failure to act with due expedition and has been at pains to make that clear by setting the requirement out in clear terms on the face of the statute. It does not,

however, appear to me that there is anything in the language of the Act in either version which shows that these are independent and free-standing requirements. I repeat that I can see no reason why Parliament should have wished to oblige the court to refuse an extension of a custody time limit because there has been some avoidable delay, even where this has not had any effect on the beneficial object which the statute is intended to achieve, namely the keeping defendants in prison awaiting trial for no longer than is justifiable.'

That decision adopts a different approach, an approach on which both the prosecution and Mr Perry on behalf of the Department for Constitutional Affairs rely.

[25] Since *Ex p Bagoutie* was decided it has been applied in a series of cases, namely *R v Kingston Crown Court, ex p Bell* (2000) 164 JP 633, *R (on the application of Collinson) v Hull Crown Court* [2001] EWHC 284 (Admin) (presided over by Kennedy LJ), *R (Crane) v Chelmsford Crown Court* [2001] EWHC 1115 (Admin) (presided over by Keene LJ), *R (on the application of Haque) v Central Criminal Court* [2003] EWHC 2457 (Admin), [2004] Crim LR 298 (presided over by Mitting J), *R (Geoghegan) v Birmingham Crown Court* [2003] EWHC 2353 (Admin) (presided over by Keith J) and finally *R (on the application of Dawson) v Newcastle upon Tyne Crown Court* [2003] EWHC 3297 (Admin), [2004] All ER (D) 144 (Jan) (presided over by Elias J).

[26] In *Crane's* case to which I have referred Keene LJ said:

'As a matter of law, [the judge] was right to approach this case by focusing on what had caused the postponement. The courts have said several times that a lack of due diligence and expedition on some matters will not prevent an extension of custody time limits if that is not the cause of the need for the extension ... In my view, one has to have regard to what were the factors, or in particular the principal factor which led to the need for the custody time limit to be extended.'

[27] In support of the argument that the approach adopted by Otton LJ is the correct approach, Mr Lofthouse submitted as follows. (1) The language of the statute is plain. (2) Parliament could have had no purpose in including the all due diligence and expedition requirement if the plain language is not followed since, if the need for an extension were occasioned by the fault of the Crown, the application would inevitably fall at the 'good' or 'sufficient' hurdles. (3) The word 'all' before 'due diligence and expedition' excludes a link such as that indicated by Lord Bingham CJ, since Parliament could otherwise have stated that it was not all, but only such due diligence and expedition as had an impact on the timetable. (4) The amendments made by the 1998 Act made this even plainer. The illness or absence of a judge, a witness or a defendant, and the ordering of separate trials cannot realistically ever be envisaged as a possible consequence of lack of all due diligence and expedition, yet that requirement is still retained for each case. (5) Finally, if there must be a link, the 'all due diligence and expedition' limb becomes of little significance in cases such as this, where the trial dates are so very far away that little that the Crown does can have an impact on the date. As part of that last point Mr Lofthouse refers to the fact that 'diligence', unlike 'expedition' has no reference to timing. He also submits that his construction is simple in practice, avoids complex causation arguments and analysis, avoids longer extension hearings and lets both parties know where they stand. He suggested that we should look at material consisting of what was said in Parliament in support of his interpretation.

- a However, under questioning by this court it appears reasonably clear that this case does not fall within the situation where it would be appropriate to consider that material, having regard to the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, and we did not look at that material. We regard this as a case of simple construction where there are arguments to be advanced in favour of the alternative approaches that the authorities indicate.
- b [28] In my judgment the purpose of the legislation has to be taken into account in order to decide the appropriate interpretation of the section. As Mr Perry submitted, absurd results can easily arise where an approach is adopted which ignores the link between the two provisions to which Lord Bingham CJ referred. There may be a failure on the part of the Crown at an early stage of the proceedings which causes no delay, and would never cause any delay to the hearing, but it still
- c would amount to a contravention of the requirement that the Crown should act with due expedition. In a situation of that sort, for there to be no ability for the Crown to obtain an extension of the custody time limit could result in significant injustice and could be counter-productive so far as the defence are concerned. Mr Perry points out that it is the practice regularly at the Central Criminal Court
- d for a defendant to ask for the trial date for a case to be deferred, for example, because the defendant wants a particular counsel to represent him and that counsel is not available until after the custody time limit has expired. In such a case if there had been any failure of due expedition by the Crown, on the construction contended for by the claimants in this case an extension would not be possible. Such a result can be appropriately categorised as 'absurd' and cannot be what
- e Parliament had in mind in legislating in the terms that it did. Thus, although the language used in the section favours the approach submitted for by the claimants, I have no doubt that the correct approach is that which was indicated by Lord Bingham CJ, the approach which has been followed in many cases since *R v Leeds Crown Court, ex p Bagoutie* (1999) Times, 31 May was decided. I would therefore find
- f against the claimants in respect of the first issue.

THE RESOURCES ISSUE

- [29] I have already referred to the approach which is indicated in the judgment of Lord Bingham CJ in *Ex p McDonald*. Clearly before a court is prepared to grant an extension because of the lack of availability of a courtroom, or a particular judge
- g required to try the case, it should go to considerable endeavours to avoid having to postpone the trial to a date beyond the custody time limits. However, it has to be remembered that the availability of a particular category of judge can be important for the achievement of justice in particular cases. The present case is an example. This is clearly a case which required to be tried by a High Court judge. While
- h expedition is important, so is the quality of the justice which will be provided at the trial. In these circumstances it is necessary for a court considering an application for an extension of custody time limits to evaluate the importance of the judge of the required calibre being available. In addition it has to be recognised that resources are not unlimited. The resources that are available have to be taken into account. So have the requirements of other cases also awaiting trial to be taken into account.
- i In this regard there is a very helpful general statement by Sopinka J of the Supreme Court of Canada in *R v Morin* [1992] 1 SCR 771 at 794–795:

'Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the *Charter* [the right to a trial within a reasonable time] ... this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia

this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates.' a

It seems to me that that approach which was specifically relied upon by Mr Perry indicates the difficulty of ignoring resources, which is what the claimants contend should be the approach of a judge considering an application to extend custody time limits. b

[30] The authority which is relied upon by Mr Lofthouse in support of his contention that resources should be ignored is the recent decision of this court presided over by May LJ, *R (on the application of Bannister) v Crown Court at Guildford* [2004] EWHC 221 (Admin), [2004] All ER (D) 229 (Feb). In considering the views expressed by May LJ in that case, it has to be recognised that that case is very different from the case which we are considering here. It was, as May LJ indicated, a 'routine case' which was due to be heard in the Crown Court at Guildford. However, in the course of his judgment May LJ, in addition to citing the approach indicated by Lord Bingham CJ in *Ex p McDonald*, said (at [11]): c

'As has been said on a number of occasions, indiscriminate use of the power to extend to the custody time limits would emasculate the Parliamentary purpose. As has also been said, and can be well understood, if Parliament willed that these should be the custody time limits, it was for Parliament also to will and provide the resources to enable courts and judges to achieve those time limits.' d

May LJ said (at [21]):

'I have been unable to detect any particular fact referable to this case which was capable of being a particular good and sufficient cause for extending the custody time limit. That leads to this stark conclusion: Parliament has set custody time limits for various obvious reasons. Parliament ultimately is also responsible for the provision of resources by way of judges, recorders, courtrooms and staff, to enable cases to be heard within those custody time limits. Is it then, in a routine case, to be regarded as a good and sufficient cause for extending the custody time limit that it is impossible to hear the case earlier because the resources available to listing officers make it impossible?' e

He added (at [22]):

'In my judgment, faced with that stark question, the answer has to be No, it is not a good and sufficient cause. I temper that only by reverting to my suggestion that at the time when cases such as this are fixed for trial, active judicial intervention at an appropriate judicial level often can and always should try to see whether the case cannot, by some means, be heard at an earlier stage. I am confident, speaking generally, that if that is done, in a number of cases an earlier date will, in fact, be found. I am equally confident that in some cases it will not be found. Some of those cases may be cases which, for other particular reasons, do have good and sufficient cause for extending the custody time limit. But a routine case with no particular facts capable of being good and sufficient cause will not qualify for an extension of custody time limits because of the general impossibility of hearing cases earlier. If that were the case, the problems to which Toulson J alluded [in *R v Blair*, *R v* f

g

h

j

a Taylor (7 October 1998, unreported), cited by Lord Bingham CJ] would unquestionably arise. As he said, if the difficulties of providing a judge and courtroom are too readily accepted as both a good and sufficient reason for extending custody time limits, there is a real danger that the purpose of the statutory provisions would be undermined. He also said that, in construing and applying the statutory provisions which impose custody time limits but
b create an exception, one must be very careful that the exception is not allowed to grow so as to emasculate the primary provision.'

[31] I fully understand most of the reasoning of May LJ in the passage to which I have referred. In respect of a routine case the approach which he indicates may generally be appropriate. In routine cases difficulties that arise can normally be
c overcome. However, I do not accept that it is right to regard May LJ's approach as indicating that the availability of resources, whether courtrooms, judges or other resources, are an irrelevant consideration. The courts cannot ignore the fact that available resources are limited. They cannot ignore the fact that occasions will occur when pressures on the court will be more intense than they usually are. In
d such a situation it is important that the courts and the parties strive to overcome any difficulties that occur. If they do not do so, that may debar the court from extending custody time limits. It may well be that in *Bannister's* case further action could have been taken (or action could have been taken earlier) than was taken by the court to ensure that in that case the custody time limit was complied with. However, it is not correct, as has been submitted before us, that judges are entitled
e to ignore questions of the non-availability of resources. Mr Lofthouse said that if we lay down a test which avoids the availability of resources having to be taken into account the matters would be simpler to resolve for judges who have to deal with these issues. That may be true, but, unfortunately, judges at all levels have to deal with difficult issues. It is not appropriate to exclude relevant considerations just to achieve a simpler means of resolving the issue.

f [32] Different considerations often need to be balanced. I have already paid tribute to the judgment of Judge Brodrick in this case. He identified the sort of matters that have to be balanced by a judge in deciding whether there is good and sufficient cause for an extension. It may have been possible to obtain a date which was a month earlier by changing the venue, but this is a case with a very large
g number of witnesses. The inconvenience to all involved in moving the trial, say to Bristol, to achieve a date a month earlier would not be justified because of the consequences to the members of the public who would have to make the journey in order to attend the trial at Bristol. It may also be burdensome to the claimants who would either have to be moved from their present prison or would have to
h make a long journey each day during the trial. It is the task of the judge, as has been indicated by the authorities, to take into account all relevant circumstances when applying the language of the section. It is for the judge to decide whether there is or is not good and sufficient cause for granting an extension.

j [33] It was also submitted by Mr Lofthouse that problems caused by lack of resources in a centre such as Winchester could be avoided by extending the time limits. In my judgment the suggestion that the Secretary of State should provide the solution to the problems faced by courts up and down the country by extending the time limits is not realistic. As was submitted on behalf of the Department for Constitutional Affairs, that would send a very undesirable message. It is better in the majority of cases to keep to the current time limit, if they can be met, even though in some cases it may result in the time limit having to be extended.

[34] In my judgment on the second issue the judge was entitled to take into account the difficulties that exist in the Crown Court at Winchester in regard to the listing of cases before High Court judges and to decide that that should be the basis for extending the custody time limit. a

[35] It was argued by Mr Lofthouse that the judge had not had regard to the length of the extension he was granting; but in my judgment it is quite clear that he had that very much in mind. To obtain the grant of a long extension, an even stronger case has to be made out to justify the length of extension. All possible steps should be taken to keep the extension to a minimum. b

[36] Before leaving this issue it is right that I should indicate that there is a history of problems with regard to the need for High Court judges to be available to try cases which warrant their attention at Winchester. That history is now the cause of particular concern. Although the approach of Judge Brodrick, in my judgment, cannot be faulted by this court, this case demonstrates that attention must be given by those responsible for seeing whether there are not, despite the efforts which have been made to resolve the problem, ways of alleviating the difficulties which the evidence indicates are occurring. They are not isolated to the particular situation with which the court had to deal on this occasion of a case being transferred from another court—a case which has occupied one courtroom for a substantial period of time. The judge referred to the number and nature of the cases with which he had to juggle. c
d

[37] The length of time which the claimants had to spend in custody before their trial by the standards of some jurisdictions may not be regarded as excessive. However, so far as this jurisdiction is concerned, the standard is set by the statutory provisions. If it should appear that there is undue difficulty in meeting that standard, then there is a very heavy onus upon the judicial and other authorities to ensure that everything possible is being done to avoid those difficulties recurring. In saying what I have, I make no criticism of those responsible for these matters in this area. It is clear from the evidence before us that very considerable efforts were made in respect of the claimants' forthcoming trial. However, none the less, despite the efforts which have already been made, there is a need for the position to be reconsidered and attempts made to ensure that there will not be a recurrence. e
f

THE ISSUE AS TO INTENSITY OF REVIEW g

[38] The third issue to which I should refer is that which deals with intensity of review. Mr Perry drew attention to the fact that in his submissions he had not relied on the *Wednesbury* principle (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). In my judgment it was correct that he should adopt that approach. This case involves the human rights of the claimants. In those circumstances it is only right that the court which originally considers the question of granting an extension should look at the matter with particular care, as the authorities indicate. Equally, when the matter comes before us we must scrutinise it rigorously, but at the same time recognising that the decision is for the judge in the court below to make. Unless we come to the conclusion that he has wrongly exercised his discretion we will not interfere. h
j

THE QUESTION OF THE MERITS

[39] It is apparent from what I have already said that although I am concerned by the situation disclosed by this case, I am satisfied by the reasoning of the judge that he came to the correct conclusion. He took into account all the right

a considerations and so, notwithstanding the arguments which were skilfully deployed on behalf of the claimants, the applications must fail.

[40] There is one further point with which I should deal before I end this judgment. There was in effect a cross-application by the Crown Prosecution Service in respect of the judge's decision that the Crown has failed to exercise the necessary expedition in the conduct of the prosecution. It is clear that the judge b approached the matter with commendable fairness. He insisted that the prosecution demonstrated that they had exercised the required degree of due expedition. He took the view that they had failed to demonstrate that in relation to one small area. While it would have been a nonsense not to have extended the custody time limits on that ground, I would not interfere with his decision that there had been a minor falling below the required standard by the prosecution in c the conduct of the case.

[41] It follows from what I have said that I would dismiss these applications.

ROSE LJ.

d [42] I agree and add only a few observations in relation to the resources issue and the importance of the Crown Court judge's discretion.

[43] As Judge Brodrick recognised, in his very careful ruling, this is a disturbing case in that a custody time limit extension was sought and granted, which had the effect of doubling, and then adding a further month to, the statutorily contemplated period of custody before trial.

e [44] It is also an exceptional case, not one which is 'utterly routine', as May LJ described the circumstances in *R (on the application of Bannister) v Crown Court at Guildford* [2004] EWHC 221 (Admin), [2004] All ER (D) 229 (Feb). Here there is a trial for murder involving many witnesses, with an expectation that it will last four or five weeks. Unless released by a presiding judge, which it has not been, it has to be tried by a High Court judge: see *Practice Direction (criminal: consolidated)* [2002] 3 f All ER 904 at 923, [2002] 1 WLR 2870 at 2890 (para 33.1).

[45] High Court judges are a limited resource. Resources for the criminal justice system generally are limited. There is competition for the necessary public funding from many other directions, of which the National Health Service, universities and schools provide but three obvious examples.

g [46] In the Canadian Supreme Court's decision in *R v Morin* [1992] 1 SCR 771, Sopinka J in a passage in his judgment, to which Lord Woolf CJ has referred, dealt with this matter.

[47] Furthermore, in cases where custody time limits are in question, judicial review may disrupt the trial process and lead to satellite litigation, contributing to delay, which is the very feature of criminal litigation which the custody time limits h are intended to help minimise.

[48] In *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 836, [2000] 2 AC 326 at 371 Lord Steyn said:

i "The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system.'

It is therefore desirable, while recognising the importance of review by this court in exceptional cases, to assert the primacy of the Crown Court judge's role in exercising discretion in relation to custody time limits: see *R v Crown Court at Manchester, ex p McDonald*, *R v Crown Court at Leeds, ex p Hunt*, *R v Crown Court at Winchester, ex p Forbes*, *R v Crown Court at Leeds, ex p Wilson* [1999] 1 All ER 805 at

813, [1999] 1 WLR 841 at 850 per Lord Bingham CJ, subject to the need, as Lord Woolf CJ has said, for rigorous scrutiny by the Crown Court judge before custody time limits are extended. a

[49] Accordingly, and for the reasons given by Lord Woolf CJ, with which I agree, I agree that these applications should be dismissed.

ROYCE J.

[50] I also agree that Judge Brodrick was fully entitled to reach the conclusion that he did. None the less, it is right to bear in mind the observations of Toulson J in *R v Blair*, *R v Taylor* (7 October 1998, unreported), cited with approval by Lord Bingham CJ in *R v Crown Court at Manchester*, *ex p McDonald*, *R v Crown Court at Leeds*, *ex p Hunt*, *R v Crown Court at Winchester*, *ex p Forbes*, *R v Crown Court at Leeds*, *ex p Wilson* [1999] 1 All ER 805 at 811, [1999] 1 WLR 841 at 849, where he said: b

‘In construing and applying statutory provisions which impose a custody time limit, but create an exception, one must be very careful that the exception is not allowed to grow so as to emasculate the primary provision.’ c

In my judgment it is important that the exception remains truly an exception. If not, applications for an extension of custody time limits may have to be refused. But for the reasons that have been given by Lord Woolf CJ and Rose LJ, I also would refuse these applications. d

Applications dismissed. The court certified pursuant to s 1(2) of the Administration of Justice Act 1960 that the following points of law of public importance were involved in the decision: (1) Where a court hearing an application to extend a custody time limit, pursuant to s 22(3) of the Prosecution of Offences Act 1985, is not satisfied that the prosecution has acted with all due diligence and expedition, may the court nevertheless extend the custody time limit if the lack of all due diligence and expedition has not caused the need for the extension? (2) Whether the unavailability of resources, either (a) within the criminal justice system generally or (b) for cases of the type before a court, is a relevant consideration under s 22(3)(a) of the Prosecution of Offences Act 1985. Permission to appeal to the House of Lords was refused. e

Dilys Tausz Barrister. f

a **R (on the application of Bushell and others)
v Newcastle Licensing Justices and
another**

[2004] EWCA (Civ) 767

b COURT OF APPEAL, CIVIL DIVISION

JACOB, MAURICE KAY LJ AND SIR MARTIN NOURSE

24, 25 MAY, 24 JUNE 2004

c *Licensing – Licence – Removal – Special removal – Old on-licence – Removal on the ground that premises for which licence granted are or are about to be pulled down or occupied for any public purpose – Date on which question whether premises are or are about to be pulled down or occupied to be asked – Date on which specified conditions must subsist – Licensing Act 1964, s 15(1)(a).*

d The second defendant owned a hotel. It also owned a small public house, in the same licensing district, in an area subject to a proposed compulsory purchase order. The public house closed for business in July 2002. There were a number of potential objections to the second defendant's plan to obtain a new on-licence for the hotel and run it as a public house with music. It therefore wished to use
e the special removal provisions of the Licensing Act 1964 to remove the public house's old on-licence to the hotel. The relevant conditions under s 15(1)(a)^a of the 1964 Act were that the premises for which the licence had been granted were or were about to be pulled down or occupied for, inter alia, any public purpose. In March 2003, the application for special removal came before the justices. The
f 1964 Act provided that a licensing sessions could be continued by adjournment beyond the day appointed but that no new application could be made at any adjourned sessions. The second defendant's application was adjourned twice until November when the justices heard the application. They granted the special removal of the licence. The claimants brought proceedings for judicial review. The judge determined that the justices had been wrong to hold that the
g case fell within the special removal provisions, holding that the mere making of a compulsory purchase order was not sufficient, and that the words 'about to be' pulled down or occupied in s 15 of the 1964 Act connoted both practical certainty and imminence of outcome. He remitted the matter to the justices. The second defendant appealed. Before the Court of Appeal the issues included the date
h when the question under s 15 whether premises 'are or are about to be pulled down or occupied' should be asked. The second defendant contended for the November date on the basis that the justices had then been considering a new application, not least because during the intervening period a justice had retired and been replaced by another, and because certain formalities had had to be gone through again in November.
j

Held – (1) The date on which the application for special removal of an old on-licence first came before the justices was the date when the question of whether premises were or were about to be pulled down or occupied was to be asked. The

a Section 15, so far as material, is set out at [7], below

committee had not been considering a new application in November. It had been sitting in November because it was an adjourned licensing sessions and as such had no power to deal with a new application. The fact that one of the justices had been replaced did not stop it being an adjourned hearing (see [14]–[16], below). a

(2) The specified conditions for special removal had to subsist at the time of the application. Special removal applied only in limited cases bordering on necessity and urgency. In relation to the progress of a compulsory purchase order s 15 of the 1964 Act only came into play toward the end of the process, when a point was reached when it could be said that pulling down or occupation for public purposes was truly imminent. Justices considering an application under s 15 needed to be appraised of the exact position at the time of application, not only of the formal making or confirmation of a compulsory purchase order, but whether it was being followed through and when. Accordingly the judge had been right to say that at the time of the application the premises were not within s 15(1)(a). The justices' decision would therefore be quashed (see [15], [19]–[21], [23], [28], [29], [32], [33], below). b

Notes c

For special removal of licences, see 26 *Halsbury's Laws* (4th edn reissue) paras 172, 173, 179–182. d

The Licensing Act 1964 is repealed, subject to transitional provisions, by the Licensing Act 2003, ss 199, 200, Schs 7, 8, as from a day to be appointed under s 201(2) of the 2003 Act.

For the Licensing Act 1964, s 15, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 320. e

Cases referred to in judgments

Bentsen v Taylor Sons & Co (No 2) [1893] 2 QB 247, CA.

Harris v Birkenhead Corp [1976] 1 All ER 341, [1976] 1 WLR 279, CA. f

R v Goodwin [1944] 1 All ER 506, [1944] KB 518, CCA.

Appeal

The second defendant, Ultimate Leisure Group plc, appealed from the decision of Lightman J on 15 March 2004 ([2004] EWHC 446 (Admin), [2004] All ER (D) 272 (Mar)), in proceedings for judicial review brought by the claimants Ron Bushell and others, quashing the grant on 1 December 2003 by the first defendants, the licensing justices for Newcastle-upon-Tyne, of Ultimate's application under s 15 of the Licensing Act 1964 for special removal of an old on-licence from its public house, Mims Bar, Newcastle-upon-Tyne, to its property, the Gresham Hotel, Osborne Road, Newcastle-upon-Tyne, and remitting the application to the justices for reconsideration. Rindberg Holding Company Ltd and Peel Hotels Ltd appeared as interested parties. The facts are set out in the judgment of Jacob J. g

Ian Dove QC and *Charles Holland* (instructed by *Mincoffs*, Newcastle-upon-Tyne) for Ultimate. h

John Steel QC, *Gerald Gouriet* and *Robert Walton* (instructed by *Sintons*, Newcastle-upon-Tyne) for the claimants. j

James Rankin (instructed by *Sintons*, Newcastle-upon-Tyne) for the interested parties.

a 24 June 2004. The following judgments were delivered.

JACOB LJ.

b [1] The Gresham Hotel is in Osborne Road, Newcastle-upon-Tyne. It is owned by the second defendant, Ultimate Leisure Group plc (Ultimate). At the relevant time Ultimate also owned a small public house called Mims Bar and in the same licensing district. Ultimate want an on-licence for the Gresham to run it as a public house with music. The scale would be substantial, accommodation enough for 420 people. The claimants live nearby and are representative of many local people who object to the proposed licensing of the Gresham. Trade objectors also object, two of these

c appearing as interested parties.
[2] There are a number of routes by which premises can be granted an on-licence. They are set out in the Licensing Act 1964 as amended. This legislation is shortly to be replaced, having been repealed by the Licensing Act 2003 but only from a date to be appointed, which we understand is likely to be in 2005. We have to construe the legislation as it stands, unrepealed.

d [3] The routes for a justices' licence are 'as a new licence or by way of renewal, transfer or ... removal' (s 3(2)). By s 3(3) these various terms are defined. 'Renewal' is defined as one might expect and nothing turns on that. 'Transferring a licence' means changing the holder and again nothing turns on that. '[R]emoving a justices' licence means taking it from the premises for which it was granted and granting it for other premises' (s 3(3)(b)). This case is about a proposed removal of the licence from Mims Bar to the Gresham. There are three sorts of removal—'ordinary removal', 'special removal' and a 'planning removal or temporary premises removal' (s 5).

e [4] It is evident that Ultimate could not easily obtain a licence for the Gresham by way of a new application or an ordinary removal. For these types of licence there is substantial scope for objection. The objectors are both numerous and they apparently have significant grounds. Ultimate have virtually recognised this by withdrawing an application. However, the potential grounds for objection to a 'special removal' are much more limited. Ultimate say that they can use this procedure to get the licence transferred from Mims.

f [5] It is not, I think, necessary to go into the details of some of the earlier battles concerning the attempts to get a licence for the Gresham. It is sufficient to say that a lot of this is set out in the judgment of Owen J dated 31 July 2003 ([2003] EWHC 1937 (Admin), [2003] NLJR 1474). I therefore will just set forth the facts relevant to this appeal in chronological order.

g 20 March 2002

The City of Newcastle-upon-Tyne cabinet approved the making of a compulsory purchase order (CPO) for the St James Boulevard/Waterloo Street area. This is an area which included Mims Bar. The council resolution authorised the purchase of affected properties by agreement in advance of any compulsory purchase order.

h 31 July 2002

Mims was closed for business. Its licence was suspended pursuant to the provision of s 141 of the 1964 Act (see below as to this).

j

- 1 August 2002 The city council made the CPO and Ultimate were duly notified of this shortly thereafter. The notification included the following statement: 'Funds are currently available to support the regeneration scheme through the Grainger Town Partnership. The opportunity exists until March 2005. It is therefore imperative that land is brought into public ownership quickly to ensure that the scheme can be completed and the Grainger Town funding can be claimed by March 2005.'
- Jan/Feb 2003 The public inquiry into the CPO proceeded.
- 12 February 2003 Ultimate gave notice of its intention to apply at the transfer session for the licensing district of Newcastle-upon-Tyne to be held on Tuesday 11 March for an order authorising the special removal from Mims to the Gresham.
- 11 March 2003 The application for special removal came before the justices. It was adjourned. There was procedural impropriety as noted by Owen J, but nothing turns on this.
- 7 April 2003 The application was reconvened. The justices decided certain preliminary issues, those that went before Owen J.
- 5 June 2003 The minister confirmed the CPO.
- 26–28 November 2003 The justices heard the application for special removal.
- 1 December 2003 The application was granted.

[6] Following this the claimants sought judicial review and the matter came before Lightman J ([2004] EWHC 446 (Admin), [2004] All ER (D) 272 (Mar)). He held (on 15 March 2004) that the justices were wrong to hold that the case came within the provisions concerning special removal. He held that the decision should be quashed and that the application for the grant of special removal should be remitted for reconsideration. He went further and expressed views on the 'discretionary grounds for special removal'. As I read his decision these views form no part of his essential reasoning. They were not alternative reasons for quashing the decision. They were intended to be no more than 'guidance'.

[7] The principal issue before us therefore is whether Lightman J was right in holding that the special removal procedure could not be invoked. He called this 'jurisdiction' but really it is simply a question of whether the facts at the relevant time brought the case within the language of the section providing for special removal. That is s 15 which reads:

'(1) Where application is made for the special removal of an old on-licence from any premises in a licensing district to premises in the same district on the ground—(a) that the premises for which the licence was granted are or are about to be pulled down or occupied under any Act for the improvement of highways, or for any other public purpose; or (b) that the premises for which the licence was granted have been rendered unfit for use for the business carried on there under the licence by fire, tempest

a or other unforeseen and unavoidable calamity; the provisions of section 12 ... of this Act shall apply as they apply to a renewal ...'

[8] This provision incorporates s 12 of the 1964 Act. The effect, by s 12(4), is that in a case covered by s 15 the justices may only refuse the application on the grounds that—

b '(a) the applicant is not a fit and proper person to hold the licence; or
(b) that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable ...'

c [9] The origins of this legislation are old indeed. They come from s 14 of the Licensing Act 1828 (sometimes called The Ale House Act 1828). This provided, *inter alia*:

d '... if any House, being kept as an Inn by a Person duly licensed as aforesaid, shall be or about to be pulled down or occupied under the Provisions of any Act for the improvement of the Highways or for any other Public purpose; or shall be, by Fire, Tempest or some other unforeseen and unavoidable Calamity, rendered unfit for the Reception of Travellers, and for other legal Purposes of an Inn; it shall be lawful for the Justices ... to grant to the person whose house shall as aforesaid have been or shall about to be pulled down, or have become unfit for the Reception of Travellers, or for the other legal Purposes of an Inn, and who shall open and keep as an inn some other fit and convenient House, a Licence to sell exciseable Liquors by Retail to be drunk or consumed therein ...'

f [10] So a special removal may be granted where the premises 'are or are about to be pulled down or occupied'. Two questions arise. First, when is the date when the question should be asked, and secondly, what do the words mean when asked on that date?

WHAT IS THE DATE?

g [11] Neither before the justices nor before Lightman J was there any significant argument about this. It was assumed (it seems) that the date was the date when the application was made. Before us an argument developed as to whether that was right. Mr Dove QC for Ultimate argued for the latest possible date for the self-evident reason that the later the date the more readily was it possible to argue that the premises were about to be pulled down or occupied.

h [12] There are, in principle, three candidates for the relevant date, namely the date of application (12 February), the date when the matter first came before the justices (11 March) or the date when the justices heard the matter (26–28 November). So far as this case is concerned there is no material difference between the first two of these and it is not necessary to decide between them.

j [13] Mr Dove contended for the November date. He said that at that time the justices were not considering an adjourned application, they were considering a new application. That was necessary, he submitted, not least because during the intervening period a justice had retired and been replaced by another. He pointed out that at that hearing the formalities (such as proof

of the notices) were gone through again and that in substance the application should be treated as having been made on that day in November. a

[14] I do not see how that can be right. By s 3(4) the procedure to be followed is set out in Sch 2 to the 1964 Act. The procedure takes place before the licensing committee. By s 2(5) the details of its constitution and as to the holding of licensing sessions are set out in Sch 1:

‘10. A licensing sessions may, for the purpose of dealing with business not disposed of, be from time to time continued by adjournment beyond the day appointed for the holding of the sessions; but no new application may be made at any adjourned sessions and references in this Act or any other enactment (in whatever terms) to the day or first day of a licensing sessions and to the conclusion of a licensing sessions shall be taken as referring to the day appointed for holding the sessions and to the conclusion of the proceedings on that day (and, in the case of a general annual licensing meeting for which different days are appointed for different parts of the licensing district, as having reference to the one appointed for the relevant part of the district).’ b

[15] So if one asks by what authority was the committee sitting in November, the answer is that it was because it was an adjourned licensing sessions. The fact that one of the justices had been replaced and at the adjourned hearing certain matters had to be reproved, does not stop it being an adjourned hearing. If Mr Dove were right and the justices were dealing with a new application then they had no power whatever to proceed by virtue of para 10 of Sch 1. c

[16] I am fortified in this belief by the fact that the notice of application for a transfer specified the original date of 11 March. If Mr Dove were right then it seems to me that his clients would not have given a relevant notice at all. He sought to get round this by saying that his clients had given notice of application to *the sessions* and this being an adjournment of the sessions his notice was in order. His clients were making an application at the advertised sessions, albeit adjourned. I do not see how this gets round the provisions of para 10 of Sch 1. So I am of the opinion that what the justices were dealing with in November was the adjourned application initially made on 11 March. d

WHEN MUST THE CONDITIONS BE SATISFIED?

[17] I turn back to the language of s 15. It says ‘[w]here application is made ... on the ground—(a) that the premises ... are or are about to be ...’ That strongly suggests that at the time of the application the specified conditions must subsist. I think this is confirmed by the consideration that otherwise the passage of time caused by adjournments and the like could bring a case which was improperly brought initially into a proper case. That would give applicants for special removal every incentive to cause delay in the hope that they would have a sufficiently immediate case to bring them within the section. I therefore think that the justices and Lightman J were right in their assumption that the relevant date was at least by 11 March. It may have been, as I say, the date of the original notice of application but there was no material change of facts between those dates. e

[18] The position when the application was made was this, in summary:
(i) The council had resolved to make the CPO. In so doing it had said (see f

a passage quoted above) that it was intended to complete the scheme by March 2005. (ii) The council had made the CPO. (iii) Mims Bar had closed for business and its licence had been suspended under s 141. (iv) The CPO had not been confirmed. The public inquiry was either still running or had just finished.

b [19] Do these facts mean that Mims Bar in March 2003 was 'about to be pulled down or occupied ... for [a] public purpose'? Lightman J held that the justices were wrong to say that the mere making of the CPO was enough. He said at [27]):

c 'The formula "about to be" as a matter of language goes beyond allowing or requiring the justices to take account of likely future events and connotes both practical certainty and imminence of outcome.'

d [20] Thus a mere probability was not enough. He also held the justices were wrong to take into account the fact of the suspension under s 141. This authorises the Commissioners of Customs and Excise to grant a certificate of suspension of a licence which keeps the licence alive where the—

'business is temporarily discontinued by reason of the compulsory acquisition, or the proposed compulsory acquisition, of licensed premises in which the business was carried on ...'

e [21] I think that Lightman J was right in his construction of s 15. It does not say, as does s 141, that a proposed CPO is enough to bring the section into play. Special removal applies only in limited cases bordering on necessity and urgency. One can get the idea of what is meant from the origin of s 15 back in 1828. The Act was concerned with what happened if an inn was about to close, not only from the point of view of the innkeeper, but also from the point of view of travellers. The about-to-be-pulled-down criterion is linked along with calamities. It is some force majeure either of God or man which is forcing the innkeeper into a removal. The stately progress of a CPO—its confirmation and then possible implementation—is altogether a slower kind of thing. Only towards the end of the process, when one reaches a point at which one can say
f that pulling down or occupation for a public purpose is truly imminent does
g the section come into play.

[22] Mr Dove suggested that the 1964 Act should not be read in the light of its history, that in 1964 Parliament had in mind a wider meaning. He pointed out that the original language had been re-written so as to put calamities into
h a different paragraph from obstacles caused by the authorities. I can see no such Parliamentary intention. All that was being done was to tidy up the 1828 language.

[23] Lightman J appears to have been of the opinion that the date of confirmation of the CPO would be enough. I am by no means certain that that
j is the case. Mr Dove submitted that it was. But by the time the justices came to consider the matter in November (the date which I have rejected) no more evidence other than the confirmation in June was placed before the justices. The fact is that the best laid plans of mice and men oft go astray. Compulsory purchases are not infrequently made and then not followed through. Justices who are considering an application under s 15 need to be appraised of exactly what the position is at the time of application, not only as a matter of formal

making or confirmation of a CPO but whether it is being followed through and when. a

[24] Lightman J supported his conclusion by referring to *Bentsen v Taylor Sons & Co (No 2)* [1893] 2 QB 247 and *R v Goodwin* [1944] 1 All ER 506 at 509, [1944] KB 518 at 523. For myself, I do not think that these cases help either way. True it is that nearly similar words in very different contexts were construed in the same way. But because the contexts were different it by no means follows that the similar words would have the same meaning in the licensing context. The real point is that the meaning in that context conveys immediacy. b

‘OCCUPIED ... FOR [A] PUBLIC PURPOSE’

[25] Mr Dove ran an alternative argument. He submitted that the council were actually in occupation of the premises from the time they had bought them. Moreover he submitted they were in occupation for a public purpose, namely redevelopment. Hence there was no need to go into the question of ‘about to be pulled down’. Nor was there any need to go into ‘about to be ... occupied’. For the premises were actually ‘occupied’. He took us to a case under the Occupiers’ Liability Act 1957, *Harris v Birkenhead Corp* [1976] 1 All ER 341, [1976] 1 WLR 279. For the purposes of that Act it was held that the corporation, having the immediate right of control of the property became its occupier as soon as a tenant had left. In other words the council occupied the vacant property. I do not think this case assists at all. The purpose of the 1957 Act is miles away from considerations of licensing. The point was that under the 1957 Act an occupier has a duty to protect infants from a danger of trespassing. The council knew the property was empty. They had control of it and they had done nothing about providing any such protection. The concept of occupation for the purposes of the 1957 Act is quite different from a concept of occupation for a public purpose within the meaning of s 15 of the Licensing Act 1964. Indeed, as Mr Steel QC for the claimants pointed out in relation to occupier’s liability there can be more than one occupier. c
d
e
f

[26] So again it is context that matters. Does ‘occupied ... for [a] public purpose’ include mere public ownership of a vacant property? Put that way the question answers itself—obviously not. g

THE ‘ABSURDITY’ ARGUMENT

[27] Mr Dove also argued that the ‘imminence’ meaning produced what he said was an absurd result: that a licensee could only get a special removal if he hung on in a derelict area until the last minute. Mr Steel said that there was no need for him to do so, he could apply for an ordinary removal or indeed apply for a new licence. To that Mr Dove responded that these were hollow words: because it was self evident that his clients would not be given either of these owing to local objections. I do not accept this response. Mr Dove is right that these other options were not open so far as removal to the Gresham is concerned. It by no means follows that an ordinary removal could not have been obtained in respect of other premises within the district. An ordinary removal to premises perhaps of the same size as Mims might well have been much easier to achieve. The formidable opposition to Ultimate’s plans for the Gresham are based upon its substantial scale and location. In truth although Ultimate are seeking removal of the licence, they are not really seeking removal of the old business of Mims but seeking to set up a wholly new h
j

a business on a quite different scale in a different part of the city. That is not an objection in law to special removal but it is an answer to Mr Dove's 'hanging on' point.

[28] In the result I would hold that Lightman J was right to say that at the time of the application (which I take to be March 2003) the premises were not within s 15(1)(a).)

b QUASH OR REMIT?

[29] Lightman J decided, as I have said, to 'give guidance' and to remit the matter to the justices. I see no point in remitting the matter to the justices. The fact is that the application when made was incompetent because it was not within the section. The justices had no option but to refuse it. On the language of the section it was not open to them to take into account later events (eg the confirmation of the CPO). So I would simply quash the decision. That of course leaves Ultimate free to make a fresh application. We are told that the Mims premises have now been pulled down and it may be that on such an application the justices will find that s 15(1)(a) has been satisfied.

d LIGHTMAN J'S 'GUIDANCE'

[30] Lightman J expressed views both on the expert and other evidence that had been provided to the justices about this case and more generally upon the procedure concerning expert evidence to be followed by the justices in general. I do not think we should go into the guidance suggested for the purposes of this particular case. None of it was a ground of Lightman J's decision. Nor do I think, if Ultimate make a fresh application for special removal, should the justices who consider it regard themselves as in any way bound by the 'guidance'. They will have to make up their own minds on the evidence before them as to whether the objections are made out. For that purpose they will have to determine the facts and consider whether they bring the case within the grounds of objection.

[31] Lightman J also indicated more generally a concern about how detailed expert evidence came to be presented to the justices. For licensing justices there is no code of procedure for expert evidence akin to CPR Pt 35. Doubtless that is true of many other judicial or quasi-judicial tribunals. I doubt that it is appropriate to graft on to all these the detailed CPR Pt 35 procedure. On the other hand there is a lot to be said for avoiding the situation which happened in this case, namely the presentation for the first time on the day of detailed technical evidence. If that is thought likely to happen then it makes sense for exchange of technical evidence in advance and possibly a meeting of experts to narrow down issues. A lot must turn on how detailed and how complex the evidence is, as well as the skills and training of the tribunal concerned. And if a tribunal finds that it is given on the day too much to digest immediately it can always exercise its power of adjournment. Further than this I do not think it right or appropriate to go.

j MAURICE KAY LJ.

[32] I agree and would add only this. Licensing decisions usually involve the balancing of conflicting interests. Mr Dove QC's submissions are predicated on the contention that so great is the impact of a compulsory purchase order on the business of a licence-holder whose premises are subject

to the order that the policy of the legislation, expressed through ss 12 and 15 of the Licensing Act 1964, is to tip the balance in favour of the licence-holder to an unprecedented extent and that, in construing the statutory provisions, it is incumbent upon the court to give effect to that policy. In my judgment that contention is too one-sided. Special removal can have serious consequences for other interests such as have been articulated in this case. Those consequences occur in circumstances where the licensing justices have a limited discretion to refuse and where objectors have no right of appeal against a grant of special removal, only the possibility of judicial review. It is an exceptional procedure and, for my part, I do not think that the courts should strain to construe the provisions of the statute in favour of the licence-holder and against the other interests. On the contrary, they should be strictly construed.

SIR MARTIN NOURSE.

[33] I agree with both judgments.

Dilys Tausz Barrister.

Order accordingly.

a Taylor v Chief Constable of Thames Valley Police

[2004] EWCA Civ 858

b COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, CLARKE AND SEDLEY LJJ

10 JUNE, 6 JULY 2004

c Arrest – Arrest without warrant – Grounds for arrest – Statutory provision requiring person to be informed of grounds for arrest – Test for determining whether person has been so informed – Application of test in cases of arrest for offence of violent disorder – Police and Criminal Evidence Act 1984, s 28(3).

d When determining whether a person has been informed of the grounds for his arrest for the purposes of s 28(3)^a of the Police and Criminal Evidence Act 1984, the question is whether, having regard to all the circumstances of the particular case, he was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. The adequacy of the information given has to be assessed objectively having regard to the information which was reasonably available to the officer. In the case of the offence of violent disorder, e it should ordinarily be sufficient, provided that the time and place of the disorder is indicated to the person arrested, for the police simply to say that the person concerned is being arrested on suspicion of violent disorder at a particular time and place (see [24], [26], [30], [37], [56], [61], below).

Fox v UK (1991) 13 EHRR 157 adopted.

f Notes

For information to be given on arrest, see 11(1) *Halsbury's Laws* (4th edn reissue) para 710.

For the Police and Criminal Evidence Act 1984, s 28, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 746.

g

Cases referred to in judgments

Abbassy v Comr of Police of the Metropolis [1990] 1 All ER 193, [1990] 1 WLR 385, CA.
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

h

Christie v Leachinsky [1947] 1 All ER 567, [1947] AC 573, HL.
Clarke v Chief Constable of North Wales Police [2000] All ER (D) 477, CA.
Fox v UK (1991) 13 EHRR 157, [1990] ECHR 12244/86, ECt HR.
Mercer v Chief Constable of the Lancashire Constabulary, *Holden v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, [1991] 1 WLR 367.

j

Murphy v Oxford [1985] CA Transcript 56.
Wilding v Chief Constable of Lancashire [1995] CA Transcript 574.
Wilson v Chief Constable of the Lancashire Constabulary [2000] All ER (D) 1949, CA.
Woods v Comr of Police of the Metropolis [1995] CA Transcript 588.

a Section 28(3) is set out at [5], below

Appeal

The Chief Constable of Thames Valley Police appealed with permission of Scott Baker LJ granted on 9 March 2004 from the order of Judge Catlin in the Reading County Court on 12 December 2003 giving judgment for the respondent, Daniel Taylor (a child proceeding by his mother and litigation friend, CM Taylor), for damages in the sum of £1500 for false imprisonment, trespass to the person and assault. The facts are set out in the judgment of Clarke LJ.

Edward Faulks QC and Iain Daniels (instructed by *Barlow Lyde & Gilbert*) for the appellant.

Brian Langstaff QC and Yvette Genn (instructed by *Irwin Mitchell*, Sheffield) for the respondent.

Cur adv vult

6 July 2004. The following judgments were delivered.

CLARKE LJ (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

INTRODUCTION

[1] This is an appeal by the Chief Constable of the Thames Valley Police against an order dated 12 December 2003 made by Judge Catlin in the Reading County Court in which he gave judgment for the respondent, Daniel Taylor, for damages in the sum of £1,500. The order was made after a trial in which it was said that the claimant had been arrested unlawfully and in which he claimed damages for trespass to the person, assault and false imprisonment. The trial lasted some five days and was in part before a jury. Some issues at the trial were determined by the jury and, by agreement, some were determined by the judge.

[2] The action arose out of the arrest of the respondent on 31 May 1998. He was only ten years old at the time and was a small boy, being only about 4 ft 9 in tall. One of the issues at the trial was whether he was sufficiently informed of the reasons for his arrest by the arresting officer, WPC McKenzie. The jury were asked to answer and in fact answered three questions. The questions and answers were as follows:

‘Q. Has the chief constable/defendant satisfied you that on 31 May 1998 WPC McKenzie had formed a genuine suspicion herself that the claimant had committed the offence of violent disorder?’

A. Yes.

Q. What did WPC McKenzie say to the claimant, if anything, when she arrested him?

A. We believe that WPC McKenzie said: “I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm.”

Q. Has the claimant satisfied you that it was not reasonable and/or necessary to take hold of the claimant’s arm to effect his arrest and detention?

A. No.’

[3] It was initially agreed that the judge should decide four questions: (i) whether the words spoken to the respondent on arrest were sufficient lawfully to effect his arrest; (ii) whether WPC McKenzie’s genuine suspicion was

a reasonably held; (iii) whether WPC McKenzie exercised her discretion in a manner which was reasonable in accordance with *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223); and (iv) whether the period of time that the claimant was detained was of such length as to make an otherwise lawful detention unlawful.

b [4] The issue raised by question (ii) was abandoned on behalf of the respondent before the judge. The judge was thus asked to answer questions (i), (iii) and (iv). He answered questions (i) and (iv) in favour of the respondent and question (iii) in favour of the appellant. The judge refused the appellant's application for permission to appeal in respect of the answers to questions (i) and (iv) but permission was subsequently granted by Scott Baker LJ. The respondent does not challenge the answer to question (iii). The issues in this appeal are therefore whether the judge was entitled to reach the conclusions which he did on questions (i) and (iv).

c [5] Question (i) was whether the arrest was lawful in the light of s 28(3) of the Police and Criminal Evidence Act 1984 (PACE), which provides:

d '... no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.'

e It was common ground that the burden of proving that the arrest was lawful was on the appellant. The judge held that he had failed to discharge that burden. The question raised by the first issue in this appeal is whether he was entitled so to hold.

f [6] Question (iv) was whether, assuming the arrest was otherwise lawful, the period over which the respondent was detained was lawful. The judge held that it was not in respect of the period of about an hour between about 20.15 hrs and 21.21 hrs on 31 May 1998. The question raised by the second issue in the appeal is whether the judge was entitled so to hold. It only arises if the appeal on the first point succeeds.

[7] I shall consider each of those issues separately but before doing so it is convenient to identify the relevant background facts, all or almost all of which are agreed or not in dispute.

g THE BACKGROUND FACTS

h [8] I take the facts in part from the account set out in the very helpful skeleton argument prepared by Miss Yvette Genn on behalf of the respondent. In 1998 Hillgrove Farm, Whitney in Oxfordshire was the site of anti-vivisection protests. On 18 April in that year the respondent and his mother came down from Liverpool where they lived and attended a demonstration at Hillgrove Farm. It was a substantial demonstration involving as many as a thousand people. It was also violent. Significant numbers of people were involved in the violence whom the police were anxious to identify from video tapes and still photographs of the events.

j [9] There were some 29 video cassettes and 26 albums of photographs. In order to identify those involved, a team of police officers known as spotters viewed the video tapes (and indeed stills taken from the tapes) and attended a further demonstration at Hillgrove Farm which took place on 31 May in order to see whether any of those identified on the tapes were present. The plan was to arrest those suspected of committing public order offences at the earlier demonstration. Some 106 people were identified as possible targets (and given a

T number) one of whom proved to be the respondent, who was seen on one of the videos throwing a rock or rocks from an adjacent field in the direction of the farmhouse. He was T42. He was one of 28 people arrested on 31 May on suspicion of having committed offences on 18 April. A number of people were also arrested in connection with the demonstration on 31 May, although that demonstration was largely peaceful and there is no suggestion that the respondent committed an offence on that day.

[10] Two of the police spotters were Sgt Deacon and DC Lynch. Although both officers had been promoted to inspector by the time of the trial in 2003, I shall where appropriate refer to them by the ranks which they each had at the time. Sergeant Deacon had reduced the images to a manageable number and on 31 May he had with him a book or album of stills and photographs in order to aid the identification process. It was his role, having identified a particular suspect, to instruct a more junior officer or more junior officers to arrest the suspect. He identified T42 and instructed WPC McKenzie to arrest him. She accordingly arrested the person pointed out to her as T42, who proved to be the respondent.

[11] The arrest took place at 16.10 hrs. As already indicated, the jury found that when doing so WPC McKenzie said: 'I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm.' For reasons which are not the subject of any present complaint, and which may have been connected with the size of the operation, it was not until 18.10 hrs that the respondent arrived at Newbury police station in a police van. His mother had been and continued to be with him throughout. There was then a further delay, during which the respondent was obliged to remain in the van, and it was not until 19.09 hrs that he was presented to the custody sergeant, who was Sgt Davey, for processing. After processing, at 19.45 hrs he was placed in a detention room. At 20.20 hrs Mrs Taylor complained about the delay and also about the fact that the detention room was oppressive. He was subsequently interviewed in the presence of his mother, who it was eventually agreed could act as an appropriate adult. The interview began at 21.21 hrs. It was the period between about 20.15 hrs and 21.21 hrs that the judge held was excessive. The interview ended at 21.53 hrs. There was then some discussion about the possibility of a formal caution, to which the respondent agreed. As a result a formal caution was administered to him and he was finally released at 23.00 hrs.

THE PROCEEDINGS AND TRIAL

[12] This action was begun some considerable time later and particulars of claim were served on 7 January 2002. In them it was alleged that the arrest was unlawful and, as indicated above, damages were claimed for false imprisonment, assault and trespass to the person. The basis of the claim was different from that which was ultimately argued before the judge in the light of the jury's findings of fact. In para (4)(ii) it was alleged as follows:

'The plaintiff was not properly informed of the reasons for his arrest. WPC McKenzie did state to the claimant's mother that the claimant had been arrested for a public order offence. However, this was said as the claimant was being taken to the police van and was not heard by the claimant. If anything was said to the claimant about the reasons for his arrest it was wholly unclear and not properly communicated to him. The claimant first understood the reason for his arrest when he arrived in the custody suite

a and was told he was suspected of violent disorder on 18 April 1998. His arrest was thereby unlawful and he was thereby unlawfully imprisoned.'

[13] As already indicated, the jury found that at the time of arrest WPC McKenzie told the respondent that she was arresting him on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm. It is perhaps an irony that, in the light of the jury's verdict rejecting the case advanced in the second and third sentences of para (4)(ii), those words were and are said to be insufficient to inform the claimant of the grounds on which he was being arrested, whereas in the fourth sentence of para (4)(ii) it was said that he first understood the reason for his arrest in the custody suite when he was told that he was suspected of violent disorder on 18 April. It is common ground that he was indeed given that information in the custody suite because there is a record to that effect in the custody record. The information was rather less than the jury found was given to him by WPC McKenzie when he was arrested.

[14] It is common ground that the above is no more than an incidental irony because it is agreed that the words used (viewed of course in their context) are either sufficient to satisfy s 28(3) of PACE or they are not. Thus both Mr Faulks and Mr Langstaff averred that the subjective state of mind of the claimant or indeed his mother was irrelevant to the determination of that question, although (perhaps naturally) neither could resist referring to those parts of the evidence of actual understanding which he perceived to be of assistance to the result he was contending for.

[15] At the outset of the five-day trial permission was sought on behalf of the claimant to amend the particulars of claim in two respects. The first alleged that WPC McKenzie had not formed a genuine suspicion that the claimant had committed an offence and/or that she did not have reasonable grounds for such a suspicion. However, the first point was rejected by the jury and the second was abandoned and is no longer relevant. The second respect in which it was sought to amend the particulars of claim was to add a new para (4)(iii), which is relevant to the second issue in the appeal, and is in these terms:

'Further or in the alternative, even if the arrest is found to have been lawful (which is denied) the period over which the claimant was detained was excessive and unreasonable in all the circumstances.'

The appellant did not resist the application for permission to amend and it was accordingly granted.

[16] The claim for damages included claims for damages for trespass to the person and for assault. However, as I understand it, it is common ground that those claims would only succeed if the claim for damages for false imprisonment succeeded on the basis that the original arrest was unlawful. The judge awarded damages totalling £1,500. The award was made in these circumstances. After the judge had held that the arrest was unlawful, he heard argument on issue (iv), during which it was submitted on behalf of the claimant that even if the arrest was lawful, it was excessive to detain the claimant for as long as he was detained. As I read the judgment, it was in effect accepted that on that assumption the detention was lawful between 16.10 hrs and 19.45 hrs and between 21.21 hrs and 23.00 hrs, but it was submitted that the interview should have started at 19.45 hrs and that the detention was unlawfully prolonged in respect of the period between 19.45 hrs and 21.15 hrs. The judge accepted that submission in part and held that

the detention was unlawfully prolonged in respect of the period between about 20.15 hrs and 21.21 hrs. a

[17] In the light of that decision the parties agreed the figure of £1,500 as damages, subject to the judge's approval because the claimant was (and is) a minor. Curiously, it appears from the discussions between the judge and counsel, of which we have seen a transcript, that the judge approved the figure on the basis that it was to cover four hours of false imprisonment, together with a trespass to the person consisting of lifting the claimant's shirt and an assault in the process of the arrest which were both at the lowest end of the spectrum. It is not absolutely clear but it appears that the four hours were arrived at by taking the three hours from the time of arrest at 16.10 hrs to the time of arrival at the custody suite at 19.10 hrs and adding the hour which the judge held to be excessive between about 20.15 hrs and 21.21 hrs. The basis for excluding the period from 19.10 hrs to 20.10 hrs and 21.21 hrs to 23.00 hrs is not clear. The only basis that I can think of is that it was accepted in calculating the damages that the arrest was lawful during those periods because what was said in the custody suite (and alleged in para (4)(ii) of the particulars of claim) was sufficient to inform the claimant of the grounds of his arrest within s 28(3) of PACE. b
c

[18] However, that approach would be inconsistent with what by the end of the trial was the central argument on liability, namely whether the words which the jury held to have been spoken by WPC McKenzie were sufficient. Since no one seeks to reopen the damages and no one suggests that the judge was not entitled to reach the conclusion that he did on the basis of an inconsistency in the approach to damages, I refer to it only to explain what would otherwise be a curiosity (to put it no higher) and to observe that it is common ground that if the appeal fails the result will be that the award of damages in the sum of £1,500 stands, that if the appeal succeeds on both points the appellant will not be liable at all so that the whole award of damages will be set aside and that if the appeal succeeds on the first point but fails on the second point the award of £1,500 will be set aside and replaced by an appropriate award of damages for excessive detention for the period of about an hour between 20.15 hrs and 21.21 hrs. In that event the parties have not asked us to assess an appropriate figure but have said that they hope to agree an appropriate figure. d
e
f

WRONGFUL ARREST? g

[19] I turn to the first question, namely whether the respondent was sufficiently informed of the grounds of his arrest. Section 28 of PACE provides so far as relevant: h

'(3) ... no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest. i

(4) Where a person is arrested by a constable, subsection (3) applies regardless of whether the ground for the arrest is obvious.'

[20] Section 28 of PACE reflects the position at common law as stated in the leading case of *Christie v Leachinsky* [1947] 1 All ER 567, [1947] AC 573. In a classic passage ([1947] 1 All ER 567 at 572–573, [1947] AC 573 at 587), after referring to a number of cases, Viscount Simon summarised the position in a series of propositions as follows: j

'1. If a policeman arrests without warrant on reasonable suspicion of
 felony, or of other crime of a sort which does not require a warrant, he must
 in ordinary circumstances inform the person arrested of the true ground of
 arrest. He is not entitled to keep the reason to himself or to give a reason
 which is not the true reason. In other words, a citizen is entitled to know on
 what charge or on suspicion of what crime he is seized. 2. If the citizen is
 not so informed, but is nevertheless seized, the policeman, apart from certain
 exceptions, is liable for false imprisonment. 3. The requirement that the
 person arrested should be informed of the reason why he is seized naturally
 does not exist if the circumstances are such that he must know the general
 nature of the alleged offence for which he is detained. 4. The requirement
 that he should be so informed does not mean that technical or precise
 language need be used. The matter is a matter of substance, and turns on the
 elementary proposition that in this country a person is, *prima facie*, entitled
 to his freedom and is only required to submit to restraint on his freedom if
 he knows in substance the reason why it is claimed that this restraint should
 be imposed. 5. The person arrested cannot complain that he has not been
 supplied with the above information as and when he should be, if he himself
 produces the situation which makes it practically impossible to inform him,
 e.g., by immediate counter-attack or by running away. There may well be
 other exceptions to the general rule in addition to those I have indicated, and
 the above propositions are not intended to constitute a formal or complete
 code, but to indicate the general principles of our law on a very important
 matter.'

Those principles must now be read subject to s 28(4) of PACE but have been followed in a number of later cases.

[21] The underlying rationale of that approach is that a person is entitled to
 know why he is being arrested. One of the reasons for that which is identified in
 the cases is that if he is told why he is being arrested he has the opportunity (for
 example) of giving an explanation of any misunderstanding or of calling attention
 to others for whom he might have been mistaken: see eg per Viscount Simon
 ([1947] 1 All ER 567 at 573, [1947] AC 573 at 588) and Lord Simonds ([1947]
 1 All ER 567 at 575, [1947] AC 573 at 591–592). Lord Simonds emphasised ([1947]
 1 All ER 567 at 575–576, [1947] AC 573 at 593) that, as he put it, 'the arrested man
 is entitled to be told what is the act for which he is arrested'.

[22] We were referred to a number of English cases in which those principles
 have been applied including (in chronological order) *Murphy v Oxford* [1985] CA
 Transcript 56, *Abbassy v Comr of Police of the Metropolis* [1990] 1 All ER 193, [1990]
 1 WLR 385, *Mercer v Chief Constable of the Lancashire Constabulary*, *Holden v Chief*
Constable of the Lancashire Constabulary [1991] 2 All ER 504, [1991] 1 WLR 367,
Wilson v Chief Constable of the Lancashire Constabulary [2000] All ER (D) 1949 and
Clarke v Chief Constable of North Wales Police [2000] All ER (D) 477. It will be noted
 that many of those cases are unreported. That is no doubt because they do not
 add to the principles set out above but are simply applications of the principles to
 the facts of particular cases.

[23] The same is in my opinion true of the reported cases. The relevant
 principles remain those set out in *Christie's* case. It seems to me that the best
 statement of those principles as articulated in more recent times is not to be
 found in an English case at all but in the decision of the European Court of
 Human Rights in *Fox v UK* (1991) 13 EHRR 157 at 170 (para 40). The court was

there of course considering, not s 28(3) of PACE, but art 5(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which provides as follows: 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.'

[24] The court said:

'Paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph (2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph (4) ... Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.'

[25] The wording of art 5(2) and of s 28(3) of PACE are not of course the same. Nor are the words used by the European Court of Human Rights the same either as those of Viscount Simon quoted above or as those used in any of the other cases I have mentioned, but to my mind the principles expressed are essentially the same. It seems to me that this court was of the same view in *Wilson's* case, in spite of the apparently stricter words of art 5(2): see [2000] All ER (D) 1949 at para 27 per Mance LJ.

[26] In the light of all the authorities I would hold that the modern approach to the application of s 28(3) is that set out in the judgment in *Fox v UK* (1991) 13 EHRR 157 at 170 (para 40). The question is thus whether, having regard to all the circumstances of the particular case, the person arrested was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. In the light of the case law as it has developed I doubt whether it will in the future be necessary or desirable to consider the cases in any detail, or perhaps at all. It seems to me that in the vast majority of cases it will be sufficient to ask the question posed by the European Court of Human Rights.

[27] I turn therefore to consider the answer to that question on the facts of this case. It is important to note that the arrested person must be told both the essential legal and the essential factual grounds for the arrest. The words spoken must therefore include some statement of the factual as well as some statement of the legal basis of the arrest. In this case it is said that WPC McKenzie did not sufficiently inform the respondent of the factual basis of the arrest. It is accepted that she included some facts because she told him that he was being arrested on suspicion of violent disorder at a particular place, namely Hillgrove Farm, on a particular date, namely 18 April. The question before the judge was whether those words went far enough.

[28] The judge recorded the argument advanced on behalf of the respondent that something more was reasonable, such as: 'You were throwing stones with others, damaging property, or hitting persons at the farm on the date in question.' The judge in fact held that WPC McKenzie should have gone further than she did by saying words such as: 'I am arresting you on suspicion of violent disorder by

a being involved with others in throwing stones towards the farmhouse at Hillgrove Farm on 18 April 1998.' He observed that the arrest occurred six to seven weeks after the event and took place at a time when the respondent was not engaged in any form of unlawful behaviour. He held that the words used did not convey the circumstances of the particular offence for which the respondent was being arrested, that is 'what act the arrested person [was] being arrested for',
b which he said was what was required by the authorities.

[29] The process of reasoning which led the judge to that conclusion, which he expressed at the end of para 8 of his judgment, involved a consideration of the question whether it was reasonable for WPC McKenzie to have been given the information that the respondent had been throwing stones or to have found it out for herself. He said this:

c '6. A question to be answered is whether the officer, as I understand it from the authorities, acted reasonably in her efforts to communicate adequate words. The officer herself was told that the reason for arrest was because of the violent disorder at Hillgrove Farm on 18 April 1998. She did not ask, nor was she told, of the nature of the claimant's involvement. There
d is no evidence either way as to whether Sergeant Deacon, who was the sergeant instructing WPC McKenzie to effect the arrest, would have been able to tell WPC McKenzie of the nature of the violent disorder alleged against the claimant. It is not in dispute that he had a photograph of the claimant, selected from a video, but whether he recalled or had a note of the
e claimant's involvement on 18 April is unknown. The jury would not have heard that evidence, and I have not heard that evidence either way. There is no doubt that he would have had a record somewhere of the video. Whether it was with him or not on the day of the arrest, 31 May, is unknown. But there is undoubtedly a video to which he had had access and still had
f access on 31 May, which would have shown the claimant's stone throwing activities, if that is a proper way to describe them, involving also other acts of stone throwing, missile throwing of others, causing serious damage to property, including a house and cars and a serious degree of violence on 18 April. That information was all available to him, but whether he had it with him at the time or whether he had it in his head, which he probably would
g have done because he had been studying the videos, and whether he would have recalled what the claimant was alleged to have done, we do not know.

7. I have considered this matter very carefully, because of the nature of the claim, the nature of the difficulties which police officers have in dealing with these huge disturbances, of which this was one, and the need to look at the
h matter sensibly rather than be nit-picking about things. Having done so, in my judgment it would have been reasonable and not difficult, despite the scale of the operation, on the information I have, for the sergeant to have had a brief note—whether it be on the photograph of somewhere in his papers, or indeed in his mind—such as the note which appears at p 144 of the bundle. That is a note on a photograph, that as far as we are aware he did not have,
i but there seems to me no particular difficulty why some sort of brief note of that sort would, if necessary, have been of assistance to remind him of why this person needed to be arrested, not just because of general involvement in violent disorder, but because of the particular role that it is alleged that he played in it. That photograph bears the legend, "Throwing missiles towards farmhouse", and it is something of that sort, it seems to me, which should

have been easily available to the sergeant, and if available to him then available to the arresting officer. In my judgment, it would also have been reasonable for WPC McKenzie to have been told more than just violent disorder with the date and the place. In my judgment, it was unreasonable of her not to ask or probably not to be told of more detail, not vast amounts of detail, but a little detail so that she could tell the claimant—whether it is a claimant of this age or older—in simple terms why they had been arrested. My understanding of s 28 and the authorities before it and since is that that is what the law requires, for good reason. People need to know why they are being arrested—not in technical terms, but in simple terms that an ordinary person is likely to understand. In other words, what had he done?

8. So, in my judgment, it follows that she could have obtained that information, if she had asked for it, or she ought to have been able to obtain that information if she had asked for it, and if it was not available it was unreasonable for it not to be made available, and it was unreasonable for her not to ask for it.'

[30] As can be seen from that quotation the judge asked himself whether the police, that is Sgt Deacon and WPC McKenzie, acted reasonably and held that they did not, in that Sgt Deacon did not tell WPC McKenzie that the respondent had been throwing stones and WPC McKenzie did not ask him. However, for my part, I do not think that that was quite the right question. The question was simply whether the respondent was told the ground for his arrest, which required that he be told the essential legal and factual grounds for the arrest. As Woolf LJ put it in *Abbassy v Comr of Police of the Metropolis* [1990] 1 All ER 193 at 197, [1990] 1 WLR 385 at 392, the question whether or not the information given is adequate has to be assessed objectively having regard to the information which is reasonably available to the officer. The person arrested is either told enough or he is not.

[31] Thus the question here was whether, viewed objectively, the respondent was told enough. As I see it, the answer to that question is the same whether WPC McKenzie knew that the respondent was suspected of throwing stones or not. How reasonably the police acted in communicating with one another seems to me to be irrelevant to the answer to the question. It follows that, in my judgment the judge took account of an irrelevant consideration in reaching the conclusion which he did and thus erred in principle. In any event, as Sedley LJ put it in *Clarke v Chief Constable of North Wales Police* [2000] All ER (D) 477 at para 30, the question to be answered is a mixed question of law and fact and, moreover, is one in which, in the particular circumstances of this case, this court is in as good a position as the judge to decide.

[32] In these circumstances, it seems to me that it is for this court to consider for itself whether the words used satisfied the test. Mr Langstaff submits that they did not. He points to these circumstances. The offence of violent disorder is not entirely straightforward. Merely to tell the respondent that he was being arrested on suspicion of violent disorder told him nothing about the wrongful acts which were alleged against him, especially since he was a small boy of only ten years of age, even though he was accompanied by his mother. It would not obviously involve throwing stones. The events complained of had taken place some weeks earlier. There was no criminality at the time of the arrest. The operation was pre-planned and the police were in possession of detailed information which could easily have been given to the respondent at the time of the arrest.

a [33] There is undoubtedly some force in those submissions. It is correct that the offence of violent disorder is not entirely straightforward. The Public Order Act 1986 provides, so far as relevant, as follows:

b '2.—(1) Where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for personal safety, each of the persons using or threatening unlawful violence is guilty of unlawful disorder.'

6. ... (2) A person is guilty of violent disorder ... if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence.

c 8 ... "violence" means any violent conduct, so that—(a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).'

d Mr Langstaff submits that in these circumstances the respondent should have been told precisely what he was suspected of doing.

e [34] I see the force of that submission in a perfect world but this is not a perfect world. The offence of violent disorder is committed not just by one person but by at least three and in many cases, of which this was a prime example, by a large number of people together. As Mr Faulks submits, it is not practicable for the police to give each arrested person detailed particulars of the case against him. He submits that it was sufficient in this case, and will ordinarily be sufficient in cases of substantial disorder for the officer to tell the person being arrested that he is suspected of violent disorder at a particular demonstration at a particular time and place. In particular he submits here that there could have been no doubt in the respondent's mind that he was being arrested for the part that he played in violent disorder at the same place as he was arrested, namely Hillgrove Farm, some weeks earlier.

f [35] Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested. In some cases it will be necessary for the officer to give more facts than in others. So, for example, in *Murphy v Oxford* [1985] CA Transcript 56, a person arrested for burglary was told that he was being arrested on suspicion of burglary in Newquay. As Donaldson MR put it, no mention was made either of the fact that the premises in Newquay were a hotel or of the date on which the offence was committed. The arrest was held to be unlawful.

g [36] By contrast, here the respondent was told that he was suspected of violent disorder at Hillgrove Farm on 18 April. To my mind the reference to Hillgrove Farm and to the date gave clear information to the respondent as to the event concerned. Hillgrove Farm was the place where the respondent and his mother were when he was arrested on 31 May. It was the same place as they had visited before on 18 April. It is true, as Mr Langstaff submits, that that was some six or seven weeks earlier, but the respondent had only been there once before when he had come with his mother on an anti-vivisection demonstration against the same person, namely the owner of the farm. There can have been no reasonable

doubt in his mind as to when and where the events occurred which led to his arrest. Despite the interval of time, there can have been no scope for confusion as to the incident to which WPC McKenzie was referring. In my opinion, that is true even though the respondent was only ten years of age. In this regard, it should be noted that the respondent's mother was present throughout.

[37] The question seems to me to boil down to whether it was sufficient to tell the respondent that he was being arrested for violent disorder on the previous occasion. The two other suggested formulations identified above, namely that suggested to the judge by counsel and that suggested by the judge, seem to me to demonstrate the difficulty of providing greater particulars because they show the difficulty of deciding how far to go. The essence of the crime of violent disorder is that the accused is alleged to have taken part in using or threatening unlawful violence or encouraging others to do so. It seems to me that, provided the time and place of the disorder is indicated to the person arrested it should ordinarily be sufficient for the police simply to say, as WPC McKenzie did, that the person concerned is being arrested on suspicion of violent disorder at a particular time and place.

[38] Such a person is to my mind being told why he is being arrested, namely for taking part in the violent disorder on a particular occasion. In this case that was in my opinion the situation. Neither the respondent nor his mother could be expected to be in any doubt why he was being arrested. It was for his part in the previous violent disorder. There was no need to specify the precise way in which he was said to be taking part. Whatever are the various ways in which violent disorder can be committed, 'violent disorder' was a good description of what had happened on the previous occasion without more. Associated with its time and place, it permitted the respondent and his mother to respond, if either had wished, that the respondent was not there or that he was doing nothing wrong. Equally it would have given enough information to take advice from a solicitor.

[39] In these circumstances it does not seem to me to be surprising that the respondent's case was originally pleaded in para (4)(ii) of the particulars of claim (quoted at [12], above) on the basis that he first understood the reason for his arrest at the police station when he was told he was suspected of violent disorder on 18 April. I express no view on what the state of mind of the respondent or his mother in fact was because it seems to me to be irrelevant but that is precisely what WPC McKenzie would reasonably have expected him to understand when she told him that he was suspected of violent disorder at Hillgrove Farm on 18 April.

[40] In all these circumstances I would hold that WPC McKenzie informed the respondent of the ground for the arrest within s 28(3) of PACE and of the reasons for his arrest within art 5(2) of the convention. In the words of *Fox v UK* (1991) 13 EHRR 157 at 170 (para 40), he was told both the essential legal and factual grounds for his arrest, namely that he was suspected of taking part in violent disorder at the same place on the occasion of the previous demonstration, which was on 18 April. I have considered whether this conclusion is inconsistent with the approach in any of the decided cases to which we were referred and I do not think that it is. Each case depends on its own facts, so that there is little, if anything to be gained by this exercise: cf *Abbassy v Comr of Police of the Metropolis* [1990] 1 All ER 193, [1990] 1 WLR 385 and *Clarke v Chief Constable of North Wales Police* [2000] All ER (D) 477 on the one hand and the decision of the majority of this court in *Wilson v Chief Constable of the Lancashire Constabulary* [2000] All ER (D)

a 1949 on the other. I would hold that on the facts of this case the words used were sufficient and that the arrest was lawful.

[41] It follows that the appellant was not liable for false imprisonment for the whole period and was not liable for trespass or assault. I would therefore allow the appeal on this point and set aside the award of damages of £1,500.

b EXCESSIVE DETENTION?

[42] As explained above, the judge held that the respondent was detained for an excessive period of about an hour between about 20.15 hrs and 21.21 hrs. It was common ground that it was for the appellant to justify the whole period of detention. As Lord Donaldson of Lymington MR colourfully put it in *Mercer v Chief Constable of the Lancashire Constabulary*, *Holden v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504 at 509, [1991] 1 WLR 367 at 373, the chief constable must prove that the detention was lawful minute-by-minute and hour-by-hour. Here the judge held that he had failed to do so in respect of that period. He held in short that the delay between those times was only to be explained by the absence of the interviewing officer and that the appellant failed to explain why no interviewing officer was available by 20.15 hrs. He held that it was, as he put it in para 5 of his second judgment, unexplained in any terms as to reasonableness.

[43] Mr Faulks submits that that conclusion is unjustified and that it is a reasonable inference that no time was wasted and that any delay is to be explained by the exigencies of policing on that afternoon and evening, given the large number of suspects who had to be processed. He submits first that the respondent's case should be put in context and in particular that account should be taken of the difficulties faced by the appellant given that no application was made to amend the claim to allege excessive detention until the first day of the trial. It is certainly true that the appellant was likely to have been put in difficulties by the late amendment because, through no fault of his own, Inspector Lynch's notebook was no longer available and he was the key witness in this part of the case. However, the application for permission to amend was not opposed on behalf of the appellant on the ground that it could no longer be fairly tried and/or that he would be irremediably prejudiced if it were granted. In these circumstances the judge was bound to consider the issue and, having regard to the fact that the burden of proof was on the appellant, was bound to ask himself whether he had discharged it.

[44] The relevant principles are set out in paras 1.1 and 1.1A of Code C issued under PACE as follows:

h '1.1 All persons in custody must be dealt with expeditiously, and released as soon as the need for detention has ceased to apply.

j 1.1A A custody officer is required to perform the functions specified in this code as soon as is practicable. A custody officer shall not be in breach of this code in the event of delay provided that the delay is justifiable and that every reasonable step is taken to prevent unnecessary delay. The custody record shall indicate where a delay has occurred and the reason why. [See Note 1H].'

Note 1H is in these terms:

'Paragraph 1.1A is intended to cover the kinds of delays which may occur in the processing of detained persons because, for example, a large number of suspects are

brought into the police station simultaneously to be placed in custody, or interview rooms are all being used, or where there are difficulties in contacting an appropriate adult, solicitor or interpreter.'

[45] The principles were considered in two unreported cases decided in this court by Nourse, Beldam and Kennedy LJ on 22 and 26 May 1995. They were *Wilding v Chief Constable of Lancashire* [1995] CA Transcript 574 respectively. In both cases the court asked itself whether the circumstances were such that the decision of the custody sergeant was unreasonable in the sense that no custody sergeant, applying common sense to the competing considerations before him, could have continued to detain the suspect.

[46] In many cases that is likely to be the sole question, although in the present case the position is slightly more complicated. The custody sergeant, Sgt Davey, explained that he was faced with a number of considerations, which included his entirely proper doubts as to whether Mrs Taylor should be allowed to act as an appropriate adult. Note 1C of Code C provides:

'A person, including a parent or guardian, should not be an appropriate adult if he is suspected of involvement in the offence in question, is the victim, is a witness, is involved in the investigation or has received admissions prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.'

[47] Mrs Taylor had been present at the demonstration on 18 April and was at the very least likely to have been a witness to what occurred. So Sgt Davey's concern was whether Mrs Taylor should be treated as an appropriate adult was justified and he spent some time trying to find someone else to act in that capacity. Sergeant Davey was also concerned about the respondent having legal advice and it appears that at one stage Mrs Taylor said that her son would like the assistance of a solicitor.

[48] However, Mr Langstaff submits that neither of those concerns was the cause of the delay which the judge held to have been unjustifiable. He relies upon the evidence of Sgt Davey both in his statement and orally at the trial. Thus in para 47 of his statement he said:

'My intention was to ensure that I complied with PACE and to expedite Daniel's release from custody as soon as possible, but I first had to wait for an interview team to interview Daniel.'

Mr Langstaff submits that in these circumstances it is clear that on Sgt Davey's evidence the delay was caused, not by concern about whether the respondent's mother should be treated as an appropriate adult or by the need to wait for a solicitor, but by having to wait for an interview team to be assembled. Mr Langstaff correctly observes that, when the interview team had been assembled and was ready to start the interview, no delay was caused for want of an appropriate adult or for want of a solicitor. The note in the custody record for 21.10 hrs records that the interview team was now in a position to interview the respondent, that they were all happy to have Mrs Taylor as an appropriate adult and that, no doubt as a result of his mother's advice, the respondent was happy to be interviewed without the presence of a solicitor.

a [49] Sergeant Davey's evidence is summarised in para 50 of his statement as follows:

b 'Any delay in processing Daniel was subject to the investigating/interviewing team attending for the purpose of the interview. My understanding was that they were currently busy processing/interviewing other detainees but they were aware that Daniel was their next priority.'

Thus, on a fair view of Sgt Davey's evidence as a whole, although he had been concerned in the two respects to which I have referred, he put any delay down to having to wait for an interview team. His evidence is to be contrasted with that of Inspector Lynch.

c [50] Unlike Sgt Davey, who had the benefit of the custody record, Inspector Lynch had no contemporary document of his own from which to refresh his memory. However, he said in evidence that once the demonstration had finished and everyone had left he had to try and find where the various people who had been arrested had been taken. He went back to Newbury Police Station where the respondent had been taken. He said that since he was only ten he was a priority. He spoke to DC Hunter and briefed him so that he would be ready to conduct the interview, since it was DC Hunter and not DC Lynch who was to interview (and in fact interviewed) the respondent, albeit with DC Lynch present. He said that, once the respondent had been booked into custody and dealt with by the custody suite and was ready for interview, then they went down and interviewed him.

e [51] In cross-examination he said in effect that the interviewing team were not responsible for any delay and in answer to a question from the judge as to when he reached Newbury he said this:

f 'I don't have that in my statement. I think I've the time in my statement that we started the interview, but effectively from the time I got there we were waiting for him to be interviewed. That is my recollection of it, not that he was waiting for us.'

g When he was pressed on the cause of the delay, especially in the light of the evidence of the custody sergeant and the contents of the custody record, he said that he did not recollect being the cause of any delay but that it was five years ago.

h [52] In the light of that evidence the judge was in my opinion entitled to hold that the delay between about 20.15 and 21.21, when the interview began, 'is only explained by the absence of the interviewing officer'. That conclusion is justified by the custody record and the evidence of Sgt Davey. The judge was I think somewhat critical of Sgt Davey for not pressing the interviewing officers harder but, for my part, I do not think that it would be fair to Sgt Davey to criticise him on the evidence available.

j [53] As I read the judge's judgment, the reason why he held that the respondent was detained for an excessive period between about 20.15 hrs and 21.21 hrs (and thus that the appellant was liable for false imprisonment in respect of that period) was that the police were unable to explain the reason for the delay in having an interview team ready to interview the respondent until then. Given the fact that Inspector Lynch was unable to account for the delay, I have reached the conclusion that there is no proper basis upon which this court could hold that the judge was not entitled to reach the conclusion which he did. I recognise that

the reason why Inspector Lynch was not able to explain the delay (which he could not in any event recall) may well have been the absence of his notebook and the passage of time since 1998 but the fact remains that the burden of proof was on the appellant and the judge was entitled to hold that he had failed to discharge it.

[54] It follows that I would hold that the judge was entitled to hold that the respondent was entitled to damages for wrongful detention and thus false imprisonment for about an hour.

CONCLUSIONS

[55] For the reasons set out above, I would hold that the judge was wrong to hold that the initial arrest was not lawful and that it is the duty of this court to allow the appeal on the first question. By contrast, I would hold that the judge was entitled to hold that the appellant was liable for damages for false imprisonment in respect of the period of about an hour. It follows that I would set aside the award of damages of £1,500, which it was agreed covered false imprisonment for some four hours and both trespass to the person and assault, both of which depended upon the lawfulness of the arrest. I would substitute an appropriate award of damages in respect of one hour's wrongful detention. The parties have said that they will try to agree the quantum of such damages, although the final figure will have to be approved by the court because the respondent is still a minor.

SEDLEY LJ.

[56] I agree.

[57] For the future, as Clarke LJ indicates, it should not be necessary in wrongful arrest cases to refer to more law than is contained in s 28(3) and (4) of the Police and Criminal Evidence Act 1984 (PACE), art 5(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the decision in *Fox v UK* (1991) 13 EHRR 157 at 170 (para 40).

[58] The practical reasons historically given by our courts for the requirement which is reflected in art 5(2) have a good deal to do with giving the suspect an immediate opportunity of explanation or self-exculpation. With PACE procedures which for good reason discourage dialogue before interview, this is less important than perhaps it once was. The real underpinning of the convention right is the simple one of respect for the dignity of the individual: if the state is taking away your liberty, you are entitled to know why.

[59] In this light, what matters is whether the legal test was met by telling this ten-year-old boy that he was being arrested 'on suspicion of violent disorder' at a named time and place. While the sufficiency of the words in no way depends on what is known to the arresting officer, it must in some measure depend on who is being arrested; so that, at least in a country which treats ten-year-olds as criminally responsible, attention needs to be given to whether words of arrest which would be adequate for an adult are sufficient when arresting a child.

[60] Approaching the first question in this light, I agree with Clarke LJ that the words 'violent disorder' are both legally and factually an adequate description of the material offence. This will not always be so: the legal names of some crimes are not self-explanatory. And, though not without some hesitation, I agree that they are words which would convey to a ten-year-old enough of what the offence involved to meet the purpose of PACE and the convention. The respondent's

- a* evidence that he did not in fact grasp what he was alleged to have done cannot be influential here. The question of sufficiency has to be answered objectively; but one aspect of objectivity is the circumstances of the arrest, and these have to include who it is that is being arrested.

SIR ANDREW MORRITT V-C.

- b* [61] I also agree that the appeal should be disposed of on the basis set out in para [55] of the judgment of Clarke LJ for the reasons given by him.

Appeal allowed in part.

Celia Fox Barrister.

R v Brady

[2004] EWCA Crim 1763

COURT OF APPEAL, CRIMINAL DIVISION

TUCKEY LJ, DOUGLAS BROWN AND HEDLEY JJ

15–17, 22 JUNE 2004

Criminal evidence – Disclosure – Lawfulness of disclosure of material obtained by Official Receiver following investigation into conduct of company – Insolvency Act 1986, s 235.

The Official Receiver investigated certain insolvent companies being compulsorily wound up with which the defendant had been involved and, in the course thereof, exercised the power under s 235^a of the Insolvency Act 1986 to obtain such information as he might reasonably require from the defendant and others involved with the companies, on pain of penalty for failure to comply without reasonable excuse. In due course, statements obtained under s 235 and certain other information were requested by and were disclosed to the Inland Revenue, and investigation into possible criminal offences of cheating the public revenue followed. The s 235 statements were used for the purpose of laying information to obtain search warrants, which were subsequently obtained and executed. On a voir dire at trial, issues arose as to whether disclosure of the s 235 statements had been lawful and whether the proceedings should be stayed as an abuse of process as a result (by the time of the hearing the 1986 Act had been amended so as to prevent the prosecution relying on the s 235 statements at trial). The judge ruled: (i) that although s 235 material was confidential, disclosure was permitted where the public interest in disclosure outweighed the public interest in ensuring co-operation of those involved with the company to effect its speedy winding up; (ii) that although the Official Receiver had not himself performed that balancing exercise, had he done so, the balance would have fallen in favour of disclosure; and (iii) that neither the failure to carry out that exercise nor the use of the material by the revenue amounted to an abuse of power, and if it had, such an abuse did not render the prosecution an affront to justice. Thereafter, the defendant pleaded guilty. On appeal against conviction, the defendant contended, inter alia, that the Official Receiver could not decide whether or not material might be disclosed to assist an investigation conducted with a view to a criminal prosecution, and that such a decision had to be taken at a suitably high level within the Department of Trade and Industry (DTI) by its prosecuting unit or by the Companies Court on notice to the individual.

Held – Where the DTI or the Official Receiver was satisfied that s 235 material was required by another prosecuting authority for the purpose of investigating crime, it was free to disclose that material to that prosecuting authority without an order of the court or notice to the person who had provided it. The purpose of the statutory investigatory power under s 235 of the 1986 Act included the identification of potential criminal or other misconduct and the taking of

^a Section 235, so far as material, provides: '... Each of the persons mentioned in the next subsection shall—(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office holder may ... reasonably require ...'

- a appropriate steps in relation to it by criminal prosecution and/or disqualification. Use for such a purpose was therefore permitted. Disclosure to an appropriate prosecuting authority for the purposes of prosecution was therefore permitted without the need for any balancing act to be performed. Accordingly, in the instant case, the disclosure of the s 235 material to the Revenue had been lawful and had not involved an abuse of power. The appeal would therefore be dismissed (see [23], [26], [27], [30], [33], below).
- b

Re Arrows Ltd (No 4), *Hamilton v Naviede* [1994] 3 All ER 814 and *Saunders v UK* (1997) 2 BHRC 358 considered.

Notes

- c For the duty to co-operate with liquidator, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) para 2438

For the Insolvency Act 1986, s 235, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 1068.

Cases referred to in judgment

- d *Arrows Ltd (No 4)*, *Re, Hamilton v Naviede* [1994] 3 All ER 814, [1995] 2 AC 75, [1994] 3 WLR 656, HL; *affg* sub nom *Re Arrows Ltd (No 4)*, *Re Bishopsgate Investment Management Ltd*, *Re Headington Investments Ltd* [1993] 3 All ER 861, [1993] Ch 452, [1993] 3 WLR 513, CA.
- R v Kearns* [2002] EWCA Crim 748, [2002] 1 WLR 2815.
- R v Mullen* [2000] QB 520, [1999] 3 WLR 777, CA.
- e *Saunders v UK* (1997) 2 BHRC 358, ECt HR.

Appeal

- f Paul Brady appealed with leave of the Court of Appeal against his conviction on 15 January 2002 in the Birmingham Crown Court before Judge Griffiths-Jones of three offences of cheating the Inland Revenue following his pleas of guilty to those offences after unsuccessfully seeking a stay of the prosecution as an abuse of process. The Department of Trade and Industry (DTI) appeared as an interested party. The facts are set out in the judgment of the court.

- g *John Aspinall QC* and *Nigel Mitchell* (assigned by the Registrar of Criminal Appeals) for the appellant.

Richard Sutton QC (instructed by the Solicitor of Inland Revenue) for the Crown.

Malcolm Davis-White QC (instructed by the Treasury Solicitor) for the DTI.

Cur adv vult

h

22 June 2004. The following judgment of the court was delivered.

TUCKEY LJ.

- j [1] On 15 January 2002 the appellant, Paul Brady, pleaded guilty to three offences of cheating the Inland Revenue and was later sentenced to 18 months imprisonment. His plea of guilty followed a 13 week voir dire at the Birmingham Crown Court before Judge Griffiths-Jones at the end of which, on 10 December 2001, the judge rejected the appellant's application to stay the prosecution as an abuse of process and refused leave to appeal against this ruling. The single judge refused leave to appeal against conviction but on the appellant's renewed application the full court grant limited leave as we shall explain.

[2] The appellant faced trial, charged jointly with his younger brother Nigel, on 15 counts of conspiracy to cheat, cheating and fraudulent trading as a result of his involvement between 1989 and 1999 in a succession of insolvent companies which manufactured fitted kitchens. The allegation was that through these companies, which used the same assets, the Bradys cheated the Revenue of very substantial amounts of PAYE and National Insurance contributions for which the companies were liable to account on behalf of their employees. A number of the companies had the name Landywood; others the name Rushgrove. In August 1993 Landywood Group Ltd was compulsorily wound up; Rushgrove Ltd traded between June 1993 and November 1995 when it in turn was wound up. By s 132 of the Insolvency Act 1986 it became the duty of the Official Receiver attached to the court which wound up these companies to investigate the causes of their failure and generally their formation, business dealings and affairs. In the course of this investigation the Official Receiver, exercising his powers under s 235 of the 1986 Act, took statements from the Bradys and two others involved with the companies. Copies of these statements and certain other information were disclosed by the Official Receiver to the Revenue at the Revenue's request. This, the appellant contends, was unlawful and an abuse of process which should have caused the judge to stay the proceedings. The appellant has leave to appeal on this point. His brother did not renew his application for leave to appeal the judge's ruling following refusal by the single judge.

[3] The circumstances in which the Official Receiver may pass information gathered under s 235 to an investigating and prosecuting authority such as the Revenue is a point of great practical importance in the context of the regulation of companies and for that reason the court has heard submissions from counsel for the DTI whose executive agency, the Insolvency Service, is responsible for such regulation. The other point which arises is whether the appellant's plea of guilty after the judge's ruling prevents him from challenging that ruling on appeal.

[4] We were invited by Mr Sutton QC for the Revenue, to consider and decide the latter point first. We declined to do so for the simple reason that Mr Aspinall QC for the appellant contends that the abuse of process in this case is of the type considered by this court in *R v Mullen* [2000] QB 520, [1999] 3 WLR 777, that is to say that the prosecution of the appellant was so unworthy or shameful that it was an affront to justice to allow it to proceed. In such a case it is now established that a plea of guilty would not be a bar to an appeal against conviction. In order to decide therefore whether this is a '*Mullen*' case we had first to consider and evaluate the abuse alleged.

[5] It is not necessary to examine the facts in any detail for the purpose of either issue. We take much of what follows from the overview which we invited Mr Aspinall to give us at the beginning of his submissions.

[6] As well as the involvement of the Official Receiver in the affairs of Rushgrove Ltd the Secretary of State appointed a partner of Cork Gulley to be its Liquidator. The Liquidator instructed solicitors to act for him. The Revenue was a major and the petitioning creditor of the company and in early 1996 the Liquidator's solicitor informed an officer of the Revenue's Special Compliance Office (its investigating and prosecuting authority), of his view that Rushgrove and its associated companies were a sham set up to defraud their major creditors. The directors of Rushgrove were two Jersey based companies controlled by the Brady brothers.

a [7] The Revenue investigation into possible criminal offences followed. The Department of Trade and Industry (DTI) could have prosecuted the Bradys for criminal offences but in due course chose to confine themselves to disqualification proceedings. It is accepted that it was entitled to use the s 235 material for this purpose. We shall have to consider the statutory provisions in more detail later in this judgment, but for present purposes it is enough to say
b that s 235 requires those involved with a company which has been wound up to give the Official Receiver (and other office holders including any liquidator) such information concerning the company as he may reasonably require on pain of penalty for failure to comply without reasonable excuse. The appellant and his brother and two others involved with the companies made a number of statements to the Official Receiver under this procedure. There was discussion
c about these statements between the Revenue and the Official Receiver at a meeting in June 1996 and there was a further meeting in February 1997 at which disclosure of documents held by the Official Receiver was considered. This was followed by a letter from the Revenue requesting disclosure of the Official Receiver's documents which it was said were 'essential' to the Revenue's investigation. The Official Receiver's officer dealing with this request sought guidance from the prosecuting unit of the DTI, as her internal instruction manual advised, and authority to disclose some (including the s 235 statements) but not all documents was given. The documents included the companies' statutory books and other records which would of course have been essential to any investigation of their affairs. In the following months and in a somewhat
d piecemeal fashion, copies of all the documents, including the requested s 235 statements, were provided to the Revenue. The s 235 statements were used, but not exclusively, for the preparation of what the Revenue call a 'Bourne Report' for the purpose of laying information to obtain search warrants. Warrants were obtained and executed in April 1998.

f [8] The disqualification proceedings against the Bradys were due to be heard on 1 May but were adjourned by the judge and not heard until 24 November 1998. The appellant did not attend the later hearing and was not represented, but the judge disqualified him for 15 years. At neither hearing was the court informed of the Revenue's intention to prosecute the Bradys although the Official Receiver and his solicitors were aware of this. On 18 December 1998 the appellant was
g arrested and interviewed by the Revenue.

[9] Before the trial started the appellant made it clear that his defence would be that it was his intention to bring about the success of the companies and not to defraud their creditors. He had not been dishonest and did not have the intention to defraud required to be established by the Crown.

h [10] As the time taken by the hearing of the voir dire demonstrates, the history which we have briefly summarised was explored in great detail. Those involved on behalf of the Official Receiver, the DTI, the Revenue and the Liquidator gave evidence. The judge had to resolve a number of issues of fact. The appellant challenged some of his findings on appeal, but was refused leave to pursue such
j challenges by the full court and so we need to say no more about them.

[11] The judge gave a comprehensive 66 page ruling. In summary he held that s 235 material is confidential but not absolutely so. Disclosure is permitted when the public interest in disclosure outweighs the public interest in ensuring the co-operation of those involved with the company to effect its speedy winding up. It could be disclosed by the Official Receiver after performing this balancing exercise. That had not been done in this case, but the judge did it himself and

concluded that if it had been done the balance would have come down in favour of disclosure. Those involved on behalf of the Official Receiver had acted in good faith. The failure by the Official Receiver to carry out the balancing exercise did not amount to an abuse of power or, if it did, not such an abuse as to render the prosecution an affront to justice. Conversely the use by the Revenue of the s 235 material was not an abuse of power either. a

[12] By the time of the hearing before the judge the 1986 Act had been amended so as to prevent the prosecution from relying on the s 235 material at trial (see what is now s 433(2) and (3) of the 1986 Act). However, its case that the appellant had cheated the Revenue was amply supported by other evidence which had been obtained from directors and employees of the companies involved and their records as the prosecution's opening note, which we have seen, clearly shows. The judge found that there would still have been a prosecution even if the s 235 statements had not been disclosed. The appellant accepted that he could have had a fair trial at which he could have contested the allegation of dishonesty made against him, but contended simply that the prosecution stemmed from and was tainted by the unlawful passing of confidential material and so was an affront to justice. b
c
d

[13] In para 4.6 of his written submissions to this court Mr Aspinall said:

'A public official, such as an Official Receiver, is to be distinguished from a public authority, such as the Companies Court and the Secretary of State for the Department of Trade and Industry. Public authorities hold material in confidence. Both pursuant to statutory gateways and at common law and in equity public authorities are entitled to disclose to a third party material obtained from an individual under compulsion and held by the public authority in confidence providing: e

- The disclosure of the material is for the lawful purpose of the public authority and is not for a collateral purpose of the third party that does not fall within the lawful purpose of the public authority. f

- A public interest is identified which justifies the disclosure of the material.

- The public authority conducts a balancing exercise which results in the conclusion that the public interest in the disclosure of the material outweighs the public interest in the material remaining confidential. The balancing exercise must be conducted in the light of all material facts and considerations and at a suitably high level of the public authority. g

- Unless there be good reason not to inform the individual of the intended disclosure, the individual is informed by the public authority of the public authority's intention to disclose the material to the third party and the public authority affords the individual proper opportunity to take suitable measures in respect of the intended disclosure, such as obtaining advice and/or seeking the intervention of a court.' h

[14] Mr Aspinall accepted that one of the purposes for which s 235 material can be obtained is the investigation of crime. Based on his written submissions he did not accept that the Official Receiver could decide whether or not such material could be disclosed to assist an investigation being conducted with a view to prosecution by another authority. This had to be done at a suitably high level within the DTI by its prosecuting unit who had to carry out the balancing exercise, preferably informing the individual of any intended disclosure. Alternatively, the Companies Court should be asked to decide on notice to the individual. Decisions to disclose made in either of these ways would ensure j

a consistency and that people who are compelled to give confidential information are not treated oppressively. In the instant case if either course had been followed the balance would have come down against disclosure since the Revenue now say that they did not need the s 235 material anyway.

b [15] It follows, Mr Aspinall says, that the judge was wrong to say that the decision to disclose was one which the Official Receiver could make. He also criticises the way in which the judge conducted the balancing exercise: he placed too much weight on the public interest in reporting serious criminal behaviour to a prosecuting authority and should not have attached any weight to the fact that the authority was also a major creditor of the companies. Some specific purpose for disclosure had to be identified to avoid a situation in which disclosure could be made at will.

c [16] To emphasise the importance of the public interest in protecting the confidentiality of s 235 material Mr Aspinall relied on the decision of the House of Lords in *Re Arrows Ltd* (No 4) [1994] 3 All ER 814, [1995] 2 AC 75 and a number of other cases where the courts have had to consider the confidentiality of similar material in the possession of public authorities.

d [17] The starting point for any consideration of these submissions must be the act itself. We have already referred to the duty of investigation cast on the Official Receiver following a compulsory winding up (s 132). He also becomes the liquidator of the company unless and until one is appointed by the Secretary of State. He is an officer of the court and may report to the court but does not have to do so and in practice seldom does. He is not a civil servant but a statutory office holder appointed by and under the direction and control of the Secretary of State (ss 399 and 400). As we have said, he is one of the office holders who may invoke the provisions of s 235. Section 236 provides that an office holder may also apply to the court to summon any person capable of giving information about the company to appear and provide such information. Rule 9 of the Insolvency Rules 1986 contains provisions for the custody and inspection of information so provided, but the act itself contains no express provisions as to whether ss 236 or 235 material may or may not be disclosed.

e [18] An analysis of the Official Receiver's powers and duties shows quite clearly that, although he is an officer of the court, he is by no means a minion as Mr Aspinall's submissions suggested. He may seek directions from the court as to how to perform his duties but is not obliged to do so. We have no doubt that the Official Receiver had the power to disclose the s 235 material to the Revenue if such disclosure was otherwise lawful. In fact, however, it was the DTI's prosecuting unit which made the decision to disclose so the appellant has no complaint about the level at which the decision was made in any event.

g [19] Section 218 of the Act under the heading 'Prosecution of delinquent officers and members of a company' provides that:

j '(1) If it appears to the court in the course of a winding up by the court that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the court may (either on the application of a person interested in the winding up or of its own motion) direct the liquidator to refer the matter to the prosecuting authority ...

(3) If in the case of a winding up by the court in England and Wales it appears to the liquidator, not being the official receiver, that any past or present officer of the company, or any member of it, has been guilty of an

offence in relation to the company for which he is criminally liable, the liquidator shall report the matter to the official receiver. a

(4) If it appears to the liquidator in the course of a voluntary winding up that any past or present officer of the company, or any member of it, has been guilty of an offence in relation to the company for which he is criminally liable, he shall—(a) forthwith report the matter to the prosecuting authority, and (b) furnish to that authority such information and give to him such access to and facilities for inspecting and taking copies of documents (being information or documents in the possession or under the control of the liquidator and relating to the matter in question) as the authority requires.’ b

The ‘Prosecuting Authority’ referred to was the Director of Public Prosecutions (DPP) but is now the Secretary of State. c

[20] We heard considerable argument about the meaning and effect of s 218. Mr Aspinall argued that s 218(1) supported his submission that the Official Receiver could not decide to whom s 235 material could be disclosed. This submission was untenable. The subsection is concerned with the power of the court to direct the liquidator to refer criminal conduct to the prosecuting authority. It says nothing about the Official Receiver. He is the person to whom the liquidator is obliged to report criminal conduct under sub-s (3). But it is self-evident that the section is not exhaustive. It says nothing about assisting criminal investigators/prosecutors who may approach the Official Receiver or Liquidator directly. It is silent as to what the Official Receiver is to do with information passed to him under sub-s (3) or what he is to do if he becomes aware of apparent criminal behaviour himself. It is silent also as to what the DPP (or now the Secretary of State) is to do with information which he receives which is more appropriately dealt with by another prosecuting authority, such as the Serious Fraud Office (SFO) or the Revenue. In *Re Arrows* in the Court of Appeal ([1993] 3 All ER 861 at 876, [1993] Ch 452 at 469) Dillon LJ said that he had no doubt that if the Official Receiver received information under sub-s (3), he would be entitled to pass it to the relevant prosecuting authority in the same way as the liquidator in a voluntary liquidation was expressly empowered to do under sub-s (4) and that the DPP could pass any information to the SFO in an appropriate case, although neither of these things were spelt out in the 1986 Act. d
e
f
g

[21] Put shortly therefore we do not think that s 218 assists Mr Aspinall. It does not prohibit or permit the disclosure with which we are concerned, but there is nothing significant about this. It is worth noting however that the section says nothing about giving notice to the suspect and that the duties to report imposed by sub-ss (3) and (4) are not subject to court approval. h

[22] Much was made by Mr Aspinall of the confidentiality of s 235 material and the need to preserve this confidentiality to encourage people to co-operate candidly with an Officer Receiver’s investigation.

[23] Confidentiality is conceded, but it is necessary to examine why the material is confidential. It is not because the information provided is private, but because it has been obtained by compulsion in circumstances where the rule against self incrimination cannot be invoked. The public interest requires that information obtained in this way should only be used for the purposes for which it was obtained. But wide use of such material can lawfully be made, as is apparent just from the terms of s 218 and the fact that it may be used for the purpose of a DTI prosecution or disqualification proceedings. Anyone providing j

a such information must be taken to be aware of this, so we do not think that the candour argument is very strong.

[24] In reaching this conclusion we do not overlook the passage in *Re Arrows* relied on by Mr Aspinall. In that case the court was concerned with the disclosure to the SFO of s 236 material. The main question was whether a judge in the Companies Court had a discretion to restrict the use of such material. It was held b that he did, but should not have done so in that case. Lord Browne-Wilkinson said:

c 'I must draw a distinction between information obtained by liquidators under s 235 and that obtained under a s 236 examination. The evidence in this and earlier cases shows that all the leading insolvency practitioners attach much greater importance to the confidentiality of information obtained under s 235 than they do to information obtained under a formal examination obtained under s 236. The reason is obvious. When a liquidator or other "office-holder" (s 234(1)) is appointed he normally has little d information about the affairs of the company and, in cases of suspected fraud, the documentation is frequently deficient or unreliable. He is therefore largely dependent on information obtained from those who have been concerned with the running of the company. For the purpose of protecting the company's assets (including the recovery of its assets which have been plundered by the fraud) he needs to obtain speedy and reliable information from those who have been concerned with the company.' (See e [1994] 3 All ER 814 at 825, [1995] 2 AC 75 at 101.)

But later in his judgment Lord Browne-Wilkinson ([1994] 3 All ER 814 at 827, [1995] 2 AC 75 at 102) said that he was not deciding anything about s 235 and in any event he was only concerned to compare the candour argument for that f section with that for s 236.

[25] The other cases on confidentiality to which Mr Aspinall referred were not concerned with the passing of information to a prosecuting authority. They were civil cases in which attempts were made to obtain material to assist claims for damages of one kind or another. We do not think these cases are of assistance here.

g [26] Mr Davis-White QC on behalf of the DTI submitted that the confidentiality arising from the compulsion principle to which we have referred was sufficiently protected by ensuring that the s 235 material was only used for the purposes for which it was obtained. The purpose of the statutory investigatory powers included the identification of potential criminal or other h misconduct and the taking of appropriate steps in relation to it by criminal prosecution and/or disqualification. Use for such a purpose was therefore permitted. Disclosure to an appropriate prosecuting authority for the purpose of prosecution was therefore permitted without the need for any balancing act to be performed. Provided the request for disclosure was made for a permitted (as j a opposed to a collateral) purpose disclosure was lawful. But in the alternative Mr Davis-White submitted that if any balancing act had to be performed the overall public interest in the efficient, thorough and fair investigation of crime meant that disclosure should be made since this interest heavily outweighed the individual's right of confidentiality. He pointed out that any detailed balancing exercise would be very difficult to perform. By definition the prosecuting authority would not know what information the Official Receiver had and the

Official Receiver would not know the detail of the prosecuting authority's inquiry. a

[27] We accept Mr Davis-White's primary submission. Once it is accepted that one of the purposes for which s 235 material is obtained is the investigation of crime it would be entirely anomalous if that material could be used by the DTI for any criminal investigation it might undertake, but not by any other prosecuting authority interested in the same material, unless some elaborate balancing exercise was carried out or the sanction of the court was obtained on notice to the individual. Once the DTI or the Official Receiver is satisfied that s 235 material is required by another prosecuting authority for the purpose of investigating crime it should be free to disclose it without an order of the court or notice to the person who provided it. It is self-evidently in the public interest that the appropriate prosecuting authority should have such material to aid its investigation which might well be considerably hampered by any requirement to obtain court approval or to give notice to the person who had provided the material. b
c

[28] It is worth stressing that the confidentiality arising from the compulsion principle is protected in another way. The European Court of Human Rights in *Saunders v UK* (1997) 2 BHRC 358 held that the use in a subsequent criminal trial of answers compulsorily obtained in a non-judicial investigation was a breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). This decision led to the amendment of the 1986 Act to which we have referred. However the decision does not help the appellant in this case because the court made it clear that its decision did not affect extra-judicial inquiries which were essentially investigative. It said (at 373 (para 67)):

'Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities—prosecuting, regulatory, disciplinary or even legislative ... a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in art 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities ...' d
e
f

[29] In *R v Kearns* [2002] EWCA Crim 748, [2002] 1 WLR 2815, this court applied that reasoning in dismissing a complaint that s 354(3) of the 1986 Act, which compelled a bankrupt to give information to the Official Receiver, was a breach of art 6. g

[30] It follows from what we have said that we conclude that the disclosure to the Revenue of the s 235 material in this case was lawful. It did not involve an abuse of power. Nor, we think, did anything in the surrounding circumstances to which we have referred. There was nothing objectionable about the tip-off given to the Revenue by the Liquidator's solicitor. The Revenue was a major creditor of the company concerned and the other Brady companies and it is difficult to think that its interest in investigating possible criminal offences was only aroused by the tip-off. The fact that the court hearing the disqualification proceedings was not told that the Revenue was intending to prosecute was not relevant to those proceedings. By the time of the first hearing the Bradys must have known of the Revenue's interest, since its search warrants had recently been executed against them. h
j

a [31] But the one thing which is absolutely clear is that even if each of the appellant's complaints had been made out, this was never within measurable distance of being a *Mullen* case. The judge's conclusion about this was entirely correct. In the event he approached the case in a way which was more favourable to the appellant than our conclusions indicate, but even on this more favourable basis we think he reached the right decision. There is nothing in his *b* ruling therefore which gives any ground for saying that the appellant's conviction was unsafe.

[32] This conclusion makes it strictly unnecessary to consider the second issue on this appeal. But, as we understand it, Mr Aspinall accepted that unless this was a *Mullen* case, the appellant's plea of guilty meant that he could not appeal against conviction. As we have concluded that it was not such a case, the appeal fails on *c* that ground also.

[33] For these reasons this appeal against conviction must be dismissed.

Appeal dismissed.

Stephen Leake Barrister.

Hashtroodi v Hancock

[2004] EWCA Civ 652

COURT OF APPEAL, CIVIL DIVISION

THORPE, DYSON LJ AND BENNETT J

6, 25 MAY 2004

Claim form – Service – Extension of time for service – Rule of procedure empowering court to extend period for service on application made before expiry of claim form – Whether showing good reason for extension a threshold condition for exercise of power – CPR 7.6.

The claimant, who had suffered serious injuries in a road traffic accident, issued a claim form against the defendant eight days before the expiry of the limitation period. Under the provisions of CPR 7.5, the claimant was required to serve the claim form on the defendant within four months. However, r 7.6(1)^a provided that a claimant could apply for an order extending the period within which the claim form could be served. Rule 7.6(2) established the general rule that such an application had to be made within the period for serving the claim form specified by r 7.5 or, where an order had been made under r 7.6, within the period specified by that order. If a claimant made such an application outside those periods, r 7.6(3) precluded the court from granting an extension save in certain specified circumstances. One working day before the expiry of the validity of the claim form (ie within the period specified by r 7.6(2) but outside the limitation period), the claimant made a without notice application under r 7.6 for an extension of the time for service. The master granted that application, even though the claimant's then solicitors could have served the claim form on the defendant by first class post or by effecting personal service, and provided no reason for failing to do so. The defendant applied, inter alia, to have the order for extension set aside on the grounds that the claimant had no good grounds for an extension, but the deputy master rejected the application. On appeal to the Court of Appeal, the defendant relied on the authorities dealing with the court's power to extend time for service of the writ under the old RSC Ord 6, r 8. He contended that those authorities, which had implied into the old rule a threshold condition of showing 'good reason' for an extension, held good under CPR 7.6(2), and that accordingly it was a necessary (though not sufficient) condition for the grant of an extension of time under r 7.6(2) that there was a good reason for the claimant's failure to serve within one of periods specified in that provision (the specified period) and therefore a good reason for an extension of time.

Held – Although the reason for a failure to serve the claim form within the specified period was a highly material factor, the showing of good reason for that failure was not a threshold condition for the grant of an extension of time for service under CPR 7.6(2). It was both unnecessary and wrong to construe r 7.6(1)

^a Rule 7.6 is set out at [4], below

- a and (2) as importing the authorities that had been developed for the interpretation of RSC Ord 6, r 8. To do so would be to ignore the fact that the CPR was a new self-contained code. It had ushered in a new era in which, in significant respects, the previous approach to civil litigation and former practices, much of it enshrined in authority, had been abandoned. Moreover, there were reasons internal to r 7.6 itself which showed that it was not intended to impose
- b any threshold condition on the right to apply for an extension of time under r 7.6(2). The reference to conditions in r 7.6(3), and the absence of any such reference in r 7.6(3), had to have been deliberate. Against the background of the authorities on Ord 6, r 8, and in view of the introduction of new and stringent conditions in r 7.6(3), it could not have been intended that r 7.6(2) should be construed as being subject to a condition that 'good reason' had to be shown for the failure to serve within the specified period, or indeed subject to any implied condition. In the absence of any such condition, the power had to be exercised in accordance with the overriding objective of the CPR. In practice, that meant that it would always be relevant for the court to determine and evaluate the reason why the claimant had not served the claim form within the specified
- d period, but that had nothing to do with the fact that, under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It was because the overriding objective was that of enabling the court to deal with cases 'justly', and it was not possible to deal with an application for an extension of time under CPR 7.6(2) justly without knowing why the claimant had failed to serve the claim form within the specified period. Whereas under the previous
- e law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR a more calibrated approach was to be adopted. If there had been a very good reason for the failure to serve the claim form within the specified period, an extension would usually be granted. The weaker the reason, the more likely the court would be to refuse the extension. If
- f the reason for failure to serve the claim form in time was that the claimant or his legal representative had simply overlooked the matter, that would be a strong reason for the court refusing to grant an extension of time. In the instant case the only reason for the failure to serve the claim form within the four-month period was the incompetence of the claimant's then solicitors. Although that was not an absolute bar, it was a powerful reason for refusing to grant an extension of time.
- g On the facts, the absence of any explanation for the failure to serve told decisively against granting an extension of time. Accordingly, the appeal would be allowed, and the master's order would be set aside (see [16]–[20], [22], [23], [34]–[37], [39], below).

h Notes

For extension of time for serving the claim form, see 37 *Halsbury's Laws* (4th edn reissue) para 306.

Cases referred to in judgment

- j *Banks v Cox* [2000] CA Transcript 1476.
Biguzzi v Rank Leisure plc [1999] 4 All ER 934, [1999] 1 WLR 1926, CA.
Garratt v Saxby [2004] EWCA 341, (2004) 148 SJLB 237.
Godwin v Swindon BC [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997.
Hickey v Marks [2000] CA Transcript 1469.

Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3) [1987] 2 All ER 289, [1987] AC 597, [1987] 2 WLR 1053, HL. a

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Robert v Momentum Services Ltd [2003] EWCA Civ 299, [2003] 2 All ER 74, [2003] 1 WLR 1577.

Stewart v Engel [2000] 3 All ER 518, [2000] 1 WLR 2268, CA.

Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA. b

Waddon v Whitecroft-Scovill Ltd [1988] 1 All ER 996, [1988] 1 WLR 309, HL.

Appeal

The defendant, Terence Hancock, appealed with permission of Keith J granted on 3 October 2003 from the decision of Deputy Master Eastman on 13 June 2003 dismissing their applications to: (i) set aside the order of Master Tennant on 9 May 2003 granting the claimant, Mahmood Hashtroodi, an extension of time for the service of the claim form in his action for personal injury against the defendant, and (ii) strike out the action on the grounds that the claim form had not been properly served within the extended time for service. Lord Phillips of Worth Matravers MR directed that the appeal should be heard by the Court of Appeal rather than the High Court. The facts are set out in the judgment of the court. c

Christopher Purchas QC and *Steven Snowden* (instructed by *Blake-Turner & Co*) for the defendant. e

Allan Gore QC and *Daniel Tobin* (instructed by *Bindman & Partners*) for the claimant.

Cur adv vult

25 May 2004. The following judgment of the court was delivered. f

DYSON LJ.

[1] This is the judgment of the court.

[2] This is an appeal by the defendant from the decision of Deputy Master Eastman who on 13 June 2003 (a) refused to set aside a 'without notice' extension of time for service of the claim form which the claimant had been granted by Master Tennant, and (b) dismissed the defendant's application that the action should be struck out on the grounds that the claim form had not been properly served even within the extended time for service. In view of the importance of the first decision, Lord Phillips of Worth Matravers MR directed that the appeal should be heard by the Court of Appeal instead of the High Court. g

THE PROPER INTERPRETATION OF CPR 7.6(2)

[3] The issue raised by the appeal against the first decision concerns the principles by which the court should determine whether to extend the time for service of a claim form where the application is made within the period for serving the claim form specified by CPR 7.5 and the claim has become statute-barred within that period. There appears to be no authority on this issue. h

a [4] Rule 7.5(2) provides: 'The general rule is that a claim form must be served within 4 months after the date of issue.' Rule 7.6 provides:

'(1) The claimant may apply for an order extending the period within which the claim form may be served.

b '(2) The general rule is that an application to extend the time for service must be made—(a) within the period for serving the claim form specified by rule 7.5; or (b) where an order had been made under this rule, within the period for service specified by that order.

c (3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—(a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and (c) in either case, the claimant has acted promptly in making the application.'

d [5] Before 1962, the power of the High Court to extend the validity of a writ was governed by a rule (RSC Ord 8, r 1) which provided that no writ should remain in force for more than 12 months, but that—

e 'the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original ... writ of summons be renewed for six months ...'

f [6] In 1962, the previous Ord 8, r 1 was replaced by a new Ord 6, r 8 which remained until the CPR came into force. Ord 6, r 8 provided that a writ was valid in the first instance for 12 months beginning with the date of its issue, and—

g '(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time ... as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.'

h [7] It was no longer a condition of allowing an extension of the validity of the writ that the court should be satisfied that reasonable efforts had been made to serve, or that there was some other good reason for granting an extension of time.

i [8] Order 6, r 8 generated a great deal of litigation. In what circumstances should the court extend the time for service of a writ? The authorities and principles were reviewed by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] 2 All ER 289, [1987] AC 597. Their Lordships decided that Ord 6, r 8 had to be construed against the background of the earlier rule, and that ([1987] 2 All ER 289 at 299, [1987] AC 597 at 622 per Lord Brandon of

Oakbrook) 'there must be implied in the new rule, as a matter of construction, a condition that the power to extend shall only be exercised for good reason'.

[9] As for what could properly be regarded as amounting to a 'good reason', Lord Brandon said ([1987] 2 All ER 289 at 300, [1987] AC 597 at 622–623) that it was not possible to define or circumscribe the scope of that expression:

'Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge ...'

He added that the decision whether an extension should be allowed or disallowed was a discretionary one, and that, in exercising the discretion, the judge was entitled to have regard to the balance of hardship. In *Waddon v Whitecroft-Scovill Ltd* [1988] 1 All ER 996, [1988] 1 WLR 309, the House of Lords said that normally the showing of good reason for failure to serve the writ during the original period of its validity would be a necessary step to establishing good reason for the grant of an extension (see [1988] 1 All ER 996 at 1000–1001, [1988] 1 WLR 309 at 314 per Lord Brandon).

[10] There were 'intricate and numerous' authorities under Ord 6, r 8 (see Adrian Zuckerman's *Civil Procedure* (2003) p 180). Thus, for example, it was held that a clear agreement between the parties that service should be deferred was a good reason for extending time; whereas the mere fact that negotiations were proceeding was not a good reason.

[11] Mr Christopher Purchas QC submits that the case law under Ord 6, r 8 still holds good, and that it is a necessary (but not sufficient) condition for the grant of an extension of time, where the application is made in accordance with r 7.6(2), that there is a good reason for the claimant's failure to serve within one of the periods specified in r 7.6(2) (the specified period), and therefore a good reason for an extension of time. The existence of a good reason is not a sufficient condition because the power to grant an extension of time is discretionary, and it must be exercised in accordance with the overriding objective identified in CPR 1.1. Mr Purchas points out that, although the words 'good reason' did not appear in the 1962 version of Ord 6, r 8, nevertheless they were implied into the rule. For the same reason, he submits, these words should be implied into r 7.6(1) and (2), and the old case law should be applied. There should be no difference, since the court would have had to have regard to the interests of justice in the pre-CPR era, just as it is now explicitly required to do by r 1.1.

[12] We cannot accept the full breadth of these submissions. The starting point is that the CPR are a 'new procedural code' (r 1.1(1)). They contain many detailed rules, and the court is required to give effect to the overriding objective when it interprets any rule (see r 1.2(b)). In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934 at 941, [1999] 1 WLR 1926 at 1934, Lord Woolf MR said:

'The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies.'

a [13] To similar effect, May LJ in *Godwin v Swindon BC* [2001] EWCA Civ 1478 at [42], [2001] 4 All ER 641 at [42], [2002] 1 WLR 997 said: '... it is not ... generally helpful to seek to interpret the CPR by reference to the rules which they replaced and to cases decided under former rules.'

b [14] There have been instances where this court has derived assistance from cases decided under the former rules when interpreting the CPR. Thus in *Banks v Cox* [2000] CA Transcript 1476 at para 41, Morritt LJ said that the principles reflected in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 remain relevant to any application for permission to rely on further evidence—

c 'not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below.'

The court adopted and applied the statement by May LJ in *Hickey v Marks* [2000] CA Transcript 1469:

d 'The principle for the future will be that, since the CPR are a new procedural code, the former body of authority will not apply, although of course the intrinsic persuasiveness of all relevant considerations, including, if they arise, those which were considered persuasive under the former procedure, will be capable of contributing to a just result.'

e [15] Other examples are *Stewart v Engel* [2000] 3 All ER 518 at 525, [2000] 1 WLR 2268 at 2276, and *Garratt v Saxby* [2004] EWCA 341 at [18], (2004) 148 SJLB 237 at [18], where I said:

f 'Although it has been said on a number of occasions that decisions on pre-CPR procedural rules are not binding for the purpose of interpreting the CPR, there are circumstances in which they may be of considerable persuasive force.'

g [16] But it should usually be possible to interpret the CPR without recourse to case law under the former rules. If the old case law were to be routinely invoked, the fundamental principle that the CPR is a self-contained procedural code would be undermined. In our judgment, it is unnecessary to construe r 7.6(1) and (2) as importing the case law that was developed for the interpretation of Ord 6, r 8, and it would be wrong to do so. It is true that the threshold condition of 'good reason' was implied into what was apparently an untrammelled discretion given by Ord 6, r 8; and r 7.6(1) and (2) appear to give the court an equally untrammelled discretion. But that is not a sufficient reason for importing the old law and the panoply of the intricate cases decided under Ord 6, r 8. To do that would be to ignore the fact that the CPR is a new self-contained code. The CPR
j ushered in a new era in which, in significant respects, the previous approach to civil litigation and former practices (much of it enshrined in case law) were abandoned.

[17] Moreover, there are reasons internal to r 7.6 itself which show that it was not intended to impose any threshold condition on the right to apply for an extension of time under r 7.6(2). The contrast between r 7.6(2) and (3) is

striking. Rule 7.6(3) empowers the court to grant an extension of time to a claimant who applies after the end of the specified period only if the conditions stated in paras (a) or (b) and (c) are satisfied. The reference to conditions in r 7.6(3), and the absence of any such reference in r 7.6(2) must have been deliberate. Against the background of the case law on Ord 6, r 8, and in view of the introduction of new and stringent conditions in r 7.6(3), it cannot have been intended that r 7.6(2) should be construed as being subject to a condition that a 'good reason' must be shown for failure to serve within the specified period, or indeed subject to any implied condition.

[18] In the absence of any such condition, therefore, the power must be exercised in accordance with the overriding objective (see CPR 1.2(b)). What does that mean in practice? We have no doubt that it will always be *relevant* for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This has nothing to do with the fact that under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It is because the overriding objective is that of enabling the court to deal with cases 'justly', and it is not possible to deal with an application for an extension of time under r 7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period. As a matter of common sense, the court will always want to know why the claim form was not served within the specified period. As Mr Zuckerman says (p 180 (para 4.121)) (see [10], above):

'For it is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed.'

[19] Whereas, under the previous law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR, a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. Thus, where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve the claim form, but has been unable to do so (the r 7.6(3) conditions), the court will have no difficulty in deciding that there is a very good reason for the failure to serve. The weaker the reason, the more likely the court will be to refuse to grant the extension.

[20] If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the court refusing to grant an extension of time for service. One of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good

a reason for a departure. In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934 at 940, [1999] 1 WLR 1926 at 1933, Lord Woolf MR said:

‘If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.’

b [21] It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant’s solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three-year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim (see CPR 16.2(1)(a)). These are generous time limits. As May LJ said in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at 790 (para 20):

d ‘If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos’ solicitors in this case may be muted and limited to one error capable of being represented as small; but there are

e statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form.

f There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order.’

g [22] In view of the importance of this appeal, we have considered whether we should try to give some guidance as to how the discretion should be exercised beyond merely saying that it should be exercised in accordance with the overriding objective, and that the reason for the failure to serve within the

h specified period is a highly material factor. We do not, however, think that it would be right to go further than this, any more than did the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] 2 All ER 289, [1987] AC 597 (see [9], above). The Civil Procedure Rules Committee could have produced a checklist of relevant factors (as it has done, for example, in CPR 3.9(1) in relation to

j applications for relief from sanctions). But it did not do so. In *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 2 All ER 74, [2003] 1 WLR 1577, this court had to consider a case where the claimant applied for an extension of time for service of particulars of claim before the time for service had expired. The application was made under CPR 3.1(2)(a), which simply provides that, except where the rules provide otherwise, the court may extend

the time for compliance with any rule, practice direction or court order. The discretion is not otherwise circumscribed. I said ([2003] 2 All ER 74 at [33]): a

‘By not spelling out a checklist in r 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in r 1.1(2).’ b

[23] For the same reasons, we consider that the draftsman also intended that the discretion to grant an extension of time under r 7.6(2) should be exercised having regard to the overriding objective.

[24] Having dealt with the question of principle raised by the first decision, we turn to the present case. c

THE FACTS

[25] The claimant was injured in a road traffic accident on 21 January 2000. His motorcycle collided with the defendant's taxi. The claimant, who was 46 years of age at the time of the accident, suffered severe damage to the cervical spine which resulted in tetraplegia. At that time, he was in paid employment. As a result of the accident, he requires care 24 hours a day and he will never be able to work again. He instructed solicitors, Lock & Marlborough (L & M), who wrote a letter before action to the defendant on 14 June 2000 and sent a copy to his insurers. The letter to the defendant was sent to his correct address. There is in force between the insurers and a third party claims handling company, then called Tradex Claims Management Co Ltd, and now called Technical Claims Management Ltd (TCM) an agreement whereby TCM handle third party claims in respect of which the insurers might have a liability. On 5 July, TCM replied to L & M notifying them of their interest, saying that there was substantial evidence to show that it was the claimant who was responsible for the accident. d
e
f

[26] On 22 August 2000, TCM wrote to L & M setting out their reasons for asserting that ‘very substantial levels of contributory negligence must be assumed by your client’. Further correspondence ensued between July and November 2000, culminating in a letter dated 28 November from L & M to TCM. Thereafter, L & M did not communicate with the defendant or TCM until they wrote on 25 April 2003 to TCM notifying them that a claim had been issued and that the relevant papers would be ready for service shortly. They asked whether TCM wished to nominate solicitors to accept service on behalf of the defendant, or whether papers should be sent to him direct, adding: ‘we should be grateful to hear from you within the next seven days failing which papers will be served on Mr Hancock direct’. The claim form had in fact been issued on 13 January 2003, eight days before the expiry of the limitation period. g
h

[27] The letter of 25 April was sent to the registered office of TCM, and not its place of business. It was received by the company's auditors, who forwarded it to TCM's place of business where it was received on 1 May. The letter did not bear the TCM reference which had appeared on the earlier correspondence written by TCM. Moreover, although it purported to do so, the letter did not enclose a copy of a letter dated 22 November 2000 which had been written by TCM to L & M and which did bear the TCM reference. The letter was, therefore, sent back to L & M who received it on 6 May. On 8 May, Mr Pike j

a (the locum solicitor contracted to L & M who handled this litigation on behalf of the claimant from May 2001 until 22 May 2003 when he left the firm) claims to have made four telephone calls to TCM (only one is admitted), but failed to receive any written confirmation that solicitors would be nominated.

b [28] On 9 May (one clear working day before the expiry of the validity of the claim form), the claimant made an application without notice for a three weeks' extension of time for the service of the claim form until 3 June. The application was supported by a statement by Mr Pike. He had made no attempt to effect service on the defendant personally.

c [29] Master Tennant allowed the application and extended time until 3 June. On 12 May, L & M wrote to TCM by fax, giving the correct reference, and enclosing their letter of 25 April again. They said that they hoped to serve on the next day, and therefore requested an urgent response. On 14 May, TCM replied nominating Blake-Turner & Co as solicitors authorised to accept service of all proceedings. On 19 May, L & M informed Blake-Turner (for the first time) that they had obtained an order extending time for service of the claim form. On 20 May, the order of Master Tennant was drawn up and sealed. d On 23 May, L & M purported to serve the claim form and response pack on Blake-Turner by DX. In his witness statement, Mr Lock explained that he arranged for the documents to be served by DX in the usual way, and that they were delivered to the document exchange before 5.30 pm on 23 May. Deputy Master Eastman found that 'ordinary office procedure and practice prevailed and the letter and claim form got to the DX and that the probabilities are that they got lost there'. e On 28 May, L & M sent by fax to TCM and by DX to Blake-Turner the particulars of claim and schedule.

f [30] On 2 June, the defendant issued an application for an order that the order of Master Tennant be set aside pursuant to CPR 23.10 on the grounds that the claimant had no good grounds pursuant to r 7.6 for extending the time for service of the claim form. On 9 June, the defendant issue an application for an order that the court strike out the claim pursuant to CPR 3.4 on the ground that neither the claim form nor the response pack had been served by 3 June in accordance with the order of Master Tennant.

g [31] In support of the application for an extension of time, Mr Pike had made a statement. He explained the reasons for the application in these terms:

h '17. Such an extension will enable me to chase the insurers for a few more days in the hope that they will nominate solicitors. In the event that the insurers still do not nominate solicitors, arrangements will be made to have the defendant served personally, or at his last known address.

j 18. In making this application, I bear in mind that the CPR does set down a timetable that should ordinarily be complied with. However, I respectfully suggest that the circumstances of this case justify the short extension of time that I seek. Such an extension is, in my respectful submission, consistent with the overriding objective. Moreover, were the defendant to ever say that he was prejudiced by the fact that a short extension of time was granted, I would point out that he and his insurers were notified of this claim as long ago as July 2000, and that the principal reason why this extension is now sought is the fact that the defendant's insurers have not yet confirmed that they are nominating solicitors to accept service.'

[32] On 13 June, the deputy master dismissed both of the defendant's applications. I have already referred to the reasons he gave for dismissing the application to strike out for non-service (see [29], above). As regards the application to set aside the extension of time for service of the claim form, he said:

'I obviously have a discretion in this matter and in exercising my discretion both in relation to that and in relation to the other summons I have to bear in mind the requirement following the overriding principle of effectively doing justice to the parties. I observe that if I accede to the first application the defendant gets what is commonly known as a windfall limitation defence and escapes a potentially expensive claim. The claimant would lose his action against the primary tortfeasor and must look to a claim against his solicitors. I observe that the result of a claim against his solicitors would be by no means certain. They may have been dilatory and they may have run this case up to the wire so far as limitation is concerned, but I observe that Mr Pike sought to act within time to try and look after his client's interests, and I am of the view that it is not absolutely certain that a negligence claim against the solicitors would succeed. So if I accede to the defendant's application there is a chance that Mr Hashtroodi would end up with nothing. Back to the substance of this appeal. It is observed to me that there is no guidance as to whether or not this is a review or a rehearing. I have to say I am not sure it particularly matters. I note that effectively there is nothing substantially new before me than was before the master on 9 May, save that I now know a little of the toing and froing of the 25 April letter. But the master saw it and I am satisfied that the fact that the claimant's solicitors were using what I will describe as the less good address originally and indeed put no reference number on the letter would not have influenced Master Tennant's decision. He had and could have and may have for all I know read the letter with its reference to personal service on Mr Hancock in it, but he chose to make an order. I am satisfied that there was a sufficient reason for him to make an order, namely so that with a little extra time what I will call "safe" service could be achieved rather than the vagaries of other methods. Mr Pike had made efforts to achieve this in time, albeit late in the date. In all the circumstances I see no reason to differ from Master Tennant's exercise of his discretion and his views on the matter, and that application will be dismissed.'

[33] It is common ground that in the events which have occurred here, the appeal to this court is a rehearing, rather than a review of the decision of Deputy Master Eastman. This is because an application under CPR 23.10(1) to set aside an order obtained without notice should involve a rehearing of the issue, and not a review of the decision that it is sought to set aside; but, in the present case, the deputy master conducted the application as if it were a review of the decision of Master Tennant.

[34] Our review of the facts discloses that the only reason for the failure to serve the claim form within the four months' period was the incompetence of L & M. The deputy master observed that Mr Pike sought to look after his client's interests, and it was not 'absolutely certain' that a negligence claim against the solicitors would succeed. On the material that has been presented

a to this court, we can see no answer to an allegation of negligence against the solicitors. It has often been said that a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period, and then leaves service of the claim form until the expiry of the period for service is imminent, courts disaster. That is precisely what occurred here. But Mr Pike was in the fortunate position of knowing the defendant's address. All he had to do was to serve the claim form on the defendant by first class post, or by effecting personal service (see CPR 6.2(a) or (b)). In his letter of 25 April 2003, he said in terms that, unless solicitors were nominated within seven days (ie by 2 May), he would serve the defendant personally. There is no explanation for his failure to do just that. The 'explanation' put forward by Mr Pike in his witness statement does not stand up to scrutiny. The fact that TCM had not yet confirmed that they were nominating solicitors to accept service may have been the reason why Mr Pike decided to apply for an extension of time. But the failure of TCM to nominate solicitors was no reason at all for Mr Pike's failure to serve the claim form within the specified period on the defendant personally. In any event, if L & M had not mishandled the sending of the letter of 25 April, there is no reason to suppose that TCM would not have nominated Blake-Turner in time for service to have been effected on that firm within the specified period.

[35] It follows that this is a case where there is no reason for the failure to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time. Despite this, Mr Allan Gore QC submits that an extension should be granted. In relation to the application of the overriding objective, he relies on the following factors. First, the claim is very substantial. Secondly, the issues in the case were identified early on, so that a short extension of time would not undermine the case management process. Thirdly, the extension of time would not put the parties on a more or less equal footing than they would have been if the extension were not granted. Fourthly, the extension would not increase the cost of the litigation. Fifthly, it would be disproportionate to refuse the extension. Finally, the defendant has not suffered any prejudice as a result of the extension, since at the date of the claimant's application, the defendant had not yet acquired an accrued limitation defence.

[36] We are in no doubt that the time for serving the claim form should not be extended in this case. The absence of any explanation for the failure to serve is, on the facts of this case, decisive. Sadly, the errors on the part of Mr Pike were particularly egregious. The other factors identified by Mr Gore are not sufficient to outweigh the complete absence of any reason which might go some way to excusing the failure to serve in time. If we were to grant an extension of time in the present case, it seems to us that the rule stated in r 7.5 would cease to be the general rule. Moreover, there would be a real risk that statements made by this court about the importance of the need to observe time limits would not be taken seriously. That would be most unfortunate.

[37] It follows that we allow the defendant's appeal against the deputy master's first decision.

THE SECOND DECISION

[38] The issue raised by the second decision turns on the meaning of CPR PD 6, para 2.2 which (until it was amended) provided:

'Service by DX is effected *unless the contrary is proved*, by leaving the document addressed to the numbered box: (1) at the DX of the party to be served, or (2) at a DX which sends documents to that party's DX every business day.'

The issue concerns the meaning and effect of the words which we have italicised. But since (a) the practice direction has been amended so as to remove these words, and (b) in view of our conclusion on the first decision this issue is moot in any event, we do not propose to deal with it.

CONCLUSION

[39] For the reasons given in relation to the first decision, the defendant's appeal is allowed, and the order of Master Tennant dated 20 May 2003 will be set aside.

Appeal allowed.

Kate O'Hanlon Barrister.

**R (on the application of Davies) v
Birmingham Deputy Coroner**

[2004] EWCA Civ 207

COURT OF APPEAL, CIVIL DIVISION

BROOKE, LONGMORE LJ AND SIR MARTIN NOURSE

14 JANUARY, 27 FEBRUARY 2004

Costs – Order for costs – Discretion – Costs orders for or against inferior courts or tribunals appearing in public law proceedings – Principles and guidance.

The claimant, who was legally aided, applied for judicial review of the verdict of a coroner's inquisition presided over by the defendant deputy coroner. The judge found in favour of the deputy coroner, ruling correctly according to the law as it stood at that time. The claimant appealed. By the time the appeal was heard, the law had moved on in significant respects; although it was open to the deputy coroner not to do so, he appeared on the appeal. If he had not done so the Court of Appeal would almost certainly have had to adjourn the matter and request the services of an advocate to the court. The appeal was allowed, and the claimant applied for the costs both of the hearing below and of the appeal. The deputy coroner argued that the order for costs in the court below should not be disturbed and that there should be no order for costs of the appeal. In determining the application, the Court of Appeal considered what constituted the established practice of the courts on the making of orders for costs for and against an inferior court or tribunal if it chose to participate in public law proceedings.

Held – The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings. Where such a court or tribunal resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, the established practice was to treat it as if it were such a party, so that in the normal course of things costs would follow the event. If, however, an inferior court or tribunal appeared in proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application. There were, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in the latter category, so that a successful applicant who had to finance his own litigation without external funding might be fairly compensated out of a source of public funds, and not be put to irrecoverable expense in asserting his rights after a coroner or other inferior tribunal had gone wrong in law, and there was no other very obvious candidate available to pay his costs. In the instant case, it would be unjust to require the deputy coroner to pay the claimant's costs of the hearing below, but he would be ordered to pay the costs of the appeal (see [47], [52], [53], [55], below).

R v Inner London North Coroner, ex p Touche [2001] 2 All ER 752 considered.

Notes

For costs orders in judicial review proceedings generally and for orders for costs against coroners, see respectively 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 178 and 9(2) *Halsbury's Laws* (4th edn reissue) para 972.

Cases referred to in judgments

Bithell (dec'd), Re (1986) 150 JP 273.

Calvi, Inquest into the Death of, Re (1982) Times, 2 April.

Providence Capitol Trustees Ltd v Ayres [1996] 4 All ER 760.

R (on the application of Khan) v Secretary of State for Health [2003] EWCA Civ 1129, [2003] 4 All ER 1239, [2004] 1 WLR 971. c

R v Birmingham Union Guardians (1874) 44 LJMC 48.

R v Camborne Justices, ex p Pearce [1954] 2 All ER 850, [1955] 1 QB 41, [1954] 3 WLR 415, DC.

R v Coventry Rent Tribunal, ex p Whitcombe (1 December 1948, unreported), DC. d

R v Goodall (1874) LR 9 QB 557, DC.

R v Hastings Licensing Justices, ex p John Lovibond & Sons Ltd [1968] 2 All ER 270, [1968] 1 WLR 735, DC.

R v HM Coroner for Kent (Maidstone District), ex p Johnstone [1995] 6 Med LR 116, DC.

R v HM Coroner for Lincoln, ex p Hay [2000] Lloyd's Rep Med 264, DC. e

R v HM Coroner for Southern District of Greater London, ex p Driscoll (1993) 159 JP 45, DC.

R v HM Coroner for Wiltshire, ex p Clegg (1997) 161 JP 521, DC.

R v Inner London North Coroner, ex p Touche [2001] EWCA Civ 383, [2001] 2 All ER 752, sub nom *R (Touche) v Inner London North Coroner* [2001] QB 1206, [2001] 3 WLR 148. f

R v Kingston-upon-Hull Rent Tribunal, ex p Black [1949] 1 All ER 260, DC.

R v Liverpool Justices, ex p Roberts [1960] 2 All ER 384n, [1960] 1 WLR 585, DC.

R v Llanidloes Licensing Justices, ex p Davies [1957] 2 All ER 610, [1957] 1 WLR 809.

R v Meyer (1875) 1 QBD 173, DC.

R v Newcastle-under-Lyme Justices, ex p Massey [1995] 1 All ER 120, [1994] 1 WLR 1684, DC. g

R v Paddington South Rent Tribunal, ex p Millard [1955] 1 All ER 691, [1955] 1 WLR 348, DC.

R v Shrewsbury Coroner's Court, ex p British Parachute Association (1987) 152 JP 123, DC. h

R v West London Coroner, ex p Gray (1986) 151 JP 209, [1987] 2 All ER 129, [1988] QB 467, [1987] 2 WLR 1020, DC.

R v West Yorkshire Coroner, ex p Smith (1982) Times, 6 November, DC.

R v Willesden Justices, ex p Utley [1947] 2 All ER 838, [1948] 1 KB 397, DC.

R v York City Justices, ex p Farmery (1988) 153 JP 257, DC.

S (a minor) v Special Educational Needs Tribunal and the City of Westminster [1996] 1 All ER 171, [1995] 1 WLR 1627; *aff'd* [1996] 2 All ER 286, [1996] 1 WLR 382, CA. j

Seifert v Pensions Ombudsman [1997] 4 All ER 947, CA; *rvsg* [1997] 1 All ER 214.

Steele Ford & Newton (a firm) v CPS [1993] 2 All ER 769, [1994] 1 AC 22, [1993] 2 WLR 934, HL; *rvsg* [1992] 2 All ER 642, [1992] 1 WLR 407, CA.

a *University of Nottingham v Eyett (No 1)* [1999] 2 All ER 437, [1999] 1 WLR 594.

Application for order for costs

b Following the decision of the Court of Appeal on 2 December 2003 ([2003] EWCA Civ 1739) allowing an appeal by the claimant, Christine Davies, from the order of Moses J on 11 February 2003 ([2003] EWHC 618 (Admin), [2003] All ER (D) 121 (Feb)) dismissing her application for judicial review of the verdict of accidental death on her son returned by jury at a coroner's inquisition, presided over by the defendant, the Deputy Coroner for Birmingham, on 1 February 2002, the claimant applied for an order requiring the deputy coroner to pay her costs of the hearing below and of the appeal. The facts are set out in the judgment of Brooke LJ.

c *Nicholas Blake QC and Paula Sparks* (instructed by *Jonas Roy Bloom*, Birmingham) for the claimant.

d *Richard Barraclough QC* (instructed by *HM Coroner*, Birmingham) for the deputy coroner.

Cur adv vult

27 February 2004. The following judgments were delivered.

e BROOKE LJ.

f [1] We handed down our judgment in this matter on 2 December 2003 ([2003] EWCA Civ 1739), and we then reconvened on 14 January 2004 to hear the parties' submissions on costs. The claimant, who is legally aided, contended that the deputy coroner should be ordered to pay her costs both of the hearing before Moses J ([2003] EWHC 618 (Admin), [2003] All ER (D) 121 (Feb)) and of her appeal to this court. She relied in this context on the recent decision of this court in *R v Inner London North Coroner, ex p Touche* [2001] EWCA Civ 383, [2001] 2 All ER 752, [2001] QB 1206. The deputy coroner argued that the order for costs in the court below should not be disturbed and there should be no order for costs of the appeal. Because these contentions raised important issues as to the liability of an inferior court or tribunal to pay the costs of the other side (and, conversely, to recover costs from the other side when an application fails) if it chooses to participate in public law proceedings, we decided to allow ourselves time to consider the matter before making an order as to costs.

g [2] There can be no doubt that the court has jurisdiction to make an order for costs against a coroner, whether or not he takes part in the proceedings. On an application made under s 13 of the Coroners Act 1988, the jurisdiction is conferred by s 13(2)(b) of that Act. On an application for judicial review the jurisdiction stems from s 51(1) of the Supreme Court Act 1981. Any uncertainty that previously existed as to a local council's willingness to indemnify a coroner in respect of an order for costs made against him was removed by s 104(1) of the Access to Justice Act 1999 which inserted a new s 27A into the 1988 Act. Section 27A(1) provides the requisite indemnity except in cases where a coroner initiates proceedings himself. These cases are covered by s 27A(2), which obliges a coroner to obtain an express indemnity before the proceedings begin.

j [3] Four issues arise for consideration: (i) what is the established practice of the courts when considering whether to make an order for costs against an

inferior court or tribunal which takes no part in the proceedings (except, in the case of justices, to exercise their statutory right to file an affidavit with the court in response to the application)? (ii) What is the established practice of the courts when considering whether to make an order for costs against (or in favour of) an inferior court or tribunal which resists an application actively by way of argument in the proceedings in such a way that it makes itself an active party to the litigation? (iii) Did the courts adopt an alternative established practice in those cases in which the inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction and procedure and such like but did not make itself an active party to the litigation? (iv) Whatever the answers to the first three questions, are there any contemporary considerations (including the coming into force of the Civil Procedure Rules (CPR)) which should tend to make the courts exercise their discretion as to costs in these cases in a different way from the way in which it was regularly exercised in the past?

[4] Competing views on some of these matters can be found in my judgment in the Divisional Court in *R v HM Coroner for Lincoln, ex p Hay* [2000] Lloyd's Rep Med 264, with which Forbes J agreed, and the judgment of Simon Brown LJ (with which Keene LJ expressly agreed) in this court in *Ex p Touche*. Needless to say, the latter judgment is binding on us unless we were satisfied that the court in *Ex p Touche* overlooked relevant case law of a material nature or that its decision could be treated as not binding on us on other grounds.

[5] There are three parallel strands of authority running through the cases, and it will be convenient to consider separately the case law relating to justices, tribunals and coroners. I will not dwell on the rare cases in which there is judicial review of a decision of a judge sitting in a county court, because in those cases a *lis* is generally joined between the competing parties and no question tends to arise in relation to the possibility of an order for costs against the judge himself.

[6] Justices experienced the same uncertainty as coroners as to whether they would receive an indemnity from central funds against an order for costs made against them until the position was put beyond doubt by recent legislation, which also gives the Lord Chancellor a role in the matter for the first time: see ss 53A and 54 of the Justices of the Peace Act 1997. When the 'case stated' procedure was introduced in 1857 justices were protected against an adverse order for costs by s 6 of the Summary Jurisdiction Act 1857 (for the modern position, see s 28A(3) of the Supreme Court Act 1981 which gives the High Court an unfettered discretion as to costs). So far as the prerogative writs were concerned, in *R v Goodall* (1874) LR 9 QB 557 Lord Cockburn CJ said that the Divisional Court in some cases inflicted costs on justices who were guilty of some gross impropriety. The following year the High Court made an order for costs against a justice who ought not to have sat on a case in *R v Meyer* (1875) 1 QB 173, but it is noteworthy that the law reporter commented in a footnote (at 178):

'The granting of costs when a rule is made absolute for a certiorari is contrary to the usual practice: see Gray on Costs, p. 466, where it is said: "As there is no provision" (in the statute 5 Geo. 2, c 19) "for the payment of costs where the order or other proceeding is quashed, neither party is in that case entitled to costs."'

[7] However that may be, s 2 of the Review of Justices Decisions Act 1872 gave justices an express power to file an affidavit with the High Court setting out the grounds of the decision which was the subject of challenge together with any

a other facts that were considered to have a material bearing on the point in issue. If they did this, they could avoid the expense of having to instruct counsel to attend the hearing (see s 3).

b [8] By the time Lord Goddard became Lord Chief Justice (1946–1958), the High Court unquestionably possessed jurisdiction to order justices to pay costs when one of the prerogative orders were made against them, but in a series of judgments in a three-judge Divisional Court he explained clearly what was the practice of that court in these matters. In those days that court had much less business than the Administrative Court has today. The Lord Chief Justice would usually preside, and the judgments which I will cite reflected the understanding of all three members of the court as to the established practice of the court (whether or not it was reflected fully in reported case law) in relation to orders c for costs against inferior courts or tribunals.

d [9] In *R v Willesden Justices, ex p Utley* [1947] 2 All ER 838, [1948] 1 KB 397 justices had fined a defendant three times the maximum penalty for a driving offence. Counsel appeared for the justices in the Divisional Court to admit that the penalty was in excess of jurisdiction and to assist the court, by reference to e case law, as to the course it should adopt. In its substantive judgment the court granted an order of certiorari to quash the conviction, but when counsel for the applicant applied for costs against the justices, Lord Goddard CJ said ([1948] 1 KB 397 at 400):

e ‘It is the rarest thing for this court to give costs against justices. The only case is when justices have done something which calls for strong disapproval from this court. In the present case the justices made a bona fide mistake. If the present applicant had appeared, or had instructed an advocate to appear for him, before the justices, the difficulty would not have arisen because the attention of the justices would have been called to the mistake at the time.’

f [10] In *R v Coventry Rent Tribunal, ex p Whitcombe* (1 December 1948, unreported) Lord Goddard CJ said that the court would not grant costs against justices or similar tribunals merely because they had made a mistake in law, but only if the tribunal had acted improperly, that is to say perversely or with some disregard of the elementary principles which every court should obey, and even g then only if it was a flagrant instance.

h [11] Although it is another tribunal case, Lord Goddard CJ’s reported comments (and his decision) in *R v Kingston-upon-Hull Rent Tribunal, ex p Black* [1949] 1 All ER 260 show the court beginning to make a distinction between cases in which the inferior court or tribunal did nothing in response to High Court proceedings (other than to file an affidavit in the case of justices) and cases where they appeared by counsel to contest the proceedings. In *Ex p Black* a landlord obtained an order of certiorari to quash an order of a rent tribunal which had reduced the rent of certain premises without hearing evidence on behalf of the landlord. Counsel appeared on behalf of the tribunal to oppose the making of the j order, and it is instructive to read the discussion between the court and counsel:

‘LORD GODDARD, C.J.: In cases where justices appear and oppose, costs are sometimes given against them. They can file an affidavit, and, if they only file an affidavit and do not appear, we do not give costs against them. In this case, however, the tribunal has appeared and made itself a party to this lis.

J.H.L. Royle for the tribunal. That is so, my Lord, but in unreported cases the principle has been laid down that there must be perverseness on the part of the tribunal. It is submitted that there has been no perverseness here. a

[*Peter*] *Lewis* [for the landlord]: My friend need not have been instructed to appear here. The tribunal might have read our affidavit and not opposed our application.

LORD GODDARD, C.J.: We decide this case on the ground that the landlord had to come here, at considerable expense to herself, to have the decision of the tribunal quashed, and the tribunal have appeared by counsel and have disputed her right to have an order for *certiorari*. On the whole, as the tribunal have appeared here and have contested this case, we think the landlord ought to have her costs ... If there had been no appearance by the tribunal, of course, we should not have given costs in this case. b
c

[12] By this time Lord Goddard CJ was concerned to check the tendency of justices to appear in his court when they could say all they needed to say in an affidavit. In *R v Camborne Justices, ex p Pearce* [1954] 2 All ER 850, [1955] 1 QB 41, although the Solicitor-General appeared with a junior as *amici curiae*, counsel also appeared for the justices. The reports in the Queen's Bench series shows that he drew the court's attention to the case law on bias and submitted that in the present case no reasonable person could suspect that the justices' clerk would be able to influence the justices to cause them to have bias. Slade J ended the judgment of a court which included Lord Goddard CJ, by saying that the court had been much indebted to all the counsel concerned in the case for their assistance. The report in the All England Law Reports, however, shows that the court refused an application made on behalf of the justices for their costs to be paid by the solicitor who acted for the applicant. Lord Goddard CJ said ([1954] 2 All ER 850 at 854–855) that the 1872 Act gave the justices the right to file an affidavit in reply to the evidence of the applicant, and as there was no allegation of misconduct against the justices there was no need for them to have been represented by counsel. d
e

[13] In *R v Llanidloes Licensing Justices, ex p Davies* [1957] 2 All ER 610, [1957] 1 WLR 809 justices appeared by counsel to resist, unsuccessfully, an application to set aside an order they had made in relation to the extension of licensing hours. In ordering them to pay the costs of the applicants Lord Goddard CJ said ([1957] 1 WLR 809 at 809–810): f
g

'If the justices appear in the Divisional Court they make themselves parties to the *lis*. They take the risk of being ordered to pay costs, and they are entitled to receive costs if they succeed in defeating the application. I have been trying to remind justices all over the country, not only in court, but in addresses I have given to them, of their rights under the Review of Justices' Decisions Act, 1872. That Act was passed for the very purpose of allowing justices, against whom *certiorari* or *mandamus* was moved, to put in affidavits (on which they do not have to pay any stamp duty) giving their reasons, so that the court could decide the case on the affidavits; but if justices insist on instructing counsel to come before the court and argue the case, they are making themselves parties to a *lis* and will have to pay costs. At one time this court very rarely ordered costs, and I think the reason was that the Act of 1872 was overlooked; but for at least three years now I have been trying to remind justices of the presence of this Act on the Statute Book, and if they are not content with exercising the power Parliament has given h
j

a them, but insist on appearing and arguing the case, they will have to pay costs if they lose. The justices in the present case have made themselves parties before this court and opposed the application, and the applicant is entitled to costs against them.' (See also [1957] 2 All ER 610 at 610–611.)

b [14] There can now be seen to be emerging a principle that if justices choose not to avail themselves of their statutory right to file an affidavit but appear in court to argue the case they make themselves parties to a lis, and as such parties may recover costs if they win and may be ordered to pay costs if they lose.

c [15] The next two cases date from Lord Parker CJ's time as Lord Chief Justice (1958–1971) and evidence the court's reluctance to make an order for costs against justices (or even against prosecutors) if they do not appear at court to resist the granting of relief.

d [16] *R v Liverpool Justices, ex p Roberts* [1960] 2 All ER 384n, [1960] 1 WLR 585 was another case in which justices convicted a defendant without hearing him. In the Divisional Court counsel only appeared for the applicant, and the court refused to make an order for costs in his favour. Lord Parker CJ, who was sitting with Ashworth and Salmon JJ, said ([1960] 2 All ER 384n, [1960] 1 WLR 585 at 586–587):

e 'So far as costs against the magistrates are concerned, it has been the practice not to grant costs against magistrates or tribunals merely because they have made a mistake in law but only if they have acted improperly, that is to say, perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance.'

f [17] The court then went on to say that its general practice was also not to award costs against a party who did not appear to resist an application of this sort unless, for instance, he had materially contributed to the error giving rise to the application. It therefore also declined to make an order against the absent prosecutor.

g [18] In *R v Hastings Licensing Justices, ex p John Lovibond & Sons Ltd* [1968] 2 All ER 270, [1968] 1 WLR 735 the court granted an order of certiorari to quash a decision of licensing justices. Although nobody except the successful applicants appeared at the hearing, their commercial rivals, who were the beneficiaries of the justices' order, had opposed the application until three months before the Divisional Court hearing. Lord Parker CJ said ([1968] 2 All ER 270 at 272, [1968] 1 WLR 735 at 738):

h 'It is very rare that this court makes any award in regard to costs on an application for one of the prerogative orders, unless the party has appeared and contested the application. Counsel for the applicants has, however, pointed out in the present case that the respondents, no doubt under a bona fide misconception as to their rights under the licensing Acts, succeeded in persuading the magistrates to adopt the same misconception and have fought this case, as it were, up to 14 December when they wrote saying they were no longer contesting the application. There is a precedent for making an award of costs in such a case: see *R v Birmingham Union Guardians* ((1874) 44 LJMC 48).'

The court therefore ordered the respondents to pay the applicants' costs up to 4 December (by which time, it appears from counsel's argument as reported at [1968] 2 All ER 270 at 272, the applicants' briefs had been delivered.)

[19] The ground rules relating to cases involving justices were by now pretty well established. They were strongly encouraged to play no part in the High Court proceedings after they had filed their affidavit. If they took this course they would be at no risk as to costs except in a 'flagrant instance' of improper behaviour. The court would, of course, generally be concerned to resolve a lis between prosecutor and defendant or between an applicant for a justices' licence and its competitors, and normally there would be no need for the justices to be represented, too. If they did appear, and fought the case, they would be generally at risk as to costs. In *R v York City Justices, ex p Farmery* (1988) 153 JP 257, however, the court had expressly invited the justices to appear to explain their apparently unreasonable behaviour. In these circumstances they were not actively taking part in a lis, or actively contesting the proceedings, and the court, presided over by May LJ, refused to order them to pay costs to the successful applicants on the basis that this was not a flagrant instance of improper behaviour.

[20] All these, and other authorities, were considered by the Divisional Court in *R v Newcastle-under-Lyme Justices, ex p Massey* [1995] 1 All ER 120, [1994] 1 WLR 1684. By this time a procedural change now permitted the parties to uncontested judicial review proceedings to sign a draft consent order, thereby obviating the expense of a hearing, and the Divisional Court introduced a new rule of practice whereby justices who unreasonably declined to sign a draft consent order might be ordered, if the court thought it appropriate, to pay the costs of the subsequent hearing.

[21] I have shown how the Divisional Court applied the same general principles to cases involving tribunals as it did in cases involving inferior courts. In 1955 Lord Goddard CJ stated the practice of the court in relation to tribunals in uncompromising terms in *R v Paddington South Rent Tribunal, ex p Millard* [1955] 1 All ER 691, [1955] 1 WLR 348. Counsel had appeared for the tribunal at the hearing, but notwithstanding this Lord Goddard CJ said ([1955] 1 All ER 691 at 693):

'It does not matter to the tenant (who is legally aided) whether her costs come out of one fund or another, but so that we should not be making a precedent I do not think we should give costs against the tribunal. We never give costs unless they act improperly.'

[22] Some tribunals exercise a highly specialist jurisdiction, and it often happened that such a tribunal might wish to be represented before the court to explain matters relating to its jurisdiction or procedure or to draw the court's attention to relevant decisions overlooked by the parties without in any way involving itself in the lis or contesting the application that was being made. A study of the frequent occasions in the late 1970s when counsel appeared before Lord Widgery CJ's Divisional Court on behalf of the Central Arbitration Committee in litigation arising out of the very complicated provisions of Sch 11 of the Employment Protection Act 1975 will show that that committee never applied for costs and was never ordered to pay costs. Its role was a neutral one. It was there to assist the court with its expertise, conscious that if the court made an incorrect ruling through pardonable ignorance of some of the complexities of the legislative scheme, this might have a serious effect on the smooth handling of the many future cases that would be referred to the committee.

- a [23] Latham J, who has great experience of practice in this field, would have had this Divisional Court practice well in mind in *S (a minor) v Special Educational Needs Tribunal and the City of Westminster* [1996] 1 All ER 171, [1995] 1 WLR 1627. After ruling, on the proper interpretation of RSC Ord 55, r 8, that the tribunal had no right to appear in the High Court because they were not a party to a statutory appeal from one of their decisions, he added ([1996] 1 All ER 171 at 176, [1995] 1 WLR 1627 at 1632):

b
c 'But the court has ample power to permit the tribunal to appear and be heard in appropriate matters. Where, as in the present appeal, issues of general principle as to jurisdiction and procedure are raised, and the tribunal has relevant material to put before the court, it is obviously appropriate for the tribunal to appear and be heard.'

- d [24] If the tribunal did appear for this limited purpose, it would not be making itself a party to the lis or be concerned to contest the appeal. It would simply be making its expertise and knowledge available to the court, and the very fact of its appearance would not make it any more susceptible to an adverse costs order than if it had not appeared.

e [25] The practice of the Divisional Court in these matters attracted the favourable attention of both the House of Lords and the Court of Appeal in recent years. In *Steele Ford & Newton (a firm) v CPS* [1993] 2 All ER 769, [1994] 1 AC 22, the House of Lords, three of whose members had held the office of
f Treasury junior counsel (common law) consecutively between 1964 and 1979, was concerned with a case in which the Court of Appeal had set aside wasted costs orders made in the Crown Court against four different firms of solicitors (see [1992] 2 All ER 642, [1992] 1 WLR 407). The House of Lords for its part set aside an order made by the Court of Appeal to the effect that the costs of the
g solicitors' successful appeals should be paid out of central funds. In a speech with which the other four members of the House agreed, Lord Bridge of Harwich said that he shared with the Court of Appeal the view, which was no doubt held by every judge brought up in the English system, that it was just for a successful litigant, and perhaps a fortiori a successful appellant, to be able to recover his costs from someone. Unfortunately, he said, it was not always so. After citing
h examples taken from the implementation of different arrangements for legal aid since 1949 and from cases where the costs of an abortive trial leading to an unopposed appeal and an order for a retrial could not be recovered from anyone, Lord Bridge said ([1993] 2 All ER 769 at 780, [1994] 1 AC 22 at 40):

i 'To take yet another example, it is relatively commonplace for a party who is the victim of a misjudgment by an inferior court or tribunal to have to seek relief by an application for judicial review in circumstances where the Divisional Court cannot hold either another party or the inferior tribunal itself liable in costs and there is no power to award costs from public funds.'

- j [26] It could be said that in this passage Lord Bridge was not expressly referring one way or another to the cases in which the inferior court or tribunal appeared by counsel in the High Court on matters concerned with jurisdiction or procedure or specialist case law without itself taking part in the lis. The same observation could also be applied to the decision of this court in *Seifert v Pensions Ombudsman* [1997] 4 All ER 947. The ombudsman did not appear on the appeal

to Lightman J, who set aside certain parts of his determination and ordered him to pay the appellants' costs (see [1997] 1 All ER 214). Staughton LJ (see [1997] 4 All ER 947 at 956) said of the fact that the decision had been modified on appeal: a

'But that is not a sufficient ground to order him to pay the costs. The limited circumstances in which an inferior tribunal, such as magistrates or an arbitrator, should be ordered to pay the costs of an appeal from its decision are well known ... [W]e do not consider that it is a case for such an order.' b

[27] This survey of the case law reveals that the established practice of the High Court for many years was to make no order for costs against an inferior court or tribunal unless it behaved improperly in a flagrant way or unless it appeared at the hearing as a party to the lis to contest the application being made (or declined unreasonably to sign a draft consent order which might obviate the costs of an unnecessary hearing). Justices were encouraged to make use of the procedure set out in the 1872 Act, but no such statutory procedure was available to a tribunal which wished to assist the court without participating in the lis. c

[28] These principles were unsurprisingly carried across to cases involving coroners. In *R v West Yorkshire Coroner, ex p Smith* (1982) Times, 6 November, the deceased's father sought an order prohibiting the coroner from conducting an inquest on his dead daughter. One of his grounds was that the coroner might appear to be biased because he had an outstanding application for costs against the coroner arising out of an earlier application for judicial review in which the Court of Appeal had overruled the Divisional Court and held that the coroner did have jurisdiction to conduct an inquest even though the deceased had died abroad. Webster J observed that there was no criticism of the coroner in those proceedings, and that there never had been any suggestion of misconduct on his part. He continued: d

'Mr Simon Brown [who appeared as *amicus curiae*] ... submitted that it is singularly unusual for an order for costs to be made against [a public judicial body] in the absence of any misconduct on its part, *even if that body appears at the proceedings to resist the application*; but where the body does not appear to resist the application ... then in Mr Simon Brown's experience, he had never known of an order for costs being made against the judicial body in question in the absence of misconduct.' (My emphasis.) e

Webster J added that Mr Brown's understanding of the practice accorded with his own. No doubt he had in mind the dictum of Lord Goddard CJ 30 years earlier, in a case in which a tribunal had been represented (see [21], above). f

[29] It is possible to see these principles being applied again and again by the Divisional Court in the next ten years in cases in which the coroner was represented at the hearing. h

[30] In *R v West London Coroner, ex p Gray* (1986) 151 JP 209, a number of police officers obtained an order directing a new inquest in a case in which the coroner was held to have misdirected the jury in relation to a possible verdict of unlawful killing. Although the court had much sympathy for the coroner, because he was dealing with a case in which a verdict of unlawful killing by neglect was being ventilated, it considered that the jury had been gravely misdirected and confused by his direction to them on the law. j

[31] Both the coroner and the deceased's family were represented at the High Court hearing. The court rejected some of the submissions made to them on behalf of the coroner and ordered a new inquest. When the successful applicants sought an order that the coroner should pay their costs, the official transcript shows that counsel for the coroner said:

“Your Lordships will be very familiar with the general proposition which has been applied in such cases before, [*Re Inquest into the Death of Calvi* (1982) Times, 2 April] [in which the coroner had been ordered to pay half the costs] notwithstanding. Coroners are in a very similar position to all those public bodies, such as benches of magistrates and so forth. If the body appears and takes part and disputes the entitlement of the applicant to the remedy sought, then the body is at risk on costs, subject to the further qualification that the conduct of the body or person calls for serious comment by the court, serious disapproval by the court. Anxious consideration was given, first of all, as to whether the coroner should ever appear in these proceedings. I can tell your Lordships the reason why he appears. It is because it became abundantly clear that the transcript was going to be defective and that one would have to try to assist the court by providing additional material. That is what we have done and I hope it has been of some assistance, not only to the court but to my learned friend. Secondly, there was the problem, which was not just a problem in relation to this inquest but in relation to future inquests, in relation to r 42, the standard of proof. That is clearly set out in the coroner's first affidavit. Notwithstanding the passages read out by my learned friend, it has always been the intention of the coroner to take a neutral line. It has been done before. It is right and proper that the coroner should, in these circumstances, [not be ordered to pay the costs].”

[32] After observing that a High Court judge might have been taxed by some of the issues in the case, Watkins LJ said ((1986) 151 JP 209 at 221–222):

“If an order for costs was made against this coroner it would be no reflection upon him. It is equally wrong of course that a number of men have had to come here to have this inquisition quashed and have to pay for it. In vehicles of investigation of this kind when they go wrong the public should pay, should they not? We will not make an order for costs against the coroner or make a charge on the legal aid fund, but we regard the situation as very unsatisfactory; that is to say, save by going to the legal aid fund or by going to a local authority, who may or may not be behind the coroner, parties who have had to come and successfully come to upset an inquest have to pay their own way. That is the position here. Regretfully, we have to say that that is how it must stand.”

Today, of course, the local authority is bound to indemnify the coroner (see [2], above).

[33] The next volume of the Justice of the Peace Reports contained two examples of cases in which experienced judges in the Divisional Court followed the principles advanced by Mr Simon Brown and accepted by Webster J in *Ex p Smith*, notwithstanding that the coroner had been represented at the hearing. In *R v Shrewsbury Coroner's Court, ex p British Parachute Association* (1987) 152 JP 123, Lloyd LJ and Mann J made a declaration to the effect that the coroner's jury had

not been entitled to make a representation to which the association took exception, but they refused to make any order for costs against the coroner. Lloyd LJ said that this was not a case where they could express strong disapproval of the coroner. He added that he was only following what was accepted to be a common practice, and there were no special features present, as there had been in *Re Bithell (decd)* (1986) 150 JP 273.

[34] In *R v HM Coroner for Southern District of Greater London, ex p Driscoll* (1993) 159 JP 45 the Divisional Court (Kennedy LJ and Pill J) were concerned with a case in which it was submitted that the coroner had behaved unreasonably, not only in deciding that the deceased's two sisters were not properly interested persons within the meaning of r 20(2)(h) of the Coroners Rules 1984, SI 1984/552 but also in the lead-up to that decision, which he had defended unsuccessfully in court. In his judgment Kennedy LJ said (at 50) that one of the coroner's letters had been offensive and misleading. He went on to say (at 55) that the route by which the coroner had arrived at his decision was so seriously flawed that the decision itself ought not to be allowed to stand. Although one of the two sisters had received emergency legal aid, the other was unlikely to qualify for legal aid. Although Kennedy LJ gave no reasons for the court's decision to order the coroner to pay the costs, there were the following features present: (1) there was some evidence that the coroner had behaved 'improperly'; (2) he defended his decision in court and entered the 'lis'; (3) the applicants would have to pay a significant amount of costs themselves if the costs order was not made against the coroner.

[35] The following year the Divisional Court (McCowan LJ and Buxton J) directed the coroner to pay the applicant's costs in *R v HM Coroner for Kent (Maidstone District), ex p Johnstone* [1995] 6 Med LR 116. The report of this case is instructive because it contains a transcript of the long discussion about costs which followed the judgment. McCowan LJ made it clear that the matters which influenced the court were: (1) although it was not a case which called for strong disapproval of the coroner's actions, the court had attached some measure of blame to him; (2) more importantly, he had sought to defeat the challenge to his decisions, and was certainly not represented in the role of *amicus curiae*, or anything of that nature. He would no doubt have been seeking his costs and would have been entitled to them if he had won; (3) the applicant was not legally aided; (4) the court was unable to recognise any principle that said that in these circumstances some special protection should be given to the coroner.

[36] In *R v HM Coroner for Wiltshire, ex p Clegg* (1997) 161 JP 521 the Divisional Court (Phillips LJ, Hooper J) made an order for costs against a coroner who merely swore an affidavit and took no part in the proceedings at all. I explained in my judgment on costs in *R v HM Coroner for Lincoln, ex p Hay* [2000] Lloyd's Rep Med 264 at 278 why I considered that this order did not follow the established practice of the court in any way. This was another case in which the court was concerned about its inability to award a successful applicant her costs from any other source.

[37] In my judgment in *Ex p Hay*, with which Forbes J agreed, I approved the correctness of the relevant text in the eleventh edition of *Jervis on Coroners* (1993). When a coroner appeared at the hearing in the High Court I said (at 279) that the relevant principles appeared to be that: (1) if a coroner not only filed an affidavit but also appeared and contested the making of an adverse order in an inter partes adversarial mode, then he or she was at risk as to costs; (2) if on the other hand, the coroner, as was fitting for somebody holding judicial office, swore an affidavit to assist the court and then appeared in court, more in the role of an *amicus* rather

a than as a contesting party, then the court was likely to follow the normal rule set out in *Jervis* and make no order as to costs provided that it did not express strong disapproval of his or her conduct.

b [38] These principles were expressly disapproved by the majority of this court (Simon Brown and Keene LJ, Robert Walker LJ expressing no opinion on this point) in *R v Inner London North Coroner, ex p Touche* [2001] EWCA Civ 383, [2001] 2 All ER 752, [2001] QB 1206.

c [39] *Ex p Touche* raised a very difficult issue of coronial law. The applicant's wife had died of a cerebral haemorrhage, the result of severe hypertension, possibly secondary to eclampsia. The coroner decided not to hold an inquest. The issue in the litigation was whether he was required to hold an inquest because there was reasonable cause to suspect that she had died an unnatural death. The Divisional Court (Kennedy LJ and Morison J) quashed the coroner's decision and ordered him to pay the costs of the application. When the coroner appealed, both on the merits and on the costs order, this court dismissed his appeal. The Divisional Court did not have my judgment in *Ex p Hay* drawn to their attention when they made their order. The deceased's husband did not d qualify for legal aid. There was no issue as to the costs of the coroner's appeal, which followed the event when he lost the appeal.

e [40] In ruling that the coroner should pay Mr Touche's costs at first instance, Simon Brown LJ said that the coroner's behaviour had not attracted the slightest criticism. On the contrary he had conducted himself impeccably and if a costs order against him was to be justified, this could only be because he had failed in the event to meet the challenge.

f [41] His reasons for dismissing the appeal on costs and for disapproving what I said in *Ex p Hay* were set out in para [54] of his judgment. They can be summarised as follows: (i) Simon Brown LJ could find no basis in earlier authority for the suggested distinction I made in relation to the coroner's two g possible roles when he appeared in court; (ii) it appeared to him difficult in practice to apply the distinction, because both roles postulated that he would be resisting the challenge and arguing the relevant law; (iii) amici curiae played different roles according to the requirements for their assistance; (iv) it was not easy to determine what role the coroner had played in the case of *Ex p Touche*, particularly as he appealed after losing at first instance: an amicus does not (and cannot) appeal; (v) if the coroner had won in the court below, he would certainly have asked for and, no doubt, been awarded his costs; (vi) although the court was greatly assisted by the coroner not merely swearing an affidavit but also appearing to argue the case, particularly as it raised a true point of law of general application, it seemed hard on the applicant that the more important the point, h the less likely he would be to recover his costs.

j [42] In the ensuing paragraphs of his judgment Simon Brown LJ made the following additional points. (1) It would be a pity if courts were deprived of the assistance of coroners if they were regularly to be condemned in costs if they lost, but it would always be open to the court to ask for an amicus, and at least then an applicant's position as to costs would be fair: he would simply have to bear his own costs irrespective of the outcome (see [55]). (2) The response to the argument that the applicant's costs at the first instance hearing were probably very little greater than if the coroner had chosen not to be represented was that it was an anomaly whereby a judicial officer could generally exempt himself from any costs liability even though his decision was found unlawful by choosing not to appear, and this anomaly ought not readily to be extended (see [56]). (3) The

language of s 13 of the Coroners Act 1988 gave the court an unfettered discretion to 'order the coroner concerned to pay such costs of and incidental to the application as to the court may appear just', and there was no sufficient reason to subject the exercise of this discretion to limitations as rigorous as those suggested by *Ex p Hay* (see [57]). (4) There was no question of the coroner personally having to pay the applicant's costs, and in the result, given that Parliament had chosen not to heed repeated pleas by the court that there be power in this sort of case to order costs out of public funds, the Divisional Court's decision, made per incuriam the decision in *Ex p Hay*, would be affirmed (see [59]).

[43] The wider review of the earlier practice of the Divisional Court which is contained in this judgment has disclosed plenty of evidence to support the distinction I made in *Ex p Hay* about the coroner's two possible roles. In my experience it has always been perfectly possible for counsel instructed by a tribunal to take a neutral role in an effort to assist the court on relevant aspects of law and procedure, and the cases in Lord Goddard CJ's and Lord Parker CJ's time made a clear distinction between the situations in which the inferior court or tribunal played an active part in the lis by arguing the correctness of the decision under challenge, and those in which it did not. Special considerations applied to justices, who enjoyed the special statutory right conferred on them by the 1872 Act, so that it was generally unnecessary for them to be represented at the hearing, and in any event the High Court would be naturally more familiar with law and practice in a magistrates' court than with law and practice in a specialist jurisdiction—or in a coroner's specialist field.

[44] Whatever the established practice of the Divisional Court may have been in earlier years, it is obviously necessary to revisit the scene today in the light of the judgment in *Ex p Touche* and the other changes that have occurred in recent years. Among these I would include: (i) the codifying of the costs rules in the CPR; (ii) the government's continuing unwillingness to permit the courts to make an order that an applicant's costs be borne by central funds in an appropriate case; (iii) budgetary pressures which make public bodies (including judicial bodies) more prone to instruct their advocate to seek an indemnity from another party for the legal costs they have incurred in 'successful' court proceedings; (iv) the fact that a coroner now has a clear statutory indemnity in respect of any adverse order for costs; (v) the growing incidence of High Court challenges by applicants who are not supported from another source, such as legal aid, an employer, or a trade union; (vi) the effect of art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), as explained in recent judgments, including our earlier judgment in the present case.

[45] All these factors are new, or have assumed new importance, since the days of Lord Goddard CJ and Lord Parker CJ. I will review them quickly in turn. (i) CPR 44.3(2)(a) provides unequivocally that the general rule is that the unsuccessful party will be ordered to pay the costs of a successful party, but this does not throw any light on the position of a neutral party. In any event, CPR 44.3(4)(a) provides that the court must have regard to the conduct of all the parties, and if a tribunal or a coroner is studiously neutral in the submissions it or he/she makes to the court, that is a factor to be taken into account. On the other hand the emphasis on justice and fairness in CPR 1.1 will oblige the court to examine anxiously whether a source of public funds is available if a privately funded litigant like Mr Touche has to initiate court proceedings in order to obtain an inquest into the death of a member of his family. (ii) The government has

a paid no heed to the plea of Watkins LJ, the Deputy Chief Justice, in *Ex p Gray* (see [32], above). Nor has it paid any heed to the recommendation of the Law Commission in its report *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226) (1994) para 10.6, to the effect that the courts should be able to order costs out of central funds in an appropriate public interest challenge in a judicial review application. (iii) Simon Brown and Keene LJ will have been very well aware of the pressure on counsel acting for public bodies in the last ten years to seek orders for costs if successful in litigation when 20 years ago they would have been content to allow costs to lie where they fell. (iv) Any uncertainty as to whether a coroner might have to pay an adverse order for costs out of his own pocket has now been resolved by the 1999 Act (see [2], above). (v) The burgeoning of public law challenges of all kinds (including challenges to coroners' decisions) over the last 15 years has simply accentuated the dilemma faced by the court when an applicant has had to pay for the cost of a successful High Court challenge and there is no readily obvious source of public funds to indemnify him for the expense to which he has been put. (vi) This dilemma is now accentuated by the fact that recent case law has made it clear that under art 2 of the convention the state is obliged to provide an effective inquiry into a death like the death with which we are concerned in the present case (see also *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129, [2003] 4 All ER 1239, [2004] 1 WLR 971), and it would appear unjust that a private citizen should have to be put to heavy expense in order to oblige the state to perform its duty properly. (vii) The very heavy pressures on the funds available to the Legal Services Commission no longer make it possible to justify the refusal of a costs order on the basis that one public fund would simply be paying another. I do not consider, however, that it is appropriate to take into consideration the fact that the remuneration of counsel (and particularly leading counsel) on a legally aided appeal of this kind is now extremely low (by the standards of the private sector market) and that counsel and solicitors would financially benefit from a costs order in their favour. There is nothing in the costs rules to suggest that the financial welfare of a party's lawyers is a legitimate consideration when a court makes an order as to costs.

g [46] This judgment has been necessarily a long one, not only because there was a need to set out clearly the earlier Divisional Court practice in the light of the judgments in this court in *Ex p Touche* which did not give the whole picture, but also because with the impending advent of a new tribunals service it seemed an opportune moment to state authoritatively the way in which the courts have exercised their discretion in these matters in the past and to identify what are the governing principles today.

h [47] It will be apparent from this judgment that the answers to the questions I posed in [3], above are:

j (i) The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings.

(ii) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event.

(iii) If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application. a

(iv) There are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (iii), above, so that a successful applicant, like Mr Touche, who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner (or other inferior tribunal) has gone wrong in law, and there is no other very obvious candidate available to pay his costs. b

[48] I do not regard this outcome as at all satisfactory, but it stems from Parliament's unwillingness to allow a successful applicant to be reimbursed from central funds for the expense to which he has been put when there is no other potential source of public funds available for this purpose. c

[49] Needless to say, if a coroner, in the light of this judgment, contents himself with signing a witness statement in which he sets out all the relevant facts surrounding the inquest and responds factually to any specific points made by the claimant in an attitude of strict neutrality, he will not be at risk of an adverse order for costs except in the circumstances set out in [47](i), above. In those circumstances the court may be obliged to request the assistance of an advocate to the court, as Simon Brown LJ suggested in *Exp Touche*. d

[50] This is a much less satisfactory solution than was afforded by the earlier practice I have described, unless the advocate to the court makes it his business to seek the assistance of the coroner and the Coroners' Society (which has been very helpful to the court on occasions in the past), in which case the disappearance of the coroner from the actual hearing would seem to be completely artificial. It may be that if the coroner makes a pre-hearing application to the court for directions of the type suggested by Chadwick J in *Providence Capitol Trustees Ltd v Ayres* [1996] 4 All ER 760 at 765, any potential ambiguity about his role in the proceedings and his status vis-à-vis any potential costs orders (one way or the other) might be satisfactorily resolved. e

[51] I do not consider it appropriate to say more than this in the present judgment. It may be that the Rules Committee may consider that further guidance by way of a practice direction is desirable. f

[52] So far as the present case is concerned, Mrs Davies has been in receipt of legal aid throughout, so that she is not in the same position as Mr Touche. In my judgment it would be unjust to require the deputy coroner to pay her costs of the hearing before Moses J. He found in his favour correctly according to the law as it stood at that time. On the other hand, the law had moved on in significant respects by the time of the appeal to this court. It would have been open to the deputy coroner not to appear on the appeal, in which case we would almost certainly have had to adjourn the matter and request the services of an advocate to the court. Instead, he appeared and argued and lost the appeal, and it was not so strongly argued that he should not pay the costs in this court. In my judgment he ought to pay the costs of the appeal. g
h
j

LONGMORE LJ.

[53] I agree with Brooke LJ's conclusion that the deputy coroner should not have to pay Mrs Davies's costs before Moses J ([2003] EWHC 618 (Admin), [2003] All ER (D) 121 Feb) but should pay her costs of this appeal.

[54] I only add that in relation to appeals against the decision of the Pensions Ombudsman where, as Brooke LJ notes in [26], above a similar problem can arise, the law appears to be that, if the ombudsman takes part in the appeal and makes himself a party to the lis, he is at risk as to the costs of the appeal: see *Providence Capitol Trustees Ltd v Ayres* [1996] 4 All ER 760 at 763. These are presumably the limited circumstances to which Staughton LJ referred in *Seifert v Pensions Ombudsman* [1997] 4 All ER 947. But a practice appears to have grown up whereby the ombudsman will only be ordered to pay the costs of a successful appellant 'to the extent to which they have been increased by the ombudsman's appearance on the appeal' (see *University of Nottingham v Eyett (No 1)* [1999] 2 All ER 437 at 448, [1999] 1 WLR 594 at 597. This affords a possible middle way but, unless the court which allows the appeal is prepared to conduct the assessment of costs itself, it must present a considerable conundrum for the costs judge.

SIR MARTIN NOURSE.

[55] I also agree with the judgment of Brooke LJ and the order proposed by him.

[56] In his judgment in *R v Inner London North Coroner, ex p Touche* [2001] EWCA Civ 383 at [54], [2001] 2 All ER 752 at [54], [2001] QB 1206, Simon Brown LJ said:

'I have, I confess, some difficulty with the approach in [*R v HM Coroner for Lincoln, ex p Hay* [2000] Lloyd's Rep Med 264]. In the first place I can find no basis in earlier authority for the suggested distinction between the coroner's appearance on the one hand as "a contesting party" ("contest[ing] the making of an adverse order in an inter partes adversarial mode"), and on the other as "an amicus".'

As to that observation, it must be said, first, that the earlier authorities cited in argument in that case appear to have been few in number and recent in origin; second, that the much fuller review of the authorities that has now been conducted by Brooke LJ provides a more than adequate basis for the distinction suggested by him in *Ex p Hay*.

[57] In *Ex p Touche*, Simon Brown LJ continued:

'Secondly, it seems to me difficult in practice to apply this distinction. How does one tell which role the coroner is playing? Both postulate that he will be resisting the challenge and arguing the relevant law. It can hardly be by reference to the force of his (or his counsel's) submissions. Amici curiae, indeed, play different roles according to the requirements for their assistance ...'

[58] With respect to that observation, I think that the difficulty is more imagined than real. The state of affairs contemplated by Brooke LJ in *Ex p Hay* [2000] Lloyd's Rep Med 264 at 279 was that the coroner would appear 'more in the role of an amicus than as a contesting party'. The question whether, in any given case, a coroner has ceased merely to assist the court and become a contestant is no more difficult to resolve than many other questions which arise

when costs are in issue. Moreover, I agree with Brooke LJ (see [50], above) that the earlier practice described by him is much more satisfactory than one which would make it necessary in many cases for the court to ask for the assistance of an amicus. a

[59] While recognising the authoritative status of the views expressed in *Ex p Touche*, I think it would be most unfortunate if they tended to establish a practice, in regard to costs, of treating coroners in the same way as any other litigants. b There is always a residual discretion as to costs. In the present case, I agree that it would be unjust to require the deputy coroner to pay Mrs Davies's costs of the hearing before Moses J ([2003] EWHC 618 (Admin), [2003] All ER (D) 121 (Feb)).

Order accordingly.

Kate O'Hanlon Barrister.

Aaron v Shelton

[2004] EWHC 1162 (QB)

QUEEN'S BENCH DIVISION

JACK J SITTING WITH MASTER CAMPBELL AND GREGORY COX AS ASSESSORS

14 MAY, 24 MAY 2004

Costs – Assessment – Detailed assessment – Conduct of parties – Whether paying party entitled to rely at assessment on conduct of receiving party when conduct in question could have been raised on making of costs order – CPR 44.3, 44.5.

By a consent order made during the trial of an action brought by the claimant against the defendant, the judge dismissed the action and ordered the claimant to pay the defendant's costs on an indemnity basis subject to a detailed assessment if not agreed. At that assessment, the claimant contended that the amounts claimed by the defendant were unreasonable because of certain alleged conduct on the defendant's part. That conduct related to issues which had been at the heart of the action. The costs judge did not allow the claimant to rely on the alleged conduct, holding, *inter alia*, that it should have been raised before the trial judge. The claimant appealed, contending that the paying party could raise the issue of the receiving party's conduct either when the costs order was made or at the stage of assessment. In dealing with that submission, the court considered various provisions of the CPR, including r 44.3(2)^a, which established the general rule that the unsuccessful party would be ordered to pay the costs of the successful party; r 44.3(4)(a), which required the court to have regard to the conduct of all the parties when deciding what costs order to make; r 44.3(6), which set out some of the orders which the court could make under r 44.3; r 44.5(2)^b, which required the court, when deciding the amount of costs, to give effect to any orders which had already been made; and r 44.5(3)(a), which required the court to have regard to the conduct of all the parties when deciding the amount of costs.

Held – Where a party wished to raise in relation to costs a matter concerning the conduct of the opposing party (either before or during the litigation), it was his duty to raise it before the judge making the costs order where it was appropriate to do so, eg where the judge making the costs order was in a position to deal with the matter by reason of his involvement in the case. Thus where a party was faced with the making of an order that he pay the costs of an action because he was the 'unsuccessful party' as referred to in CPR 44.3(2), but he considered that he should not be liable to pay the whole of those costs by reason of the opposing party's conduct and that an order should be made exercising one or more of the court's powers in relation to costs set out in r 44.3(6), he should make an application to that effect to the judge who was considering what orders as to costs should be made, ie to the trial judge in the case of a trial. If he did not do so, it was not open to him when the costs came

^a Rule 44.3, so far as material, is set out at [14], below

^b Rule 44.5 is set out at [16], below

to be assessed to raise the matter under r 44.5(3) as a ground for the reduction of the costs which he would otherwise have to pay. If he was uncertain as to whether a matter which he wished to raise fell within that category, he should raise it with the judge who could then consider whether he should deal with it or specifically direct that the costs judge deal with it on assessment. Where a costs order was made by consent, the paying party could seek to include in the consent order a provision which took account of the matter he wished to raise by providing that he was not to pay the whole of the costs or which specifically referred the matter in question to the costs judge for determination. A paying party who did not protect himself in those ways ran the risk that the costs judge would decide that the matter in question was one which should appropriately have been raised with the judge making the costs order, and which should not be raised before him. The rationale was that it was an abuse of the court's process to raise an issue before the costs judge which was not, but should have been, raised before the judge making the order for payment of costs. There was no conflict with the mandatory provisions of r 44.5(3)(a). By r 44.5(2) the court had to have regard to the order for costs, and that would include the circumstances in which the order had been made. Furthermore, in the operation of r 44.5, as with any other rule, it was the court's duty to avoid the misuse of its process. On the basis of those principles, the claimant in the instant case was not entitled to raise on the assessment the issues of the defendant's alleged conduct. If he had wanted to rely on those matters, he should not have consented to an order for costs in the terms that he did. He should have raised them before the trial judge. The position was even more plain on the particular facts because the issues went to the heart of the claimant's action. Just as it would be an abuse of the court's process to start a second action raising those issues, so it was an abuse to seek to raise them on the assessment of costs. Accordingly, the appeal would be dismissed (see [20]–[22], [24], [25], [28], below).

Notes

For circumstances to be taken into account when exercising court's discretion on costs, orders which the court may make and factors to be taken into account in deciding the amount of costs, see 10 *Halsbury's Laws* (4th edn reissue) paras 17–18, 23.

Cases referred to in judgment

Burrows v Vauxhall Motors Ltd [1998] PIQR P48, CA.

Henderson v Henderson (1843) 3 Hare 100, 67 ER 313, [1843–60] All ER Rep 378, V-C.

Skuse v Granada Television Ltd [1994] 1 WLR 1156.

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, [1975] 2 WLR 690, PC.

Cases referred to in skeleton arguments

CH (family proceedings: court bundles), *Re* [2000] 2 FCR 193.

de Lasala v de Lasala [1979] 2 All ER 1146, [1980] AC 546, [1979] 3 WLR 390, PC.

Lievesley v Gilmore (1866) LR 1 CP 570.

Tigner-Roche & Co v Spiro (1982) 126 SJ 525, CA.

Appeal

- a The claimant, Joseph Aaron, appealed from the decision of Master Simons on 28 October 2003 whereby, on a detailed assessment of the costs of an unsuccessful action brought by Mr Aaron against the defendant, Michael Shelton, he ruled, inter alia, that Mr Aaron could not rely on the alleged conduct of Mr Shelton as grounds for reducing the amount of costs payable to the latter. The facts are set out in the judgment.

Mr Aaron appeared in person.

Rachel Sleeman (instructed by Miles & Reeve, Norwich) for Mr Shelton.

Cur adv vult

24 May 2004. The following judgment was delivered.

JACK J.**INTRODUCTION**

[1] This is an appeal from rulings made by Master Simons on 28 October 2003 in the course of a detailed assessment of costs. It concerns the extent to which a paying party under a costs order can rely on the conduct of the receiving party as a reason for reducing the amount of costs which would otherwise be payable under the order, when that conduct might have been raised at the time the costs order was made.

[2] The assessment of costs is being made in an action which was brought by the appellant, Joseph Aaron, in the Queen's Bench Division against the respondent, Michael Shelton. Both are solicitors. Mr Shelton's firm, Blackman & Blackman had acted for underlessees of premises in Gants Hill, Ilford, Essex. Mr Aaron had contracted with those underlessees for an assignment of the underlease, and had gone into possession. That situation gave rise to six actions between various parties prior to the present action. The first four were in the High Court and were followed by two in the Ilford County Court. In the latter two actions the head-lessors obtained against Mr Aaron, first, an order for possession and rent over four quarters, and second, further rent. In each of the latter the conduct of Mr Aaron was criticised by the judge, and in the second he was ordered to pay costs on an indemnity basis. I take these facts from the judgment of Cresswell J in the present action delivered on 1 December 2000.

[3] In the present action, commenced on 2 December 1997, Mr Aaron relied on three causes of action against Mr Shelton: breach of warranty of authority, abuse of civil proceedings and conspiracy. The gist of the claim as it appears from the statement of claim was that Mr Shelton improperly signed a consent order in the second of the previous actions. That action had been brought by intermediate landlords, Starmex Ltd, against Mr Aaron's assignors, Mr Solomon and Mr Davis, for whom Mr Shelton's firm had acted, and was for forfeiture. The consent order provided for possession to be given. It was later set aside by Sir Peter Pain, acting as a High Court judge, by order of 31 May 1993, and he was critical of how the consent order had come into being. The present action came before Cresswell J for trial on 27 November 2000. On the fourth day of the trial, 30 November 2000, after Mr Aaron and Mr Shelton had given evidence, a document, an attendance note made by Mr Wheldon, the

solicitor acting for Starmex Ltd, was produced by Mr Aaron. The consequences of its production was one of the reasons, perhaps the major reason, why on the next day Mr Aaron consented to his action being dismissed. (Cresswell J referred to the document as 'central and crucial' in para 4 of the matters he referred to the Office for Supervision of Solicitors.) By the order made by consent on 1 December 2000 the action was dismissed, Mr Aaron was to pay Mr Shelton's costs on an indemnity basis subject to a detailed assessment if not agreed, and Mr Aaron was to pay £7,500 on account of costs by 28 December 2000. a

[4] Cresswell J also ordered that a transcript of the proceedings should be sent to the Office for the Supervision of Solicitors, and he invited the office to look into eight aspects of Mr Aaron's conduct in particular. Disciplinary proceedings against Mr Aaron followed, and appear to have been heard in February 2002. I do not have the documents showing the outcome, but it appears that one charge, possibly two, was upheld and that Mr Aaron was criticised in respect of others. b

[5] I have not found it easy to unravel the history of the assessment of costs pursuant to the order of 1 December 2000. It was not until 16 May 2002 that Mr Shelton's solicitors, Merricks, served a bill of costs. It totalled £62,000. On 21 June a default certificate was obtained by Merricks under CPR 47.9(4) because Mr Aaron had not served any points of dispute with 21 days as required by CPR 47.9(2). On 12 August Mr Aaron did serve his points of dispute consisting of three pages. The default certificate was set aside on 10 September. Mr Shelton appealed against that. By order of 17 February 2003 Sir Richard Rougier sitting as a judge of the High Court dismissed the appeal on terms relating to security provided by Mr Aaron. On 7 May 2003 Principal Costs Officer Lambert held that there was an irreducible minimum of £17,500. He referred the assessment to a costs judge because Mr Aaron had raised issues as to conduct. The finding as to the irreducible minimum was the subject of an appeal, which I understand was dismissed by Master Rogers on 2 July 2003. c

[6] Most of Mr Aaron's points of dispute relate to particular items in the bill, but there were first two general points, the first was as follows: d

'D's conduct [CPR 44.5]: (a) although D's (a solicitor) defence denied this, in X-exam D admitted that he had no authority to enter into the consent order; (b) D swore an affidavit to justify the consent order—in X-exam D admitted he had lied in the affidavit—the defence made no admission of the lie; (c) D executed an assignment purportedly on client's behalf—this was a forgery. Such matters went to the issues of abuse of civil process, want of authority, conspiracy. Costs, including D's request for further information, were generally unreasonable incurred by D's conduct and should be disallowed.' e

The second point related to charging rates and is not relevant to this appeal. Mr Aaron attached to his points of dispute 24 pages of transcript of Mr Shelton's cross-examination at the trial. f

[7] Mr Shelton's solicitors filed points of reply dated 18 February 2003. In answer to the first general point it was stated: g

'If the claimant felt that the defendant's conduct throughout the trial warranted any sanction, his counsel should have raised this at the trial h

a when the question of costs fell to be considered. It is too late to argue this issue now and the costs involved would be disproportionate. It is submitted that, had the claimant, during the trial, genuinely believed the defendant's conduct warranted any sanction, he would not have submitted to the consent order on 1 December 2000 dismissing his action with costs on an indemnity basis.'

b As Mr Shelton's conduct relating to the consent order lay at the heart of Mr Aaron's claim and Mr Aaron had submitted to his action being dismissed with indemnity costs, one can understand the concern that Mr Aaron was now seeking on the assessment of costs to re-open the issues relating to that conduct.

c [8] Following a directions hearing before Master Simons on 3 October 2003, Mr Aaron had made a statement dated 8 October 2003 in order to clarify the issues raised by him as to conduct. This had been responded to by Mr Robert Muskath on behalf of Mr Shelton in a statement dated 23 October 2003. In his statement Mr Aaron set out at some length his view of the involvement of
d Mr Shelton in the previous actions and he quoted at length from the judgment of Sir Peter Pain of 21 May 1993. He stated that the suggestion that Mr Shelton had had authority to act for his clients, the assignors, in relation to the consent order was shown to be untrue and misleading. He said that Mr Shelton should have made admissions as to his lack of authority which would have saved time and costs in the action and its trial. He also referred to Mr Shelton having made
e an affidavit dated 9 February 1993 relating to the consent order, in which Mr Shelton had said he had the authority of his clients, Mr Solomon and Mr Davis, to make it. He also referred to an assignment signed by Mr Shelton purportedly on behalf of Mr Solomon and Mr Davis.

f [9] In his statement Mr Aaron also raised two separate matters. One was the preparation on behalf of Mr Shelton of trial bundles. The other was the time taken at the trial discussing the reference to the Office for the Supervision of Solicitors.

g [10] In his statement Mr Muskath stated that Mr Aaron should not be allowed to raise the matter of Mr Shelton's authority, which had been at the heart of a trial, which Mr Aaron had conceded by the consent order that he was going to lose. He took issue with the facts alleged by Mr Aaron. In paras 7 and 8 he sought to demonstrate that the admissions, or concessions, which Mr Shelton made in cross-examination were of no importance.

h [11] I have read the cross-examination of Mr Shelton, on which Mr Aaron relies. Mr Shelton said that he thought his firm had authority to sign the consent order on behalf of Mr Davis and Mr Solomon, the underlessees/assignors, because the firm was told in a letter from Black Graf & Co dated shortly prior to 11 April 1991 that they had agreed. The attendance note which I have mentioned as being produced by Mr Aaron after the conclusion of Mr Shelton's evidence showed that Mr Weldon of Black Graf &
j Co had spoken to Mr Davis on 9 April 1991. This supported the suggestion that Black Graf & Co were correct in saying that at least Mr Davis had agreed. This was at the heart of Mr Aaron's claim against Mr Shelton.

[12] In contrast with that, Mr Shelton accepted in his cross-examination that he should not have said that he had the authority of Mr Solomon and Mr Davis to make the affidavit of 9 February 1993. He also agreed that he should not

have signed the assignment (p 70, lines 54–57, where Mr Aaron’s counsel suggested that ‘no great harm’ was done by it). Those are the second and third matters raised by Mr Aaron in the passage I have quoted from the start of his points of dispute. On p 76 of the transcript the substance of Mr Aaron’s case was put to Mr Shelton by counsel in five questions: he did not accept any of it.

[13] The adjourned detailed assessment came before Master Simons on 28 October 2003. After hearing submissions concerning the points as to conduct which Mr Aaron sought to raise, the master made three rulings. I can summarise them as follows. (1) By seeking to raise issues as to Mr Shelton’s authority on behalf of Mr Davis and Mr Solomon Mr Aaron was seeking to dilute the effect of the costs order to which he had consented. Cresswell J could have been asked by Mr Aaron to determine whether a reduction in costs should be made on account of this, but he was not asked. It would be disproportionate to incur the time and costs that an investigation of these allegations would incur and contrary to the overriding objective of the CPR. He would not allow Mr Aaron to suggest that the amounts claimed on behalf of Mr Shelton were unreasonable by reason of the alleged conduct of Mr Shelton which was relied on. (2) In the light of what Cresswell J and the disciplinary tribunal had said about the trial bundles prepared by Mr Aaron, he would proceed on the basis that Mr Shelton’s solicitors were entitled to make up bundles themselves to use in place of those provided by Mr Aaron. He would not bar Mr Aaron from raising issues as to whether Mr Shelton’s bundles had been made up in a proper manner: I take as examples of that questions as to the inclusion of unnecessary documents and the duplication of documents. (3) He would not hear argument as to the costs of the fifth day of the trial.

[14] It is next necessary to look at the relevant provisions of the CPR. CPR 44(3) is headed ‘Court’s discretion and circumstances to be taken into account when exercising its discretion as to costs’. It covers the making of orders by the court in relation to costs. The relevant provisions are:

‘44.3 (1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

(2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions ...)

(5) The conduct of the parties includes—(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

- a (6) The orders which the court may make under this rule include an order that a party must pay—(a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs
- b from or until a certain date, including a date before the judgment.'

[15] CPR 44.4 is headed 'Basis of assessment' and covers the bases on which costs are to be assessed. It provides that costs will be assessed on the standard basis or the indemnity basis and defines them.

- c [16] CPR 44.5 is headed 'Factors to be taken into account in deciding the amount of costs'. It covers what the court is to have regard to when assessing costs. It provides:

- d '44.5 (1) The court is to have regard to all the circumstances in deciding whether costs were—(a) if it is assessing costs on the standard basis—(i) proportionately and reasonably incurred; or (ii) were proportionate and reasonable in amount, or (b) if it is assessing costs on the indemnity basis—(i) unreasonably incurred; or (ii) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

- e (3) The court must also have regard to—(a) the conduct of all the parties, including in particular—(i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute; (b) the amount or value of any money or property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge
- f and responsibility involved; (f) the time spent on the case; and (g) the place where and the circumstances in which work or any part of it was one.'

(CPR 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

- g [17] By CPR 44.3(4)(a), in deciding what order to make, the court must have regard to the conduct of all the parties, and by para (5)(a) conduct includes conduct before, as well as during, the proceedings. Likewise by CPR 44.5(3) in assessing the amount of costs the court must have regard to conduct before, as well as during, the proceedings. Although it is not relevant to the facts here, it is relevant to the understanding of the rules that in each case the court must
- h have regard to offers to settle. CPR 44.3(6) sets out a number of kinds of order which the court may make which are particularly appropriate to reflect matters of conduct. This indicates that where the conduct relied on is of a kind which it is suggested should result in one of these orders, it will, in the majority of cases at least, be raised before the court making the costs order. For there is no
- j equivalent provision in CPR 44.5.

[18] Mr Aaron submitted that, where a paying party wished to say that the conduct of his opponent was such that he should not receive all the costs he might otherwise be entitled to, the paying party had the opportunity to raise the matter of conduct either at the time when the order for costs was made or at the stage of assessment. He accepted that, if the paying party did raise it

before the court making the order, for example, before a trial judge, and the judge decided not to make any special order on account of it, that was conclusive: but, he said, the paying party need not do so, he may keep silent and make his point on the assessment.

[19] If Mr Aaron's submission was correct, it would mean that, if a party who had lost an action wished to say, for example, that his opponent had wasted a day of the trial by an unnecessarily prolonged cross-examination of a witness, or has contested an issue unsuccessfully, he need not raise it before the trial judge as a matter to be reflected in the order for costs, but could do so before the costs judge on the assessment. The trial judge would, of course, have heard the cross-examination, or would have considered the issue, and would be able to decide the point quickly. In contrast the costs judge would have to instruct himself as to the relevant issues in the action and would then have to read the transcript. He would still not be in the same advantageous position as the trial judge. There is also the possibility that an unscrupulous litigant, knowing that the trial judge would give his point short shrift, might obtain a more favourable hearing from the less-informed costs judge. That might be the case here.

[20] In my judgment, where a party wishes to raise in relation to costs a matter concerning the conduct of his opposing party (either before the litigation or during it), it is his duty to raise it before the judge making the costs order where it is appropriate to do so. One situation where it will be appropriate is where the judge making the costs order is in a position to deal with the matter by reason of his involvement in the case. So I would hold that, where a party faces the making of an order that he pay the costs of an action because he is the 'unsuccessful party' as referred to in CPR 44.3(2), but he considers that he should not be liable to pay the whole of those costs and an order should be made exercising one or more of the court's powers in relation to costs set out in CPR 44.3(6), he should make an application to that effect to the judge who is considering what orders as to costs should be made, that is, the trial judge in the case of a trial. If he does not do so, it is not open to him when the costs come to be assessed to raise the same matter under CPR 44.5(3) as a ground for the reduction of the costs which he would otherwise have to pay. If he is uncertain whether a matter he wishes to raise fails within that category, he should raise the matter before the judge. The judge can then consider whether he should deal with it or specifically direct that it should be considered by the costs judge on assessment. Where a costs order is made by consent, the paying party can seek to include in the consent order a provision which takes account of the matter he wishes to raise by providing that he is not to pay the whole of the costs or which specifically refers the matter in question to the costs judge for determination. Otherwise a party who thinks he has achieved an order which will get him his costs subject to the reasonableness of the amount, may on the assessment face an argument intended to deprive him of what he justifiably thought he had obtained. Where the consent order is made during a trial and by it the paying party, if claimant, abandons his claim, or, if defendant, concedes the claim, the position is particularly clear. A paying party who does not protect himself in these ways, runs the risk that the costs judge will decide that the matter in question was one which it was appropriate to raise before the judge making the costs order, and which should not be raised before him, as happened here.

a [21] The rationale is that it is an abuse of the court's process to raise an issue before the costs judge which was not but should have been raised before the judge making the order for payment of costs. An analogy can be found in the principle that, if a party could properly have raised an issue in proceedings but does not, he will not be permitted to do so subsequently. I refer to *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590, [1975] 2 WLR 690 at 696:

b 'But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of the aspect of *res judicata* is the judgment of Wigram V.-C. in *Henderson v. Henderson* ((1843) 3 Hare 100 at 115, [1843-60] All ER Rep 378 at 381-382), where the judge says: "... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which the parties, exercising reasonable diligence, might have brought forward at the time."

f *Henderson v Henderson* was cited in *Skuse v Granada Television Ltd* [1994] 1 WLR 1156 where on rather special facts arising under the old rules it was held that a party was barred from raising an argument as to costs before a taxing master because it had not been raised before the Court of Appeal, the court which had made the order for costs: see [1994] 1 WLR 1156 at 1162-1164.

g [22] I do not think that there is any conflict here with the mandatory provisions of CPR 44.5(3)(a). For by CPR 44.5(2) the court must have regard to the order for costs, and I would include with that the circumstances in which the order was made. Further, in the operation of CPR 44.5 as with any other rule it is permissible for the court, and the court's duty is, to avoid abuse, that is the misuse, of its process. Nor do I think that there is any conflict with the concept that by the consent order the parties have agreed that the costs should be assessed in accordance with the CPR. The assessment will be carried out in accordance with the CPR as the rules apply to the situation which has arisen. That was an alternative way in which Mr Aaron put his case.

h [23] Mr Aaron referred to *Burrows v Vauxhall Motors Ltd* [1998] PIQR P48. There the Court of Appeal was concerned with two personal injury actions proceeding under the old County Court Rules. It was alleged that the plaintiffs had issued proceedings when it was unnecessary because it was clear that the defendants would settle. In each case the action had settled by the acceptance of a payment into court. In one the acceptance had been within time, and the plaintiff was automatically entitled to his costs to be taxed. In the other the acceptance was out of time and the plaintiff had to come before the court. It was held appropriate that in each case the plaintiff's unreasonable conduct

should be reflected in the costs recovered. In the first case the opportunity only arose on taxation and it was held that the rules gave the power on taxation to effect that. Plainly in similar circumstances today the court would have power under CPR 44.5. There could be no question of any misuse of the court's procedure because no prior opportunity would have arisen for the conduct in question to be raised. a

[24] On the basis of the principles which I have set out Mr Aaron is not here entitled to raise on the assessment the issues of Mr Shelton's conduct which he refers to in his points of dispute. If he wanted to rely on these matters, he should not have consented to an order for costs in the terms which he did. He should have raised them before Cresswell J. b

[25] On the particular facts, however, the position is even more plain. For, as I have set out, the issues which Mr Aaron seeks to raise as to conduct were at the heart of his action. He consented to the dismissal of that action. Just as it would be an abuse of the court's process to start a second action raising those issues, so is it an abuse to seek to raise them on the assessment of costs. Although I have thought it right to deal with the matter of general principle, which is how it was approached in Mr Aaron's submissions, this provides a short and clear ground on which the first ruling of Master Simons should be upheld. c
d

[26] The second ruling related to the production of trial bundles by Mr Shelton. This point can be dealt with much more shortly. The seventh of the matters referred to the Office for Supervision of Solicitors by Cresswell J was: e

'Mr Aaron's approach to compliance with the court order of 5.5.2000 in this action as to the preparation of documents for trial as reflected in the witness statement of Catherine Hudson dated 27.11.2000 and the exhibits thereto.' f

In the course of submissions before him Master Simons quoted from para 217 of the finding of the disciplinary tribunal:

'The respondent has demonstrated a high degree of negligence in the preparation of the trial bundles. Again he created a shambles and the effect was grotesque. The tribunal were deeply troubled by what the perception of a member of the public would be if he had learned of the considerable deficiencies in the preparation of the respondent's papers and the very considerable waste of court time which ensued.' g
h

In the light of these passages the master was entitled to conclude that the trial bundles prepared by Mr Aaron were so inadequate that it was reasonable for Mr Shelton's advisers to prepare bundles themselves. The master would have been wholly wrong in the light of this material to embark on an investigation of the adequacy of the bundles prepared by Mr Aaron. j

[27] Lastly, there is the matter of the last day of trial. When I referred Mr Aaron to the fact that this had been raised before Cresswell J and that Cresswell J had dealt with it saying that the costs should be included among those to be paid by Mr Aaron, Mr Aaron abandoned the point. Although I had not then located a copy of the order made on 1 December 2000, I found one

a subsequently: it expressly includes the costs of 1 December. It is astounding that the point was raised.

[28] For these reasons the appeal is dismissed. It is to be hoped that the assessment of these costs, which were ordered to be paid three-and-a-half years ago, will now be completed.

b Appeal dismissed.

Aaron Turpin Barrister.

Kataria v Essex Strategic Health Authority

[2004] EWHC 641 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

STANLEY BURNTON J

9 MARCH, 1 APRIL 2004

Medicine – Medical practitioner – National Health Service – National disqualification – Review of disqualification – Family Health Services Appeal Authority Tribunal – Scope of powers – National Health Service Act 1977, s 49N(7), (8).

Pursuant to s 49F of the National Health Service Act 1977 the respondent health authority determined to remove the appellant medical practitioner from a list of medical practitioners undertaking to provide general medical services on the ground that his continued inclusion in the list would be prejudicial to the efficiency of the services which those included in the list undertook to provide. In 1996, the NHS Tribunal (NHS tribunal), the predecessor of the Family Health Services Appeal Authority Tribunal (the tribunal), imposed a national disqualification on the appellant which precluded him from working within the National Health Service. In accordance with s 49N(7) and (8)^a of the 1977 Act the appellant requested a review of his disqualification by the tribunal. Those subsections provided that the tribunal might at the request of the person on whom it had been imposed review a national disqualification, and on a review might confirm or revoke it providing such a request was not made before the end of a period of two years beginning with the date on which the national disqualification was imposed or one year beginning with the date of the decision on the previous review. At the hearing, the appellant submitted that the tribunal was entitled to reconsider the decision of the previous tribunal. The tribunal decided that it was restricted to a consideration of whether the appellant had established that his conduct since the previous decision justified the revocation of his national disqualification and if his re-inclusion would not be prejudicial to the efficiency of the NHS services. Thereafter, the tribunal heard evidence that the appellant had worked as a locum, through an agency, at a number of military bases without disclosing his disqualification. It also considered the *Good Medical Practice* booklet, produced by the General Medical Council (GMC), which made it clear that doctors were not to omit relevant information and concluded that the appellant had continued to be economical with the truth and to conceal his status. It therefore upheld the disqualification. The appellant appealed. He contended, inter alia, that the tribunal had erred in law: (i) in misconceiving its function: (ii) in imposing the burden of proof on him; and (iii) in seeking to enforce a general ethical standard in respect of medical practitioners which was a matter reserved for the GMC.

Held – (1) When conducting a review under s 49N of the 1977 Act, it was not the function of the tribunal to investigate whether the procedures of the earlier

^a Section 49N, so far as material, is set out at [5], below

a tribunal were flawed or its findings of fact correct. Rather the tribunal was restricted to confirming or revoking the national disqualification. If the object of a review was to reconsider the correctness of the first tribunal's decision, it was difficult to explain why a review could not be requested before the minimum time periods laid down in s 49N(8). Practical considerations pointed to the same conclusion. If, on a review, a practitioner could contend that the first tribunal was wrong to have accepted the disputed evidence of an adverse witness. A second tribunal could only deal with the case by rehearing the evidence. That might occur long after the original decision, when the adverse witness' memory had faded or where he was no longer available. There was also a public interest in finality that a reconsideration of the evidence would not accommodate. In addition there was no machinery to prevent multiple requests for the reconsideration of the original tribunal decision other than the minimum periods before a new request for a review could be made. Parliament could not have intended to allow repeated reconsiderations and rehearings of the matters that led to the original disqualification. Furthermore, it would be most unfortunate if a subsequent tribunal of equal standing to the first tribunal were required to hear and rule on contentions that the first tribunal's procedure had been unfair, that its discretions had been exercised unreasonably, that its proceedings had been irregular, or that any of its findings of fact or its decision was incorrect. It was also significant that there was a right to appeal from the decisions of the tribunal to the High Court on points of law. It followed that the tribunal had not misconceived its function (see [24]–[28], [37], below).

e (2) The onus was on the practitioner to establish that the disqualification should be revoked since it was he who made the request for a review and but for that request the disqualification would continue to have effect. If he were to put no evidence or material before the tribunal, his request would have to be rejected. However, the respondent to the request would bear the onus of proving any facts it asserted, such as any alleged misconduct of the practitioner since the date of his disqualification. It did not follow, however, that the reviewing tribunal could not or should not receive evidence as to the circumstances in which a practitioner came to do that which the earlier tribunal had found he had done. A practitioner might wish to adduce evidence that he had suffered from depression at the time of the defaults that had led to his disqualification, had received treatment, and had recovered (see [41], [44], below).

g (3) The tribunal was entitled to take into account a want of probity found by it on the part of the practitioner in determining whether his inclusion in the list would be prejudicial to the efficiency of the NHS. Fellow practitioners and other NHS staff and patients had to be able to rely on the integrity of doctors and the honesty of their statements. The fact that his want of probity might also be relevant to the GMC did not exclude it from consideration by the tribunal (see [69], below).

h (4) In the instant case, the tribunal's decision could not be impugned and accordingly the appeal would be dismissed (see [79], below).

j
Notes

For national disqualification, see Supp to 33 *Halsbury's Laws* (4th edn reissue) para 373A.

For the National Health Service Act 1977, s 49N see, 30 *Halsbury's Statutes* (4th edn) (2001 Reissue) 499.

Cases referred to in judgment

Chaudhury v General Medical Council [2002] UKPC 41, [2002] All ER (D) 299 (Jul).
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Diennet v France (1996) 21 EHRR 554, [1995] ECHR 18160/91, ECt HR.

Hanlon v Law Society [1980] 2 All ER 199, [1981] AC 124, [1980] 2 WLR 756, HL.

Hossain v General Medical Council [2001] UKPC 40, 65 BMLR 1.

Madan v General Medical Council [2001] EWHC Admin 577, [2001] Lloyd's Rep Med 539, DC.

Medicaments and Related Classes of Goods (No 2), Re [2001] ICR 564, [2001] 1 WLR 700, CA.

Porter v Magill, Weeks v Magill [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.

R v Crown Court at Wolverhampton, ex p Crofts [1982] 3 All ER 702, [1983] 1 WLR 204, DC.

R v Lyons [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.

R (on the application of Holmes) v General Medical Council [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul).

R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board [2003] EWCA Civ 842, [2004] QB 310, [2004] 2 WLR 98.

Rohatgi v Medical Tribunal of New South Wales (20 April 1994, unreported), NSW CA.

Appeal

Dr Kewel Kataria appealed, pursuant to s 11 of the Tribunal and Inquiries Act 1992, from the decision of the Family Health Services Appeal Authority Tribunal, dated 30 July 2003, dismissing his application under s 49N(7) of the National Health Services Act 1977 for the review of his national disqualification imposed by the National Health Service Tribunal on 25 November 1996. The facts are set out in the judgment.

Charles Foster (instructed by *Hempsons*) for Dr Kataria.

Angus Moon (instructed by *Clyde & Co*) for the health authority.

Cur adv vult

1 April 2004. The following judgment was delivered.

STANLEY BURNTON J.

INTRODUCTION

[1] This is a statutory appeal by Dr Kewel Kataria against the decision of the Family Health Services Appeal Authority (the FHSAA) dated 30 July 2003 dismissing his application under s 49N(7) of the National Health Service Act 1977 for the review of his national disqualification imposed by the National Health Service Tribunal (the NHS Tribunal) on 25 November 1996. I was told that this is the first appeal from the FHSAA to the High Court in respect of a decision on a review under that subsection.

THE NHS TRIBUNAL'S DECISION

a [2] Dr Kataria's national disqualification had resulted from a complaint that he had 'repeatedly failed to put himself in a position to reach an informed view as to the personal medical services which are appropriate to his patients'. The NHS Tribunal's conclusions were as follows:

b 'First, in relation to (three named patients) there has been amply
c demonstrated a consistent disregard of patients' complaints and of
patients' care. Second, in his reaction to criticism the respondent has, by
his attacks on those who made or were associated with complaints against
him, gone beyond temporary and understandable loss of control. His
conduct, as we find it proved, exactly corroborates the assessment of his
former receptionist that his attitude to staff and patients was arrogant and
lacking in sympathy for their needs and views. Third, we were concerned
about the unreliability of [Dr Kataria's] evidence. This could not be
explained merely by lack of memory. As we have indicated earlier in this
report, we have been driven to reject a great deal of his evidence on crucial
points. Our conclusion is that the respondent has been prepared
intentionally to alter his evidence in what he perceives to be in his best
interests in the tribunal before which he appears. It was represented on his
behalf that he has learnt his lesson, regrets his outbursts and has improved
his systems: that he now takes part in an effective rota scheme, and that he
has improved his record keeping. Nevertheless, his evidence, containing
as it did evasions and unacceptable denials to which we have referred,
failed to persuade us of a really genuine change of attitude. We therefore
conclude that the continued inclusion of [Dr Kataria's] name in the
complainant's list of medical practitioners undertaking to provide general
medical services would be prejudicial to the efficiency of the services in
question ...'

THE STATUTORY FRAMEWORK

(a) *Primary legislation*

g [3] The provisions relating to the disqualification of medical practitioners from working within the NHS are ss 49F and following of the 1977 Act. The provisions in question in this appeal were inserted into the 1977 Act by the Health and Social Care Act 2001, which received the Royal Assent on 11 May 2001 and was brought into force in England by regulation on 22 November 2001. I shall refer to the 1977 Act as so amended as 'the Act'.

h [4] Section 49F authorises (and in prescribed circumstances requires) a primary care trust or health authority to remove a person from a list of medical practitioners undertaking to provide general medical services if 'the continued inclusion of the person concerned in the list would be prejudicial to the efficiency of the services which those included in the list undertake to provide'.

j A medical practitioner may appeal to the FHSAA against a decision of a primary care trust or health authority under s 49F. Despite its name, the FHSAA is an independent tribunal, the president and members of which are appointed by the Lord Chancellor. Section 49M(3) provides that 'The appeal shall be by way of redetermination of the decision of the Primary Care Trust or of the Health Authority'.

[5] Section 49N provides that if the FHSAA removes a practitioner from a list, it may also decide to disqualify him from inclusion in, among others, all lists referred to in s 49F(1)(a)–(e) prepared by all primary care trusts and all health authorities. Such a decision by the FHSAA is referred to as ‘the imposition of a national disqualification’. A national disqualification precludes a practitioner from working within the NHS. Section 49N(7) and (8) are as follows:

‘(7) The FHSAA may at the request of the person on whom it has been imposed review a national disqualification, and on a review may confirm it or revoke it.

(8) Subject to subsection (9), the person may not request such a review before the end of the period of—(a) two years beginning with the date on which the national disqualification was imposed, or (b) one year beginning with the date of the FHSAA’s decision on the last such review.’

Subsection (9) empowers the Secretary of State to vary the periods of two years and one year referred to in sub-s (8).

(b) *Delegated legislation: the Abolition of the NHS Tribunal (Consequential Provisions) Regulations 2001*

[6] By virtue of reg 4(1) of the Abolition of the NHS Tribunal (Consequential Provisions) Regulations 2001, SI 2001/3744 (the Abolition Regulations), Dr Kataria was to be treated as having had a national disqualification imposed on him by the FHSAA. Regulation 4(2) tracks s 49(N)(8) of the Act:

‘Where a person is treated as having had a national disqualification imposed on him by the FHSAA in accordance with paragraph (1)—(a) where no review decision has been made he may request a review by the FHSAA under section 49N(8)(a) of the 1977 Act not less than two years after—(i) the date on which a national disqualification decision was made, where that decision has not been appealed, or (ii) the date on which a national disqualification was upheld by a court, whichever is the later; or (b) where he has had a review decision, he may request a review by the FHSAA under section 49N(8)(a) of the 1977 Act not less than one year after the date of that review decision, and thereafter, subject to paragraph (3), section 49N(8)(b) shall apply in his case.’

[7] Regulation 4(3) is as follows:

‘Where the FHSAA states that it is of the opinion that there is a need for an immediate review because—(a) a criminal conviction considered by the Tribunal in reaching its decision has been quashed or the penalty has been reduced on appeal, or (b) the decision of a professional, licensing or regulatory body has been quashed or the penalty has been reduced on appeal, the period specified in paragraph (2) which applies before a review may be undertaken shall be reduced to the period that has already elapsed.’

- a (c) *Delegated legislation: the Family Health Services Appeal Authority (Procedure) Rules 2001*

b [8] These rules (Family Health Services Appeal Authority (Procedure) Rules 2001, SI 2001/3750) (the FHSAA rules) are expressed to apply to specified appeals (see the definitions of 'an FHS regulations appeal' and 'FHS Regulations' in r 2(1)) and applications (see r 2(2)) to the FHSAA. Although applications or requests under s 49N(7) of the Act are not included in the lists of procedures to which the FHSAA rules apply, it was submitted on behalf of Dr Kataria that this was an accidental omission, and that the FHSAA rules should be interpreted as applying to such applications, which would otherwise not be the subject of any statutory rules.

- c [9] Regulation 43 of the FHSAA rules is as follows:

d '(1) Subject to the following paragraphs, if, on the application of a party or of its own motion, a panel is satisfied that—(a) its decision was wrongly made as a result of an error made by the panel; (b) a party, who was entitled to be heard at a hearing but failed to appear or be represented, had good and sufficient reason for failing to appear; (c) new evidence has become available since the conclusion of the hearing to which the decision relates the existence of which could not have been reasonably known of or foreseen; or (d) the interests of justice require, the panel may review and, by certificate under the Chairman's hand, set aside or vary the decision of the panel in question.

e (2) An application by a party for the purposes of paragraph (1) shall be made to the FHSAA not later than fourteen days after the date on which the decision was sent to the parties in accordance with rule 42 and shall be in writing, stating the grounds in full.

f (3) The parties shall have an opportunity to be heard on any application for review under this rule and the review shall, subject to rule 45, be determined by the panel which decided the case.

(4) Where for any reason it is not practicable for the review to be carried out by the same panel, the President shall allocate the matter to another panel.

g (5) If, having reviewed the decision, the decision is set aside, the panel shall substitute such decision as it thinks fit or order a rehearing before it.

(6) The certificate of the Chairman as to the setting aside or variation of a panel's decision under this rule shall be sent to the President who shall ensure that such correction as may be necessary is made in the register and that a copy of the entry so corrected is sent to each of the parties.

h (7) Where a decision is reviewed the FHSAA shall serve a copy of that revised decision on the parties as soon as practicable thereafter.

(8) Where a copy of the original decision has already been sent to any person or body referred to in rule 47, the President shall ensure that the person or body in question is notified immediately of the revised decision.'

j

THE DECISION OF THE FHSAA

[10] It was submitted to the FHSAA on behalf of Dr Kataria that it was entitled to review, ie to reconsider, the decision of the NHS Tribunal. I shall refer to the scope of the review he sought below. The FHSAA decided that it could not do so: it had to accept the decision of the NHS Tribunal as a given,

and to consider whether Dr Kataria had established that his conduct since its decision justified the revocation of his national disqualification. The chairman displayed a strong reluctance to hear the submissions of Mr Foster, who appeared then, as he did before me, on behalf of Dr Kataria. The conduct of the chairman is alleged to have given rise to an appearance of bias, or demonstrated actual bias, namely that she had prejudged or appeared to have prejudged his case, and it is alleged that she gave the appearance that she would not consider his case on the merits impartially and fairly. a
b

[11] The second preliminary matter determined by the FHSAA was whether to admit at the instance of Essex Strategic Health Authority written statements of a number of witnesses who were not available for cross-examination. The FHSAA decided to do so.

[12] The FHSAA determined that their— c

‘remit was to assess whether on the balance of probabilities Dr Kataria’s conduct and actions since the original tribunal’s decision justified the revocation of his national disqualification and his re-inclusion in the list would not be prejudicial to the efficiency of NHS services.’ d

He had worked in Scotland as a NHS GP locum in July and August 2001 in breach of his national disqualification. He told the FHSAA that he had been advised, following his disqualification by the NHS Tribunal, that his national disqualification did not apply in Scotland. The FHSAA did not expressly reject Dr Kataria’s evidence on this point, but it is implicit in para D2 of their decision that they did so, having regard to the improbability of Dr Kataria’s legal advisers incorrectly advising and his inability to produce any written confirmational note of the alleged advice. Paragraph D3 of the decision is as follows: e

‘Even if we gave Dr Kataria the benefit of the doubt and accepted he was genuinely under the impression his disqualification did not extend to Scotland, this would not have affected our decision as there were other factors as mentioned below to take into account.’ f

[13] Between August 2001 and October 2002, Dr Kataria had worked as a locum, principally through an agency called C&B Locums Ltd, at a number of military bases. He had not disclosed his disqualification to the locum agency or to those for whom he worked. None of the employments were within the NHS, and he had not been questioned about his status. The FHSAA concluded that Dr Kataria should have disclosed the disqualification. They stated, in para D4: g
h

‘However, whilst we understood why Dr Kataria might not wish to volunteer this information, we considered good practice dictates that Dr Kataria should have disclosed the disqualification and we agreed with the submissions of counsel for [Essex Strategic Health Authority] that Dr Kataria had put his own interests first, that a doctor’s moral conduct should not need prompting by others and that it was essential that public confidence in the professions be maintained. Dr Kataria must have known that if he revealed his status there was every chance the locum agency and his employers would not have taken him on. This was borne out by the witness statements of Wing Commander Schofield, Paul Booth and j

a Margaret Hanlon. The GMC [General Medical Council] *Good Medical Practice* booklet makes it clear that doctors must not write or sign documents which are false and misleading because they omit relevant information and yet we felt Dr Kataria did precisely that when he prepared and submitted his CV to the locum agency and he continued to be economical with the truth and to conceal his status in September or
b October 2002 when the locum agency advised him he would need to join the supplementary list if he still wished to be considered by the armed forces. We did not accept his counsel's submission that the heading of the relevant paragraph in the GMC booklet meant this duty did not extend to his CV.'

c [14] In para D5, the FHSAA considered the fact that Dr Kataria had not undertaken any courses for the purposes of Continuing Professional Development (CPD). In evidence he had said that he had kept up to date by reading magazines such as the British Medical Journal (BMJ) and had had case discussions with his colleagues once or twice a week while he was working for
d the Armed Forces. The FHSAA stated:

'In our opinion, merely to read magazines and journals such as the BMJ and to attend case discussions with his colleagues once or twice a week when he worked for the Armed Forces did not constitute adequate CPD.
e Dr Kataria had not worked within the NHS for almost seven years and his priority should have been to ensure he complied with the GMC requirement for practitioners to keep their professional knowledge and up to date and to provide evidence that he had attempted to address some of the concerns that had been raised in 1996 ... We appreciated Dr Kataria might have been financially constrained from attending some courses, but
f we considered that at the very least he should have contacted his local post-graduate centre at an early opportunity to discuss how he could best maintain his CPD in the light of his particular circumstances ... Dr Kataria told us he had planned to attend some courses but he had been ill since October 2002; now he had recovered he planned to attend some.
g However, we noted he had done nothing since 1996 and we were concerned he was simply telling us what he thought we wanted to hear rather than what he actually intended to do.'

[15] In para D6 the FHSAA referred to Dr Kataria's lack of computer skills.
h They said:

'We also noted that whilst there were no official complaints relating to Dr Kataria's clinical competence there were some complaints about his lack of computer skills and the locum agency had told him to become computer-literate as he had experienced difficulties in the first couple of
j posts it had placed him in. To address this problem Dr Kataria told us he had learned with a computer at a friend's practice and a receptionist had helped him for a couple of days at one job. Again, we felt that this was not good enough; if Dr Kataria was serious about addressing his shortcomings and wanted to show his re-inclusion in the list would not be prejudicial to services, he should have arranged to obtain proper tuition or to attend a

course to remedy this problem and ensure he was sufficiently computer-literate.’

[16] The FHSAA commented on Dr Kataria’s lack of any positive references or testimonials since 1996. They concluded:

‘9. Our prime concern was that we did not consider there had been any robust documented or oral evidence to show Dr Kataria had moved on since 1996 and taken real steps to demonstrate he had learned from his mistakes and addressed his shortcomings with a view to having his national disqualification revoked. We hope that he will take note of our observations and take steps to address our concerns to improve his future chances of having his disqualification revoked should he wish to reapply for a review in the future.’

E. Conclusion

For all the above reasons we confirm [Dr Kataria’s] removal from all lists as ordered by the NHS Tribunal of 25 November 1996.’

[17] Finally, under the heading ‘Appeal’ the FHSAA stated:

‘Finally, in accordance with r 42(5) of the Family Health Services Appeal Authority (Procedure) Rules 2001, we hereby notify [Dr Kataria] that he may have rights relating to appeals under s 11 of the Tribunals and Inquiries Act 1992.’

Plainly, the FHSAA considered that the FHSAA rules applied to its procedure: see too the directions issued by the chairman enclosed with her PA’s letter of 28 February 2003, expressed to be pursuant to r 32(1) of the FHSAA rules. On the other hand, according to the skeleton argument for Dr Kataria before the FHSAA, it had confirmed in correspondence with his solicitors that ‘the legislation is silent as to the procedure to be followed in such a case’.

THE GROUNDS OF APPEAL TO THIS COURT

[18] There are numerous grounds of appeal. They are: (i) the FHSAA erred in law in misconceiving its function and refusing to reconsider the correctness of the decision or of the findings of the NHS Tribunal. (ii) The FHSAA was biased or created a reasonable apprehension of bias in expressing a predetermined view as to the scope of its review and in admitting into evidence written witness statements adduced on behalf of Essex Strategic Health Authority. The FHSAA thereby deprived Dr Kataria of his right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and at common law. (iii) The FHSAA had erred in finding that Dr Kataria had ‘continued to be economical with the truth’ and to conceal his disqualification in circumstances where it had not been part of Essex Strategic Health Authority’s case or suggested to Dr Kataria that he had engaged in deliberately deceptive conduct concerning his status. (iv) The FHSAA had erred in law in finding that the conduct of Dr Kataria in failing to disclose his disqualification contravened the GMC publication *Good Medical Practice*, which had been published only subsequently. (v) The FHSAA erred in law in seeking to enforce a general ethical standard in respect of medical practitioners, a matter which is appropriately reserved to the

- a GMC. (vi) The FHSAA had failed to take into account the fact that the adverse clinical findings of the NHS Tribunal had been considered by the Preliminary Proceedings Committee of the GMC, which had decided to take no further action in relation to them. (vii) In finding that Dr Kataria did not genuinely believe that his disqualification did not extend to Scotland, the FHSAA erred in law in that its finding was perverse. (viii) The FHSAA erred in law in failing to consider the proportionality of a continuing national disqualification order or the consequences for him and his family of the continuation of that order. (ix) The FHSAA failed to provide adequate reasons for finding that the removal of the national disqualification order would be prejudicial to NHS services.
- b

THE SCOPE OF THE FHSAA'S REVIEW

- c [19] In opening Dr Kataria's appeal, Mr Foster initially stated that the FHSAA's error had been to preclude Dr Kataria from explaining his lack of candour found by the NHS Tribunal and from giving evidence of his difficult personal circumstances at the time. He did not submit that the NHS Tribunal's decision was wrong; he submitted that Dr Kataria should have been permitted
- d to give evidence of the reasons he had given a negative impression to the NHS Tribunal. That exposition understated the submission made to the FHSAA, and indeed the submission made in his skeleton argument. Mr Foster subsequently submitted that the FHSAA could have reconsidered the findings of fact made by the NHS Tribunal, and considered whether it should accept the evidence given to the NHS Tribunal. He gave as an example of a case calling
- e for such a review one in which a witness who had given evidence of sexual impropriety by a practitioner subsequently admits having lied.
- [20] Mr Foster's original skeleton before the FHSAA stated that Dr Kataria did not seek to question the findings of fact made by the NHS Tribunal. However, in his supplementary skeleton argument before the FHSAA, he
- f submitted that 'the review encompasses a reconsideration of the correctness of the original decision'. Paragraph 6.1 stated:

'... there were significant procedural and substantive irregularities in the original hearing. The Appeal Authority must exclude from its consideration those factors upon which the original Tribunal wrongly relied, and must take into account legal and factual developments since the original hearing.'

g

- [21] One of the arguments put forward on behalf of Dr Kataria was that the NHS Tribunal had infringed his rights under art 6 of the convention and that
- h 'the Tribunal may have adopted procedures which would not be acceptable under present standards'. In his oral submissions, he contended that the NHS Tribunal had failed to accord Dr Kataria a fair hearing and made improper findings of dishonesty against him.

- [22] Mr Moon submitted that the FHSAA had correctly determined its
- j function on a review under s 49N(7).

[23] The word 'review', of itself, gives no relevant guidance as to the scope of inquiry by the FHSAA. Where a decision is to be reviewed, the reviewing body will normally examine the lawfulness of the decision in question, as in the expression 'judicial review' or whether that decision is safe or well-founded, as in the title of the Criminal Cases Review Commission. CPR 52.11 begins:

'Every appeal will be limited to a review of the decision of the lower court ...' Where a second tribunal rehears or otherwise considers the evidence before a first tribunal and makes its own findings of fact, the rehearing is normally termed an appeal rather than a review, as in s 49M(2) of the Act. a

[24] However, as Mr Moon pointed out, s 49N(7) refers not to a review of an earlier tribunal's decision, but to a review of a national disqualification, which may be confirmed or revoked. Confirmation has the effect of continuing the disqualification in force for the future; revocation brings it to an end. The distinction between the review of a decision and the review of a disqualification is significant, and as appears from sub-s (8) designedly so. If the object of a review is to reconsider the correctness of the first tribunal's decision, it is difficult to explain why sub-s (8) imposes a minimum time before a person may request a review. If a witness recants, why should there not be an immediate review of the first tribunal decision? However, the requirement of a minimum period before a disqualification may be reviewed is wholly explicable if the object of a review under sub-s (7) is to consider whether the disqualification should continue or be terminated. b
c

[25] Practical considerations point to the same conclusion. If Mr Foster's submission were correct, on a review a practitioner could contend that the first tribunal was wrong to have accepted the disputed evidence of an adverse witness. It is difficult to see how the second tribunal could deal with the case other than by rehearing the evidence. That might occur long after the original decision, when the adverse witness was no longer available. Even if the witness were available he would be troubled again and have to give evidence about matters that had been decided, and where his memory would have faded. There is a public interest in finality that Mr Foster's submission does not accommodate. d
e

[26] In addition, there is no machinery to prevent multiple requests for the reconsideration of the original tribunal decision, other than the minimum period under s 49N(8) or (9) before a new request for a review may be made. It is difficult to believe that Parliament could have intended to allow repeated reconsiderations and rehearings of the matters that led to the original disqualification. f

[27] Furthermore, any such procedure is effectively an appeal, rather than a review of the order made by the first tribunal, and moreover to the same tribunal or to a tribunal of equal standing. Appeals to tribunals or courts of equal standing to the tribunal or court responsible for the original decision are rare, if known at all. It would be most unfortunate if a subsequent tribunal of equal standing to the first tribunal were required to hear and to rule on contentions that the first tribunal procedure had been unfair, that its discretions had been exercised unreasonably (eg that an adjournment should have been granted), that its proceedings had been irregular, or that any of its findings of fact or its decision was incorrect. It is most unlikely that Parliament intended this. g
h

[28] It is significant that there was a right to appeal from decisions of the NHS Tribunal to the High Court on points of law, which would include contentions of bias on the part of the NHS Tribunal and contentions that the findings of fact or the decision of the NHS Tribunal were perverse or wholly unsupported by the evidence before it. As is obvious, there is such a right of appeal from a decision of the FHSAA. In addition, if a witness admitted to lying j

a to these tribunals, its decision, if based on his evidence, could be the subject of judicial review and quashed: see *R v Crown Court at Wolverhampton, ex p Crofts* [1982] 3 All ER 702, [1983] 1 WLR 204. I see therefore no need to give a broad and unlikely interpretation to s 49N(7).

b [29] Apart from authority, therefore, I should unhesitatingly reject Mr Föster's submission. I turn to consider whether authority, or the terms of the Abolition Regulations or the FHSAA rules, require me to decide otherwise.

c [30] Mr Foster relied upon the decision of the New South Wales Court of Appeal in *Rohatgi v Medical Tribunal of New South Wales* (20 April 1994, unreported), in which it held that the power of a tribunal to review a deregistration or erasure order imposed upon a medical practitioner did entitle it to reconsider the findings of an earlier medical tribunal upon the basis of the evidence and material placed before it. A decision of that court commands respect, and is of persuasive authority. Mahoney AP gave the only judgment, with which the other members of the court agreed. He said:

d 'The submissions for Dr Rohatgi suggested, I think, that if there was a duty upon the tribunal to review, that duty must involve a reconsideration of the original findings and orders. It followed, on this view, that Dr Rohatgi had the right, and the tribunal had the correlative duty, to undertake a reconsideration de novo of those findings and orders. I do not think that that is the effect of the legislation. In my opinion, the meaning of review lies between the two extremes to which I have earlier referred.

e It is for the tribunal to determine what the material placed before it warrants to be done, ie, what course of action should be followed. Thus, a mere claim for reconsideration of otherwise apparently reasonable findings and orders could be held by the tribunal to involve no more than a consideration of the terms of the findings and orders on their face. A

f claim for reconsideration supported by a credible retraction by a crucial witness in the original proceedings might well require or warrant that the tribunal do more. There is, no doubt, a minimum below which it may not descend: the nature of a review may require at least a consideration of the position in the manner to which I have referred. But beyond this it is, I

g think, a matter for the Tribunal to determine acting within proper limits, what is required in order to discharge its obligation to review. In one case it may feel it appropriate to consider the findings of fact de novo; in another case it may not. No error of law would be involved merely by deciding the matter one way or the other.'

h [31] On this basis the FHSAA has a discretion as to the scope of its review. I confess that I have difficulty in seeing how this would work satisfactorily in practice. The judgment in *Rohatgi's* case would seem to envisage that a second tribunal might refuse to consider an arguable claim that an earlier tribunal had come to an incorrect finding of fact; but that in similar circumstances a second

j tribunal could exercise its discretion to the opposite effect. A discretion as to the scope of review would be an unusual, if not unique, discretion in English law. I also find some of the reasoning of the Court of Appeal difficult. In particular, Mahoney AP distinguished between courts, to the decisions of which the principle of finality applies, and the tribunal in question in that case, which he stated was 'in concept, an administrative body which makes findings

of fact and on the basis of those findings it does administrative acts'. A tribunal such as the FHSA or the NHS Tribunal is not an administrative body: it is a tribunal independent of the executive (and in this sense of the administration) adjudicating on the rights of the citizen. I do not think that the distinction between tribunals and the courts justifies me in reaching a different conclusion from that I would otherwise reach on the basis of the provisions of the Act. I do not think that I should follow *Rohatgi's* case.

[32] Mr Foster submitted that reg 4(3) of the Abolition Regulations shows that a review includes a reconsideration of the original decision. I agree that it points in that direction. However, it is restricted in application, and applies only where something has occurred after the tribunal's decision. It is not sufficient to cause me to arrive at a generally unreasonable construction.

[33] Furthermore, it is questionable whether and to what extent the Abolition Regulations are relevant to the interpretation of the Act. In general, subordinate legislation is not a guide to the interpretation of primary legislation. The law is helpfully summarised in the speech of Lord Lowry in *Hanlon v Law Society* [1980] 2 All ER 199 at 218, [1981] AC 124 at 193–194:

'A study of the cases and of the leading textbooks ... appears to me to warrant the formulation of the following propositions: (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous. (2) Regulations made under the Act provide a parliamentary or administrative contemporanea expositio of the Act but do not decide or control its meaning; to allow this would be to substitute the rule making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires. (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation. (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former. (5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify. (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act.'

[34] I do not think that the Act is ambiguous. As to its amendment, s 49N(9) confers power to vary the period specified in sub-s (8), but not to vary the content of a review. I do not know whether the Abolition Regulations were prepared contemporaneously with the Act: the Act received the Royal Assent on 11 May 2001, but must have been drafted at an earlier date. The Abolition Regulations were made on 22 November 2001. Those dates suggest that the Abolition Regulations were not contemporaneously prepared.

[35] The comments in the previous paragraph apply equally to the FHSA rules. In their case, however, there is the added difficulty that they are not expressed to apply to a request under s 49N of the Act. To decide that they do apply and to use them as an aid to construction in order to depart from what I consider to be the natural meaning of that section is to use uncertainty to apply a guide to resolve what is clear. I am far from clear that I should do so. Their

a application involves reading in words that are not present in the FHSAA rules. I am invited to have regard to the explanatory note to the FHSAA rules, as did Clarke LJ in *R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board* [2003] EWCA Civ 842 at [49], [2004] QB 310 at [49], [2004] 2 WLR 98. However, the explanatory note does not indicate that the FHSAA rules apply to a request under s 49N for a review. The obvious place to include
b such a request is in Pt III of the FHSAA rules, as to which the note states that ‘it makes provision in respect of three kinds of applications (defined in rule 2(2))’. A request under s 49N is not one of those kinds of application. The material relied upon as showing that it was intended to include a request under s 49N in the FHSAA rules is far less powerful and specific than in the *Confederation of Passenger Transport UK* case: it is only that there is no other provision made for
c the FHSAA’s procedure on a s 49N review.

[36] On the basis that the FHSAA rules are applicable, Mr Foster submitted that the provisions of r 43 of the FHSAA rules shows that Parliament used the word ‘review’ in the 2001 Act to denote a reconsideration of the original decision. It is true that the word is used in this sense in that rule. However, the
d restrictions on a r 43 review, both the grounds required for such a review and the requirement that an application be made not later than 14 days after service of the original decision, are inconsistent with his interpretation of s 47N(7) of the Act. If his interpretation is correct, the grounds for reconsideration of a tribunal decision are not so restricted, and there is no maximum time for applying for such a reconsideration. The power conferred by r 43 is akin to the
e power of a court to set aside its own decision before its order is perfected. The power under r 43 is exceptional rather than typical.

[37] Thus the provisions of r 43 do not lead me to depart from my provisional view as to the scope of a review under s 49N of the Act. In my judgment, it is not the function of the FHSAA on such a review to investigate
f whether the procedures of the earlier tribunal were flawed or its findings of fact correct or the disqualification justified.

[38] Quite apart from the question whether a civil right or obligation of Dr Kataria was engaged (which I consider further below) the contention that Dr Kataria’s art 6 rights were infringed by the FHSAA’s decision could not affect the scope of review by the FHSAA. The 1998 Act was not in force when it made its decision, and the Act is
g not retrospective: see *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976. In any event, there is nothing to justify a finding that the NHS Tribunal failed to give Dr Kataria a fair hearing.

[39] In its reasons, the FHSAA seems to have been confused as to the appeal procedures available to Dr Kataria to challenge the NHS Tribunal’s decision.
h That is irrelevant if, as I hold, it came to the correct conclusion on this question of law.

[40] Dr Kataria also contended that the FHSAA erred in imposing the burden of proof on him, and in concluding that there had been a general failure by him to observe proper standards. In that connection Mr Foster referred to
j [14] of the judgment of the Judicial Committee of the Privy Council in *Hossain v General Medical Council* [2001] UKPC 40, 65 BMLR 1.

[41] The practitioner makes a request for a review under s 49N of a national disqualification, which but for that request would continue to have effect. If he puts no evidence or material before the FHSAA, his request must be rejected, ie the tribunal must confirm the disqualification. It follows that he bears the

onus of establishing that the disqualification should be revoked. However, the respondent to his request will bear the onus of proving any facts it asserts, such as any alleged misconduct of the practitioner since the date of his disqualification. Once the tribunal has determined the facts relevant to its decision, the question for the tribunal in an efficiency case (see s 49F(2)) is whether the revocation of the disqualification would be prejudicial to the efficiency of the services in question. Once the facts have been found, the answer to that question will rarely depend on the onus one way or the other. a
b

[42] In Dr Kataria's case, the relevant primary facts were not significantly in issue. The FHSAA made no error of law in formulating, in para D1 of its decision, the question it had to answer. Nor did the FHSAA improperly generalise from specific defaults on the part of Dr Kataria that it found. c

[43] In my judgment, for the reasons set out above, the FHSAA did not err in rejecting Dr Kataria's contentions as to the scope of review. c

[44] It does not follow from this that a FHSAA could not or should not receive evidence as to the circumstances in which a practitioner came to do that which an earlier tribunal found he had done. By way of example, a practitioner might wish to adduce evidence that he had suffered from depression at the time of the defaults that had led to his disqualification, had received treatment, and had recovered. Similarly, I should not be taken to have decided that Dr Kataria could not have given evidence to the NHS Tribunal as to the personal stresses he had been under in the period relevant to the NHS Tribunal's decision and during the hearing before that tribunal. The submission made to the NHS Tribunal was different, and did not cover such facts. In fact, Dr Kataria in his cross examination did give evidence as to his state of mind at the times relevant to the NHS Tribunal decision and at the time of the hearing. d
e

BIAS

[45] The general law on this issue is well established by the decisions of the Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564 at [85], [2001] 1 WLR 700 at [85], approved by the House of Lords in *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357: f

'The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.' g

[46] There being no difference between the test for bias at common law and under art 6, it is unnecessary for me to determine whether art 6 applies to the NHS Tribunal's proceedings. h

[47] I turn to consider the facts. In a letter faxed to Dr Kataria's solicitors on 9 May 2003, the chairman of the NHS Tribunal stated that there would not be a review or appeal against the decision of the NHS Tribunal. His legal team none the less decided to continue with their contention that the NHS Tribunal could reconsider the findings of the earlier tribunal. j

[48] According to Dr Kataria's solicitors' notes of the hearing, which for present purposes I accept as materially accurate, at the beginning of the hearing the chairman referred to the skeleton argument she had received and the

a question whether the NHS Tribunal should reconsider the decision of the NHS Tribunal. She said:

b 'I have spoken to the President and he agrees as I wrote to your solicitors on 9 May that the hearing is not to look at the correctness of the 1996 Tribunal. We are here to consider whether in all the circumstances Dr Kataria should be permitted to return to the Medical List ... We are not here to spend hours arguing about this decision.'

Mr Foster asked to make his submissions on this issue. The chairman said:

c 'There is no point. The President agrees that we are not here to look at the findings of the 1996 Tribunal. The words are a review of the Disqualification Order and not the findings. We are not looking at the findings. There is no point arguing this any further.'

d [49] Mr Moon tried to intervene. The chairman refused to permit him to do so. She said to Dr Kataria: 'Dr Kataria, I do not think your best interests are being served by this line of argument. I think you need to know this is not helping you.'

e [50] Mr Foster asked whether the chairman was prepared to hear his application. Mr Moon then did successfully intervene. He said that he agreed with Mr Foster that the NHS Tribunal needed to hear his submissions before making a decision on this issue. He said:

'Please, if you close you mind to the submission before you hear it, you will be vulnerable to an appeal ... But you must allow the parties to address you on this before you make a decision.'

f [51] At this, the chairman said that if the parties were agreed that the application should be heard, she would allow it. She said: 'We are willing to hear the argument but we would request counsel to keep to point and to time.'

[52] Mr Foster then made his submission, to which Mr Moon responded. The chairman rejected Mr Foster's submissions. In doing so, she said:

g 'Suggest we proceed to discuss application on its merits and would like to reassure Dr Kataria-seen my irritation as this preliminary issue raised-being raised at this later stage and in contravention of my directions-not in any way affect our consideration of the merits of your application. We appreciate how important this is to you and how can affect your earning capacity.'

j [53] It is far from certain that the NHS Tribunal should have recused itself before considering the question raised as to the scope of a s 49N review. I accept Mr Moon's comparison of this case with *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul), in which it was held that a member of the Court of Appeal who had refused permission to appeal (on the basis that the appeal was unarguable) was not precluded from sitting as a judge on the hearing of the substantive appeal. When a judge hears oral argument on a point, it is to be assumed that he will genuinely consider it and if persuaded his original view was wrong decide

accordingly. The full and careful note made by the chairman of the parties' respective submissions on the scope of review do not suggest pre-judgment. a

[54] However, even if the NHS Tribunal did give an appearance of bias (ie pre-judgment) in relation to the preliminary issue as to the scope of review, it does not follow that it did so in relation to other issues that fell for decision. To the contrary, the chairman displayed concern for Dr Kataria when she spoke to him as referred to in [49], above and in the passage cited in [52], above. There is nothing to show an appearance or actual bias in relation to those other issues. b

[55] The NHS Tribunal's decision is not liable to be set aside on the ground of bias.

[56] For the sake of completeness, I mention that Mr Foster sensibly abandoned the suggestion that the chairman's complaint that her directions had not been complied with, and that he had failed to provide the NHS Tribunal in advance of the hearing with copies of the legal authorities on which he relied, did not give rise to an appearance of bias. c

THE ADMISSION OF THE WRITTEN WITNESS STATEMENT IN THE ABSENCE OF THE WITNESSES

[57] This ground of appeal is addressed in Mr Foster's skeleton argument under the heading of bias. Cases in which the exercise by a tribunal of a discretion to admit evidence give rise to an appearance of bias will be unusual, and I see nothing in the present case to justify this suggestion. The real question is whether the admission of this evidence was something that a reasonable tribunal was entitled to do in the circumstances. I turn to consider the circumstances. d

[58] The respondent's solicitors had outlined to Dr Kataria's solicitors the content of the witness statements in question in a letter of 17 April 2003. The principal point was that Dr Kataria had not disclosed his national disqualification to his employers, who would not have employed him had they known of it. Dr Kataria's solicitors responded in a letter dated 25 April 2003. Under part 3 of that letter, they stated: e

'ii. Our client cannot provide written confirmation that he disclosed his national disqualification Order to the persons nominated as it will be his evidence that he did not volunteer the making of this Order to either RAF Wittering or the Fernbank Medical Centre in Glasgow. The suggestion of obligation to volunteer such information in a non-NHS context in the prevailing circumstances will be the subject of submissions at the hearing ... iv. Our client cannot provide written confirmation that he disclosed his national disqualification Order to C&B Locums Ltd as it will be his evidence that he did not volunteer the making of this Order to C&B Locums ... In view of the responses to 3(ii) and (iv), we would presume that the Health Authority's solicitors will not seek to call oral evidence from the five persons indicated if such evidence is restricted to the issues detailed in their letter to you of 17 April 2003 ...'

f
g
h
j

[59] Mr Paul Booth of C&B Locums Ltd gave evidence to the NHS Tribunal in accordance with his witness statement and was cross-examined on it. He stated that if his company had been aware that Dr Kataria was subject to a national disqualification they would not have permitted him to register with them and would not have been prepared to find employment for him. He

a confirmed that Dr Kataria had not informed them of his national disqualification.

[60] The witness statements in respect of which the complaint is made were those of Wing Commander Schofield, Flight Sergeant Rae, and Margaret Hanlon. Wing Commander Schofield confirmed that Dr Kataria had not disclosed his national disqualification when working as a locum at Wittering, b and said that had he been aware of it, he would not have agreed to Dr Kataria being employed. Flight Sergeant Rae's witness statement was to a similar effect with regard to Dr Kataria's work at RAF Odiham. In addition, he said that while there had been no official complaints about Dr Kataria's standard of care, there had been 'unofficial' complaints of grumblings about his communication c skills, the adequacy of his notes, and his difficulties in working the computer. Margaret Hanlon worked at the Fernbank Medical Centre in Glasgow. She confirmed that the practice had not been informed of Dr Kataria's national disqualification, and she too stated that had the practice been aware of it, they would not have employed him. She too referred to Dr Kataria's lack of d computer literacy. She said that he was not able to use a computer, even for quite routine tasks.

[61] As appears above, there was no issue of fact before the NHS Tribunal as to whether Dr Kataria had disclosed his national disqualification. He accepted that he had not. The principal question for the NHS Tribunal on this matter was whether he should have done so. That was a matter of ethics to be e determined by the NHS Tribunal, and not a matter for factual evidence.

[62] The complaints of lack of computer literacy contained in the witness statements were not relied upon by Mr Moon before the NHS Tribunal as a ground for confirming Dr Kataria's disqualification. However, this matter was f put fairly to Dr Kataria by the NHS Tribunal, and it is clear that there was no real issue of fact relating to it. The questions by the chairman and Dr Kataria's answers were, as recorded in the chairman's notes, as follows:

g 'Q: Concerned there is evidence from more than one witness to effect you did not know how to use computer when you worked for them. Do you now know?

A: C&B Locums told me to be computer literate. In first couple of jobs had difficulty.

Q: What did you do to address this?

h A: Learned with one in friend's practice and also at one job for a couple of days with one of receptionists.'

[63] In my judgment, Dr Kataria has not shown any basis for arguing that the NHS Tribunal exercised its discretion unreasonably in admitting the three j witness statements in question. If there had been any significant factual dispute relating to the evidence in the witness statements, one would have expected the NHS Tribunal to take into account the fact that the evidence had not been tested by cross-examination. In the result, there was no real factual dispute. Dr Kataria has not established that the admission of the witness statements led to any unfairness.

DR KATARIA'S NON-DISCLOSURE OF HIS DISQUALIFICATION

[64] Whether honesty or good practice or the probity to be demanded of practitioners required Dr Kataria to disclose to potential employers and those in a like position was for the NHS Tribunal to determine. It was not a matter to be determined by factual witnesses: it was not a question of fact. a

[65] That Dr Kataria's failure to disclose his disqualification was to be the subject of criticism was made clear by the respondent's solicitors' letter to his solicitors dated 1 May 2003 and by the respondent's first skeleton argument at paras 11 and 12. The allegation was put to Dr Kataria by Mr Moon and addressed by Dr Kataria in evidence to the NHS Tribunal. b

[66] Between September 2001 and October 2002 Dr Kataria had failed to disclose his disqualification in 11 jobs. In evidence Dr Kataria told the NHS Tribunal that he realised he had been wrong not to disclose his disqualification. c

[67] Contrary to Mr Foster's submission, the NHS Tribunal did not find that Dr Kataria had been dishonest. As is made clear from para D4 of the decision, set out above, it found that he had not met the requirements of good practice and morality; he had preferred his own interests and had been 'economical with the truth'. Those were findings that the NHS Tribunal was entitled to make. d

[68] Mr Foster complains that the NHS Tribunal took into account the version of the GMC *Good Medical Practice* guide that post-dated the events in question. That point was not made to the NHS Tribunal. In any event, the previous version, which Dr Kataria accepts was current at the relevant time, was not materially different. I have my doubts as to whether the guidance was intended to apply to CVs: it seems to relate to documents (death certificates are the example given) that a practitioner signs in his professional capacity as a doctor. But in my view that is irrelevant. No one should sign any document that will be relied upon that he does not believe to be true or which he believes to be false or misleading, and a doctor should not require a *Good Medical Practice* to appreciate this. e

THE RELEVANCE OF GOOD ETHICAL STANDARDS

[69] In my judgment it is obvious that the efficiency of the NHS might be prejudiced by a want of probity of a practitioner, and in particular by any unreliability of his written or oral statements. Fellow practitioners and other NHS staff and patients must be able to rely on the integrity of doctors and the honesty of their statements. The FHSAA is entitled to take into account any want of probity found by it on the part of a practitioner in determining whether his inclusion in a list would be prejudicial to the efficiency of the service. The fact that his want of probity may also be relevant to the GMC does not exclude it from consideration by the FHSAA. f

FAILURE TO TAKE INTO ACCOUNT THE DECISION OF THE GMC

[70] It was for the NHS Tribunal to determine whether the revocation of Dr Kataria's disqualification would be prejudicial to the efficiency of the NHS. It could not delegate to another tribunal the consideration of any relevant issue. g
In any event, the Preliminary Proceedings Committee of the GMC had not considered the matters that were before the FHSAA, but only those that had been before the NHS Tribunal. h

[71] Dr Kataria has not shown any error of law by the NHS Tribunal under this head. j

THE FINDING IN RELATION TO DR KATARIA'S WORK IN SCOTLAND

a [72] The NHS Tribunal stated in para D3 that their findings relating to Dr Kataria's work did not affect the their decision. There is no reason not to accept this statement. It follows that the NHS Tribunal's findings in relation to his work in Scotland are not a ground to interfere with its decision.

b [73] I add that while I have some sympathy with Mr Foster's submission as to the improbability of Dr Kataria volunteering (as he did) that he had worked in Scotland while disqualified, I could not say that the NHS Tribunal's finding was irrational. Moreover, the NHS Tribunal was certainly entitled to reject his evidence that he had been expressly wrongly advised that he could work within the NHS in Scotland, for the reasons it gave. The rejection of that evidence would have been relevant to its assessment of his reliability, if there had not been other matters to be taken into account. It was also relevant to the NHS Tribunal's assessment of Dr Kataria's evidence that he did believe that he was entitled to practise within the NHS in Scotland.

PROPORTIONALITY AND ADEQUACY OF REASONS

d [74] Apart from authority, I should have considerable doubts as to the applicability of the convention doctrine of proportionality to the decision of the FHSAA. The principle relates to the decisions and acts of public authorities that interfere with a fundamental right: see, eg, Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684. The FHSAA makes no decision as to any fundamental right of a practitioner: Mr Foster was unable to identify any convention right engaged. It may be that the right to work within the NHS is a 'civil right' for the purposes of art 6 (as to which see *Diennet v France* (1996) 21 EHRR 554, which related however to a doctor who was struck off the register, ie prohibited from working as a doctor at all). But it does not follow, as Mr Foster assumed, that the doctrine of proportionality is applicable. Most 'courts' making decisions as to civil rights and obligations do not apply the principle of proportionality. Cases of breach of contract are but one example.

e [75] In *Madan v General Medical Council* [2001] EWHC Admin 577, [2001] Lloyd's Rep Med 539, the Divisional Court held that a decision of the Interim Orders Committee of the GMC continuing the suspension of registration of a practitioner was subject to the principle of proportionality because it affected a civil right within art 6. However, in *Chaudhury v General Medical Council* [2002] UKPC 41, [2002] All ER (D) 299 (Jul) the Privy Council expressed doubt as to the correctness of that reasoning. With respect to the court in *Madan's* case, I share those doubts. The present case of course differs from *Madan's* case in that the decision of the NHS Tribunal does not disqualify Dr Kataria from working as a doctor, but only prevents his doing so within the NHS. The argument for the application of the convention doctrine of proportionality is therefore attenuated.

h [76] These issues will however generally be academic, since, as the Privy Council pointed out in *Chaudhury's* case, there is little or no difference between the common law requirement that a tribunal act fairly and reasonably and the doctrine of proportionality. Nor is there any magic in the use by a tribunal of the word 'proportionality' provided (assuming the doctrine applies) its decision meets the requirements of the doctrine and adequate reasons for the decision are given.

[77] The FHSAA did not expressly weigh the prejudice to Dr Kataria as against the potential prejudice to the efficiency of the NHS. It was however conscious of the financial effect of the disqualification on him, and referred to it in para 2.4 of its decision. The reasons given for the conclusion that the revocation of his disqualification would be prejudicial to the efficiency of NHS services were substantial and cogent. They included their findings as to his probity and, in relation to his lack of CPD, a risk of clinical failings. In my judgment the decision satisfies the doctrine of proportionality and the common law requirement that the decision be reasonable and fair. The NHS Tribunal's reasons were adequate.

[78] I reject the curious submission made to the NHS Tribunal and in Dr Kataria's skeleton argument to this court that because he did not intend to work in the NHS it could not lawfully find that the revocation of his disqualification would be prejudicial to the efficiency of the NHS. The submission undermined the case put forward on his behalf on proportionality. The statutory test requires the NHS Tribunal to assume that a practitioner works within the NHS and to determine whether, if he does, its efficiency would be prejudiced.

CONCLUSION

[79] For the reasons set out above, Dr Kataria's appeal will be dismissed.

Appeal dismissed.

Dilys Tausz Barrister.

a

R v Dica

[2004] EWCA Crim 1103

COURT OF APPEAL, CRIMINAL DIVISION
LORD WOOLF CJ, JUDGE LJ AND FORBES J

b 31 MARCH, 5 MAY 2004

c

Criminal law – Grievous bodily harm – Inflicting grievous bodily harm – Sexually-transmitted disease – Whether recklessly infecting another person with sexually transmitted disease through consensual sexual intercourse capable of constituting offence of inflicting grievous bodily harm – Whether consent of victim to risk of contracting disease constituting defence to such offence – Offences against the Person Act 1861, s 20.

d

The defendant, who was HIV positive, had unprotected consensual sexual intercourse with the two complainants on several occasions in the course of long-term relationships with them. Both complainants contracted HIV. The defendant was charged with inflicting grievous bodily harm on the complainants contrary to s 20^a of the Offences against the Person Act 1861. It was not alleged that the defendant had deliberately set out to infect the complainants. Instead, the prosecution alleged that he had been reckless as to whether they might become infected. It was also the prosecution's case that, while both complainants had been willing to have sexual intercourse with the defendant, their agreement would never have been given if they had known of the defendant's condition. The defendant intended to allege in response that he had told the complainants of his condition, and that they had been willing none the less to have sexual intercourse with him—an allegation that would have been strenuously denied.

f

At the end of the prosecution case, the judge ruled that it was open to the jury to convict the defendant of the offences alleged in the indictment notwithstanding a nineteenth-century authority which had held, in the context of sexually transmitted disease, that there could be no conviction under s 20 of the 1861 Act without an assault. In a separate ruling, the judge also held, relying on an

g

authority relating to extreme sado-masochistic activities for sexual gratification, that, whether or not the complainants had known of the defendant's condition, their consent, if any, was irrelevant and provided no defence because they did not have the legal capacity to consent to such serious harm. Following that ruling, the defendant elected not to give evidence, and the issue of whether the complainants had consented to sexual intercourse, knowing of the defendant's

h

condition, was withdrawn from the jury. The defendant was convicted. He appealed, challenging both of the judge's rulings.

j

Held – (1) Where a defendant was reckless as to the risk of another person contracting a sexually transmitted disease from him through consensual sexual intercourse, and the other person contracted that disease through such intercourse, he could be convicted of inflicting grievous bodily harm contrary to s 20 of the 1861 Act notwithstanding that there had been no assault on the victim. Even when no physical violence had been applied, directly or indirectly, to the victim's body, an offence under s 20 could be committed. Putting it another way, if the remaining

a Section 20, so far as material, is set out at [20], below

ingredients of s 20 were established, the charge was not answered simply because the grievous bodily harm suffered by the victim did not result from direct or indirect physical violence. It followed in the instant case that the judge had been correct that, notwithstanding the nineteenth-century authority, it had been open to the jury to convict the defendant of the offences on the indictment (see [30], [31], below); *R v Wilson (Clarence)*, *R v Jenkins (Edward John)* [1983] 3 All ER 448 and *R v Ireland*, *R v Burstow* [1997] 4 All ER 225 applied; *R v Clarence* (1889) 22 QBD 23 disapproved. a b

(2) Although consensual sexual intercourse was not of itself to be regarded as consent to the risk of consequent disease, a consent by the victim to that risk provided a defence to a charge under s 20 of the 1861 Act. It did not follow from the authorities dealing with sexual gratification that consensual acts of sexual intercourse were unlawful merely because there might be a known risk to the health of one or other participant. Those participants were not intent on becoming infected with disease through sexual intercourse. They were not indulging in serious violence for the purposes of sexual gratification. They were simply prepared, knowingly, to run the risk—not the certainty—of infection, as well as all the other risks inherent in, and possible consequences of, sexual intercourse, such as, and despite the most careful precautions, an unintended pregnancy. Modern society had not thought to criminalise those who had willingly accepted the risks. While the two were inevitably linked, the ultimate question for the purposes of s 20 was not knowledge, but consent. Unless a person was prepared to take whatever risk of sexually transmitted infection there might be, it was unlikely that he would consent to a risk of major consequent illness if he were ignorant of it. But in every case where those issues arose, the question whether the defendant was or was not reckless, and whether the victim did or did not consent to the risk of a sexually transmitted disease, was one of fact and was case-specific. It followed in the instant case that the judge had been wrong in law to rule that the possible consent of the complainants was irrelevant, and he should not have withdrawn that issue from the jury. Accordingly, the appeal would be allowed, and a retrial ordered (see [39], [40], [47], [50], [57], [59], [60], below); *R v Brown (Anthony Joseph)* [1993] 2 All ER 75 distinguished. c d e f

Per curiam. Where there is deliberate infection or spreading of HIV with intent to cause grievous bodily harm, the agreement of the participants will provide no defence to a charge under s 18 of the 1861 Act (see [58], below). g

Notes

For inflicting grievous bodily harm and for consent, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 471, 494.

For the Offences against the Person Act 1861, s 20, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 109. h

Cases referred to in judgment

Bravery v Bravery [1954] 3 All ER 59, [1954] 1 WLR 1169, CA.

Laskey v UK (1997) 24 EHRR 34, [1997] ECHR 21627/93, ECt HR.

R v Boyea (1992) 156 JP 505, CA. j

R v Brown (Anthony Joseph) [1993] 2 All ER 75, [1994] 1 AC 212, [1993] 2 WLR 556, HL.

R v Chan-Fook [1994] 2 All ER 552, [1994] 1 WLR 689, CA.

R v Clarence (1889) 22 QBD 23, [1886–90] All ER Rep 133, CCR.

R v Cort [2003] EWCA Crim 2149, [2004] QB 388, [2003] 3 WLR 1300.

- a** *R v Cuerrier* [1998] 2 SCR 371, [1999] 2 LRC 29, Can SC.
R v Donovan [1934] 2 KB 498, [1934] All ER Rep 207, CCA.
R v Emmett (unreported, 18 June 1999).
R v Ireland, R v Burstow [1997] 4 All ER 225, [1998] AC 147, [1997] 3 WLR 534, HL.
R v Mwai [1995] 3 NZLR 149, [1995] 4 LRC 719, NZ CA.
R v R (rape: marital exemption) [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL.
- b** *R v Tabassum* [2000] 2 Cr App Rep 328, CA.
R v Taylor (1869) LR 1 CCR 194.
R v Wilson (Clarence), R v Jenkins (Edward John) [1983] 3 All ER 448, [1984] AC 242, [1983] 3 WLR 686, HL.

- c** **Cases also cited or referred to in skeleton arguments**
A-G's Ref (No 6 of 1980) [1981] 2 All ER 1057, [1981] QB 715, [1981] 3 WLR 125, CA.
C v DPP [1995] 2 All ER 43, [1996] AC 1, [1995] 2 WLR 383, HL.
Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402, [1986] AC 112, [1985] 3 WLR 830, HL.

- d** *R v Case* (1850) 14 JP 339, CCR.
R v Coney (1882) 8 QBD 534, DC.
R v Flattery (1877) 2 QBD 410, CCR.
R v Mowatt [1967] 3 All ER 47, [1968] 1 QB 421, [1967] 3 WLR 1192, CA.
R v Williams [1923] 1 KB 340, [1922] All ER Rep 433, CCA.

e **Appeal against conviction**

The appellant, Mohammed Dica, appealed with leave of Judge Philpot against his conviction in the Crown Court at Inner London on 14 October 2003, following a trial before Judge Philpot and a jury, of two offences of inflicting grievous bodily harm contrary to s 20 of the Offences against the Person Act 1861. The facts are

- f** set out in the judgment of the court.

Jeremy Carter-Manning QC (assigned by the *Registrar of Criminal Appeals*) and *Nicholas Mather* (instructed by *Shah Solicitors*, Harrow) for the appellant.
Mark Gadsden and *Heather Stangoe* (instructed by the *Crown Prosecution Service*) for the Crown.

g

Cur adv vult

5 May 2004. The following judgment of the court was delivered.

h **JUDGE LJ.**

[1] This is an appeal by Mohammed Dica, with leave of the trial judge, against his conviction at Inner London Crown Court before Judge Philpot and a jury on 14 October 2003 of two offences of inflicting grievous bodily harm, contrary to s 20 of the Offences against the Person Act 1861. He was sentenced to consecutive sentences of three-and-a-half and four-and-a-half years' imprisonment, a total sentence of eight years' imprisonment. His appeal against sentence was referred to the full court by the Registrar.

j

[2] The appeal raises issues of considerable legal and general public interest about the circumstances in which a defendant may be found guilty of a criminal offence as a result of infecting another person with a sexually transmitted disease. In the present case we are directly concerned with HIV. However we understand

that there have been significant recent increases in the recorded rates of syphilis and gonorrhoea, and that a significant proportion of sexually active young women, and many young men, are infected with chlamydia. Accordingly, although we agreed to accept submissions from the Terence Higgins Trust, the George House Trust and the National AIDS Trust in relation to HIV, and some of the problems faced by those with this condition, for which we are grateful, the issues which arise in this appeal are not confined to that devastating disease.

THE FACTS

[3] The facts relevant to this appeal can be summarised briefly.

[4] The appellant was told in December 1995 that he was HIV positive. Appropriate medication was then started.

[5] The first complainant, L, was born on 12 December 1966. She was a refugee from Somalia who arrived in the United Kingdom in November 1994. She said that she was first introduced to the appellant in 1997, and they subsequently met on a number of occasions. She explained that she was having matrimonial difficulties, and he told her that he had left his wife. The relationship between them developed from there.

[6] According to L, when they had sexual intercourse, the appellant would say 'Forgive me in the name of God'. He however insisted that they should not use protection, telling her that she could not become pregnant because he had undergone a vasectomy. After a time she experienced thrush and swollen glands. She eventually went to hospital where she was diagnosed HIV positive.

[7] She was cross-examined at trial, when it was suggested that she might have contracted HIV from sources other than the appellant.

[8] The second complainant was D. She met the appellant in December 2000. In February 2001 they had protected sexual intercourse, but on subsequent occasions during their relationship, sexual intercourse was unprotected. When she found that she was developing similar symptoms to those suffered by L, she sought medical advice. She was diagnosed as being HIV positive. Apart from the appellant, her only other sexual partner during the previous 18 years had been her husband.

[9] The appellant was arrested on 11 July 2002. When cautioned, he replied, 'I am terminally ill, and need to go to hospital today for an operation, I will tell you everything, I did it.' A few days later he was interviewed in the presence of his solicitor. He said that he had first met L in Kenya in 1988 and had a casual relationship with her. He had met her again in the United Kingdom. He had told her he was HIV positive when their relationship restarted, and she responded by saying that she thought that she was also infected. He said that she had been involved with between six and ten different men. In relation to D, he asserted that he had met her in 1994, when they had had a 'one night stand'. The relationship resumed in 2001, when she knew that he was HIV positive. Thereafter he was charged, and after caution he replied, 'I've understood'.

[10] It is perhaps important to emphasise at the outset that the prosecution did not allege that the appellant had either raped or deliberately set out to infect the complainants with disease. Rather, it was alleged that when he had consensual sexual intercourse with them, knowing that he himself was suffering from HIV, he was reckless whether they might become infected. Thus, in the language of the counts in the indictment, he 'inflicted grievous bodily harm' on them both.

[11] It was not in dispute that at least on the majority of occasions, and with both complainants, sexual intercourse was unprotected. Recklessness, as such,

a was not in issue. If protective measures had been taken by the appellant that would have provided material relevant to the jury's decision whether, in all the circumstances, recklessness was proved.

[12] Although both women were willing to have sexual intercourse with the appellant, the prosecution's case was that their agreement would never have been given if they had known of the appellant's condition. The appellant would
b have contended that he told both women of his condition, and that they were none the less willing to have sexual intercourse with him, a case which in the light of the judge's ruling, he did not support in evidence. The suggestion would have been strongly disputed by them both.

c THE TRIAL

[13] At the end of the prosecution case, Judge Philpot made two critical but distinct rulings. First, he concluded that notwithstanding the well-known decision by the Crown Cases Reserved in *R v Clarence* (1889) 22 QBD 23, [1886–90] All ER Rep 133, it was open to the jury to convict the appellant of the offences alleged in the indictment, on the basis that its standing as 'an important
d precedent has been thoroughly undermined, and ... provides no guidance to a (first) instance judge'. His second conclusion, which in a sense was more far-reaching, was that whether or not the complainants knew of the appellant's condition, their consent, if any, was irrelevant and provided no defence. Accepting the Crown's argument as advanced to him, the judge believed that the decision in the House of Lords in *R v Brown (Anthony Joseph)* [1993] 2 All ER 75,
e [1994] 1 AC 212 deprived the complainants 'of the legal capacity to consent to such serious harm'.

[14] Following that ruling the appellant elected not to give evidence, and the issue whether the complainants consented to have sexual intercourse with him knowing of his condition was not left to the jury.

f [15] Mr Carter-Manning QC, arguing the case on behalf of the appellant before this court, contends that both these rulings were wrong in law. We must therefore examine them both. We have been fortunate that Professor John Spencer QC of Selwyn College, Cambridge, had, as a result of these convictions, published two articles in the *New Law Journal* of 12 and 26 March 2004, entitled
g 'Liability for reckless infection', which were of considerable assistance to us.

R v CLARENCE

[16] Clarence had sexual intercourse with his wife when he knew, but she did not, that he was suffering from gonorrhoea. It was not suggested that he intended
h to cause her to become infected, and it was assumed that if she had known of the risk, she would not have had consensual sexual intercourse with him. In the result, she became infected with gonorrhoea, and accordingly suffered grievous bodily harm.

[17] The indictment included two counts, the first alleging the infliction of
j grievous bodily harm, contrary to s 20 of the 1861 Act, and the second, assault occasioning actual bodily harm, contrary to s 47. The Recorder of London directed the jury that if the facts were proved the defendant could be convicted on either count, notwithstanding that the complainant was his wife. Clarence was convicted on both counts. By a majority of nine to four, his appeal was allowed. He had not committed an offence against either s 20 or s 47 of the 1861 Act. If *R v Clarence* remains authoritative, this case is indistinguishable and

therefore this appellant should not have been convicted. His convictions, like Clarence's, would have to be quashed. a

[18] In *R v Clarence* the main majority judgments were given by Wills and Stephen JJ. It is reasonable to infer that Manisty J agreed with them both, and Lord Coleridge CJ and Pollock B certainly agreed with both judgments, adding brief judgments of their own. The remainder of the majority, that is Matthew, AL Smith and Grantham JJ and Huddleston B expressly agreed with Stephen J b

[19] *R v Clarence* has achieved notoriety as support for the proposition that a married woman is deemed to consent to sexual intercourse with her husband. A husband could not be indicted for rape of his wife. This 'irrevocable privilege', as Hawkins J described it, was finally identified as a fiction in *R v R (rape: marital exemption)* [1991] 4 All ER 481, [1992] 1 AC 599. However the artificial notion that sexual intercourse forced on an unwilling wife by her husband was nevertheless bound in law to be treated as if it were consensual sexual intercourse permeated much of the reasoning of the majority, and was fundamental to the outcome in relation to both counts. For present purposes, it is sufficient to illustrate the impact of this artificial notion in relation to s 47 by considering Pollock B's observations ((1889) 22 QBD 23 at 62–64, [1886–90] All ER Rep 133 at 155–156): c
d

'The second count charges an assault ... I should be inclined to hold that ... an assault must in all cases be an act which in itself is illegal, and ... I cannot assent to the proposition that there is any true analogy between the case of a man who does an act which in the absence of consent amounts to an indecent assault upon his niece, or any woman other than his wife, and the case of a man having connection with his wife. In the one case the act is, taken by itself, in its inception an unlawful act, and it would continue to be unlawful but for the consent. The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life ... the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent.' e
f

Many of the same considerations were thought to extend to the s 20 offence. Thus, for example, AL Smith J, having dealt with the assault issue on the basis of deemed matrimonial consent, turned to the offence under s 20, and went on ((1889) 22 QBD 23 at 37–38, [1886–90] All ER Rep 133 at 141): '[I]t appears to me that this offence cannot be committed unless an assault has in fact been committed, and indeed this has been so held ...' Both Wills and Stephen JJ made the same point, Stephen J noting ((1889) 22 QBD 23 at 41, [1886–90] All ER Rep 133 at 143) that although the word 'assault' did not appear in s 20, 'I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result.' Both believed that this conclusion was supported by the decision in *R v Taylor* (1869) Law Rep 1 CCR 194. Manisty J ((1889) 22 QBD 23 at 56, [1886–90] All ER Rep 133 at 151), in his very short judgment, considered it 'contrary to common sense' to describe what Clarence did as an assault, and from his judgment, it looks as though this robust assertion was meant to apply to both convictions. g
h
j

[20] Section 20 of the 1861 Act provides:

'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being

a convicted thereof shall be liable ... to imprisonment ... for not more than five years.'

[21] Wills J suggested that s 20—

b 'clearly points to the infliction of direct and intentional violence, with a weapon, or the fist, or the foot, or any other part of the person, or in any other way not involving the use of a weapon, as, for instance, by creating a panic at a theatre ...' (See (1889) 22 QBD 23 at 36, [1886–90] All ER Rep 133 at 140.)

Without direct personal action of some kind, a conviction under s 20 would be wrong.

c [22] Stephen J thought that the section was dealing with—

'the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down.' (See (1889) 22 QBD 23 at 41, [1886–90] All ER Rep 133 at 143.)

d He identified ((1889) 22 QBD 23 at 41–42, [1886–90] All ER Rep 133 at 143) what seems to have been regarded as a crucial difference between the—

'immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is communicated.'

e It is perhaps significant that neither Wills nor Stephen JJ would have been prepared to accept that the administration of poison fell within the ambit of s 20 notwithstanding that grievous bodily harm was sustained.

f [23] Pollock B, consistently with both judgments, suggested that for the purposes of s 20, grievous bodily harm must represent—

'the natural consequence of some act in the nature of the blow, wound, or other violence which is in itself illegal, and not merely the result of conduct which is immoral and injurious by reason only of a fraud or breach of good faith; or to put the proposition in another form, "grievous bodily harm" which is the ultimate effect of treachery in the doing of that which is not a "wounding or inflicting, &c., with or without any weapon or instrument," but is in the doing of an act of an entirely different character, is not within the terms of the statute.' (See (1889) 22 QBD 23 at 62, [1886–90] All ER Rep 133 at 155.)

h [24] The requirement for an assault and an immediate connection between the violent action of the defendant and the onset of its consequences were plainly central to the decision that the conviction under s 20 should be quashed.

[25] We have, so far, made no reference to any of the minority judgments. However we must now note the way in which Hawkins J approached the construction of s 20. He rejected the suggestion that bodily harm could not be i 'inflicted' unless it were brought about by an assault. He said ((1889) 22 QBD 23 at 47, [1886–90] All ER Rep 133 at 146): '... the first count may be supported even assuming no assault to have been proved.' He referred to the precise language of s 47 itself, commenting:

'Here it will be observed that where the legislature intends that an assault shall be the foundation of the offence, it says so in express terms. If in using the

word "inflict" in s. 20 it had intended that it should be interpreted as "cause by means of an assault." s. 47 would have been superfluous; for by merely substituting the word "actual" for "grievous" in s. 20, the whole object of both sections would have been attained; for the punishment awarded in each is the same, and the "actual" harm of necessity includes "grievous" harm ... (See (1889) 22 QBD 23 at 49, [1886–90] All ER Rep 133 at 147.)

After a lengthy analysis, he concluded:

'These considerations lead me to the conclusion that the word "inflict" when used in the statute was not intended to be construed as involving an assault ...' (See (1889) 22 QBD 23 at 50, [1886–90] All ER Rep 133 at 148.)

[26] Hawkins J's minority view has now been vindicated. In *R v Wilson (Clarence)*, *R v Jenkins (Edward John)* [1983] 3 All ER 448, [1984] AC 242, the House of Lords was considering the problem of convictions on alternative counts under s 6(3) of the Criminal Law Act 1967. It was necessary for the decision that the true ambit of s 20 of the 1861 Act should be considered. In the only detailed speech, with which each member of the House of Lords agreed, Lord Roskill made plain that notwithstanding the absence of an assault, a conviction under s 20 could nevertheless be sustained. He said in terms ([1983] 3 All ER 448 at 455, [1984] AC 242 at 260) that 'there can be an infliction of grievous bodily harm contrary to s 20 without an assault being committed'. This decision undermined, indeed destroyed, one of the foundations of the reasoning of the majority in *R v Clarence*, based on the view that an offence under s 20, like that under s 47, required an assault resulting in a wound or grievous bodily harm. This represented a major erosion of the authority of *R v Clarence* in relation to the ambit of s 20 in the context of sexually transmitted disease.

[27] This process has continued. Since *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689, as approved in the House of Lords in *R v Ireland*, *R v Burstow* [1997] 4 All ER 225, [1998] AC 147, it has been recognised that for the purposes of both s 20 and s 47 'bodily harm' includes psychiatric injury, and its effects. Although the impact of *R v Chan-Fook* is reflected in that now well-established principle, it is perhaps worth noticing that—

'an injury can be caused to someone by injuring their health; an assault may have the consequence of infecting the victim with a disease or causing the victim to become ill. The injury may be internal and may not be accompanied by any external injury.' (See [1994] 2 All ER 552 at 557, [1994] 1 WLR 689 at 694 per Hobhouse LJ.)

[28] This language, reflecting contemporary ideas, is entirely contrary to the reasoning adopted by the majority in *R v Clarence*. In argument in the House of Lords in *R v Ireland*, *R v Chan-Fook* was strongly criticised. The challenge was robustly rejected. The ruling was said by Lord Steyn ([1997] 4 All ER 225 at 233, [1998] AC 147 at 159) to mark 'a sound and essential clarification of the law'. As he explained ([1997] 4 All ER 225 at 233, [1998] AC 147 at 158), the 1861 Act was 'always speaking', and the ambit of the offences in ss 18, 20 and 47 had to be considered in circumstances which were never envisaged by the majority in *R v Clarence*.

[29] In *R v Ireland*, much argument also centred around the difference between the concept of inflicting grievous bodily harm in s 20 and causing it in s 18. Lord Steyn recognised that the two words, 'inflict' and 'cause', are not synonymous. In

a relation to *R v Clarence*, he acknowledged that the possibility of inflicting or causing psychiatric injury would not then have been in contemplation, whereas nowadays it is. In his view the infliction of psychiatric injury without violence could fall within the ambit of s 20. Lord Steyn ([1997] 4 All ER 225 at 235, [1998] AC 147 at 160) described *R v Clarence* as a 'troublesome authority', and in the specific context of the meaning of 'inflict' in s 20 said expressly that *R v Clarence* 'no longer assists'. Lord Hope of Craighead similarly examined the consequences of the use of the word 'inflict' in s 20 and 'cause' in s 18. He concluded that for practical purposes, and in the context of a criminal act, the words might be regarded as interchangeable, provided it was understood that 'inflict' implies that the consequence to the victim involved something detrimental or adverse.

c [30] Such differences as may be discerned in the language used by Lord Steyn and Lord Hope respectively do not obscure the fact that this decision confirmed that even when no physical violence has been applied, directly or indirectly to the victim's body, an offence under s 20 may be committed. Putting it another way, if the remaining ingredients of s 20 are established, the charge is not answered simply because the grievous bodily harm suffered by the victim did not result from direct or indirect physical violence. Whether the consequences suffered by the victim are physical injuries or psychiatric injuries, or a combination of the two, the ingredients of the offence prescribed by s 20 are identical. If psychiatric injury can be inflicted without direct or indirect violence, or an assault, for the purposes of s 20 physical injury may be similarly inflicted. It is no longer possible to discern the critical difference identified by the majority in *R v Clarence*, and encapsulated by Stephen J in his judgment, between an 'immediate and necessary connection' between the relevant blow and the consequent injury, and the 'uncertain and delayed' effect of the act which led to the eventual development of infection. The erosion process is now complete.

f [31] In our judgment, the reasoning which led the majority in *R v Clarence* to decide that the conviction under s 20 should be quashed has no continuing application. If that case were decided today, the conviction under s 20 would be upheld. Clarence knew, but his wife did not know, and he knew that she did not know that he was suffering from gonorrhoea. Nevertheless he had sexual intercourse with her, not intending deliberately to infect her, but reckless whether she might become infected, and thus suffer grievous bodily harm. Accordingly we agree with Judge Philpot's first ruling, that notwithstanding the decision in *R v Clarence*, it was open to the jury to convict the appellant of the offences alleged in the indictment.

CONSENT

h [32] We express no opinion, either way, whether the complainants did or did not have the requisite knowledge. That will be decided hereafter. For present purposes we have to address both possibilities, assuming for the purposes of the argument only that either may be correct, and bearing in mind that in this context the crucial question is whether the complainants were consenting to the risk of infection with HIV.

(A) THE CROWN'S CASE

Concealment of the truth by the appellant

[33] The judgments of the majority in *R v Clarence* included considerable discussion about the issue of fraud (in the sense of concealment), and the

consequences if consent were vitiated. Again, however, the observations have to be put into the context of the perceived requirement that in the absence of an assault Clarence could not be guilty of the s 20 offence, and the deemed consent of the wife to have sexual intercourse with her husband. To illustrate the reasoning, two lengthy passages in the judgments must be cited. a

[34] Wills J suggested:

‘That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.’ (See (1889) 22 QBD 23 at 27, [1886–90] All ER Rep 133 at 135.) b

Later, he added:

‘If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape ... it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. The essence of a rape is, to my mind, the penetration of the woman’s person without her consent ... if coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault because no mischief ensues to the woman, nor indeed where it is merely uncertain whether the man be infected or not.’ (See (1889) 22 QBD 23 at 33–34, [1886–90] All ER Rep 139.) c

[35] Stephen J addressed the issue of the defendant’s failure to tell his wife about his condition, and stated ((1889) 22 QBD 23 at 42, [1886–90] All ER Rep 139 at 144): d

‘The question here is whether there is an assault. It is said there is none, because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner’s silence was a fraud.’ e

He continued ((1889) 22 QBD 23 at 42–43, [1886–90] All ER Rep 139 at 144): f

‘... is the man’s concealment of the fact that he was infected such a fraud as vitiated the wife’s consent to his exercise of marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification.’ g

He went on ((1889) 22 QBD 23 at 44–45, [1886–90] All ER Rep 139 at 144): h

‘... the only sorts of fraud which so far destroy the effect of a woman’s consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done ... The woman’s consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent. The injury j

a done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault.'

[36] Clarence did not face a charge of rape or indecent assault, yet the concept of his wife's notional consent to the act of sexual intercourse was inextricably linked with the quashing of his convictions for offences of violence. He was not charged with an offence under s 3(2) of the Criminal Law Amendment Act 1885, until recently, s 3 of the Sexual Offences Act 1956, and now in slightly different terms, s 4 of the Sexual Offences Act 2003. Section 3(2) of the 1885 Act, enacted shortly before the decision in *R v Clarence*, provided:

c 'Any person who ... by false pretences or false representations procures any woman ... to have unlawful carnal connexion ... shall be guilty of a misdemeanour.'

In short, by 1885, quite separately from rape, it was already unlawful to procure sexual intercourse by deception. This provision was not considered in *R v Clarence*, no doubt because he was not charged with the offence, and presumably because on the then understanding of the principle of matrimonial privilege, sexual intercourse by a husband with his wife could never be unlawful.

[37] The present case is concerned with and confined to s 20 offences alone, without the burdensome fiction of deemed consent to sexual intercourse. The question for decision is whether the victims' consent to sexual intercourse, which as a result of his alleged concealment was given in ignorance of the facts of the appellant's condition, necessarily amounted to consent to the risk of being infected by him. If that question must be answered 'Yes', the concept of consent in relation to s 20 is devoid of real meaning.

[38] The position here is analogous to that considered in *R v Tabassum* [2000] 2 Cr App Rep 328. The appellant was convicted of indecently assaulting women who allowed him to examine their breasts in the mistaken belief that he was medically qualified. Rose LJ considered *R v Clarence*, and pointed out that in relation to the infection suffered by the wife, this was an additional, unexpected, consequence of sexual intercourse, which was irrelevant to her consent to sexual intercourse with her husband. Rejecting (at 335) the argument that an 'undoubted consent' could only be negated if the victim had been deceived or mistaken about the nature and quality of the act, and that consent was not negated 'merely because the victim would not have agreed to the act if he or she had known all the facts', Rose LJ observed (at 337), in forthright terms, 'there was no true consent'. Again, in *R v Cort* [2003] EWCA Crim 2149, [2004] QB 388, [2003] 3 WLR 1300, a case of kidnapping, the complainants had consented to taking a ride in a motor car, but not to being kidnapped. They wanted transport, not kidnapping. Kidnapping may be established by carrying away by fraud:

j '... it is difficult to see how one could ever consent to that once fraud was indeed established. The "nature" of the act here is therefore taking the complainant away by fraud. The complainant did not consent to that event. All that she consented to was a ride in the car, which in itself is irrelevant to the offence and a different thing from that with which Mr Cort is charged.' (See [2004] QB 388 at [19].)

[39] In our view, on the assumed fact now being considered, the answer is entirely straightforward. These victims consented to sexual intercourse. Accordingly, the appellant was not guilty of rape. Given the long-term nature of

the relationships, if the appellant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it. On this basis, there would be no consent sufficient in law to provide the appellant with a defence to the charge under s 20.

(B) THE DEFENCE CASE

The victims' knowledge

[40] We must now address the consequences if, contrary to their own assertions, the complainants knew of the state of the appellant's health, and notwithstanding the risks to their own, consented to sexual intercourse. Following Judge Philpot's second ruling, this issue was not considered by the jury. In effect the judge ruled that in law such consent (if any) was irrelevant. Having listened to the exchanges on this topic between Mr Carter-Manning QC, for the appellant, and the court, and on further reflection, Mr Gadsden for the Crown accepted that this issue should not have been withdrawn from the jury. Although we can take the issue relatively briefly, we must explain why this concession was right.

[41] As a general rule, unless the activity is lawful, the consent of the victim to the deliberate infliction of serious bodily injury on him or her does not provide the perpetrator with any defence. Different categories of activity are regarded as lawful. Thus no-one doubts that necessary major surgery with the patient's consent, even if likely to result in severe disability (eg an amputation) would be lawful. However the categories of activity regarded as lawful are not closed, and equally, they are not immutable. Thus, prize fighting and street fighting by consenting participants are unlawful: although some would have it banned, boxing for sport is not. Coming closer to this case, in *Bravery v Bravery* [1954] 3 All ER 59 at 68, [1954] 1 WLR 1169 at 1180, Denning LJ condemned in the strongest terms, and as criminal, the conduct of a young husband who, with the consent of his wife, underwent a sterilisation operation, not so as to avoid the risk of transmitting a hereditary disease, or something similar, but to enable him to 'have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it'. He thought that such an operation, for that reason, was plainly 'injurious to the public interest'. This approach sounds dated, as indeed it is. Denning LJ's colleagues expressly and unequivocally dissociated themselves from it. However, judges from earlier generations, reflecting their own contemporary society, might have agreed with him. We have sufficiently illustrated the impermanence of public policy in the context of establishing which activities involving violence may or may not be lawful.

[42] The present policy of the law is that, whether or not the violent activity takes place in private, and even if the victim agrees to it, serious violence is not lawful merely because it enables the perpetrator (or the victim) to achieve sexual gratification. Judge Philpot was impressed with the conclusions to be drawn from the well-known decision in *R v Brown (Anthony Joseph)* [1993] 2 All ER 75, [1994] 1 AC 212. Sado-masochistic activity of an extreme, indeed horrific kind, which caused grievous bodily harm, was held to be unlawful, notwithstanding that those who suffered the cruelty positively welcomed it. This decision of the House of Lords was supported in the European Court of Human Rights on the basis that although the prosecution may have constituted an interference with the private

a lives of those involved, it was justified for the protection of public health (see *Laskey v UK* (1997) 24 EHRR 34).

[43] The same policy can be seen in operation in *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207, where the violence was less extreme and the consent of the victim, although real, was far removed from the enthusiastic co-operation of the victims in *R v Brown*.

b [44] *R v Boyea* (1992) 156 JP 505 represents another example of the application of the principle in *R v Donovan*. If she consented to injury by allowing the defendant to put his hand into her vagina and twist it, causing, among other injuries, internal and external injuries to her vagina and bruising on her pubis, the woman's consent (if any) would have been irrelevant. Recognising that social attitudes to sexual matters had changed over the years, a contemporaneous approach to these matters was appropriate. However, 'the extent of the violence inflicted ... went far beyond the risk of minor injury to which, if she did consent, her consent would have been a defence' ((1992) 156 JP 505 at 513). On close analysis, however, this case was decided on the basis that the victim did not in fact consent.

c [45] In *R v Emmett* (unreported, 18 June 1999), as part of their consensual sexual activity, the woman agreed to allow her partner to cover her head with a plastic bag, tying it tightly at the neck. On a different occasion, she agreed that he could pour fuel from a lighter onto her breasts and set fire to the fuel. On the first occasion, she was at risk of death, and lost consciousness. On the second, she suffered burns, which became infected. This court did not directly answer the question posed by the trial judge in his certificate, but concluded that *R v Brown* demonstrated that the woman's consent to these events did not provide a defence for her partner.

e [46] These authorities demonstrate that violent conduct involving the deliberate and intentional infliction of bodily harm is and remains unlawful notwithstanding that its purpose is the sexual gratification of one or both participants. Notwithstanding their sexual overtones, these cases were concerned with violent crime, and the sexual overtones did not alter the fact that both parties were consenting to the deliberate infliction of serious harm or bodily injury on one participant by the other. To date, as a matter of public policy, it has not been thought appropriate for such violent conduct to be excused merely because there is a private consensual sexual element to it. The same public policy reason would prohibit the deliberate spreading of disease, including sexual disease.

f [47] In our judgment the impact of the authorities dealing with sexual gratification can too readily be misunderstood. It does not follow from them, and they do not suggest, that consensual acts of sexual intercourse are unlawful merely because there may be a known risk to the health of one or other participant. These participants are not intent on spreading or becoming infected with disease through sexual intercourse. They are not indulging in serious violence for the purposes of sexual gratification. They are simply prepared, knowingly, to run the risk—not the certainty—of infection, as well as all the other risks inherent in and possible consequences of sexual intercourse, such as, and despite the most careful precautions, an unintended pregnancy. At one extreme there is casual sex between complete strangers, sometimes protected, sometimes not, when the attendant risks are known to be higher, and at the other, there is sexual intercourse between couples in a long-term and loving, and trusting relationship, which may from time to time also carry risks.

[48] The first of these categories is self-explanatory and needs no amplification. By way of illustration we shall provide two examples of cases which would fall within the second. a

[49] In the first, one of a couple suffers from HIV. It may be the man: it may be the woman. The circumstances in which HIV was contracted are irrelevant. They could result from a contaminated blood transfusion, or an earlier relationship with a previous sexual partner, who unknown to the sufferer with whom we are concerned, was himself or herself infected with HIV. The parties are Roman Catholics. They are conscientiously unable to use artificial contraception. They both know of the risk that the healthy partner may become infected with HIV. Our second example is that of a young couple, desperate for a family, who are advised that if the wife were to become pregnant and give birth, her long-term health, indeed her life itself, would be at risk. Together the couple decide to run that risk, and she becomes pregnant. She may be advised that the foetus should be aborted, on the grounds of her health, yet, nevertheless, decides to bring her baby to term. If she does, and suffers ill health, is the male partner to be criminally liable for having sexual intercourse with her, notwithstanding that he knew of the risk to her health? If he is liable to be prosecuted, was she not a party to whatever crime was committed? And should the law interfere with the Roman Catholic couple, and require them, at the peril of criminal sanctions, to choose between bringing their sexual relationship to an end or violating their consciences by using contraception? b
c
d

[50] These, and similar risks, have always been taken by adults consenting to sexual intercourse. Different situations, no less potentially fraught, have to be addressed by them. Modern society has not thought to criminalise those who have willingly accepted the risks, and we know of no cases where one or other of the consenting adults has been prosecuted, let alone convicted, for the consequences of doing so. e

[51] The problems of *criminalising* the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life, including, again for example, the mother or father of a child suffering a serious contagious illness, who holds the child's hand, and comforts or kisses him or her goodnight. f
g

[52] In our judgment, interference of this kind with personal autonomy, and its level and extent, may only be made by Parliament. h

[53] This, and similar questions, have already been canvassed in a number of different papers. These include the efforts made by the Law Commission to modernise the 1861 Act altogether, and replace it with up-to-date legislation. In relation to sexually transmitted disease, much of the discussion initially focussed on the decision in *R v Clarence*, and its perceived consequences, which as we have now concluded is entirely bereft of any authority in relation to s 20 of the 1861 Act. In its report *Criminal Law, Legislating the Criminal code, Offences against the Person and General Principles* (1993) (Law Com no 218), the Law Commission expressed the view that intentional or reckless transmission of disease should be capable of constituting an offence against the person (paras 15.15–15.17). A second publication, *Criminal Law, Consent in the Criminal Law* (1995) (Law Commission j

a Consultation Paper No 139) made a provisional proposal that precluded a defence of consent for the proposed offence of recklessly causing seriously disabling injury (para 4.46–4.51). In 1998, in response to the activities of the (Law Commission, the Home Office issued a consultation paper entitled *Reforming the Offences Against the Person Act 1861*. In this paper, the Home Office indicated that the government had not accepted the recommendation that there should be offences to enable the

b intentional or reckless transmission of disease to be prosecuted. It pointed out that the issue had ramifications going beyond the criminal law into wider considerations of social and public health policy. It stated (para 3.16) that the government ‘is particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral Hepatitis or who carry any kind of disease’. It then went on to say that there is a strong case for arguing that society

c should have criminal sanctions available for use to deal with evil acts, and that it was hard to argue that the law should not be able to deal with the person who gives the disease causing serious illness to others with intent to do them such harm. It then proposed that the criminal law should apply only to those whom it can be proved beyond reasonable doubt had deliberately transmitted a disease, intending to cause

d serious injury. It added (para 3.18):

‘This aims to strike a sensible balance between allowing very serious intentional acts to be punished while not rendering individuals liable for prosecution of unintentional or reckless acts or for the transmission of minor disease.’

e On this approach it would seem that the policy at that stage would have been to criminalise conduct of the nature we are considering when it fell within s 18 of the 1861 Act, but not when it falls within s 20. In the Law Commission’s report in 2000, *Consent in Sex Offences*, no view was expressed on this topic, but it was assumed that any forthcoming legislation would not impose criminal liability for recklessly

f communicating HIV or other disease.

[54] We have taken note of the various points made by the interested organisations. These include the complexity of bedroom and sex negotiations, and the lack of realism if the law were to expect people to be paragons of sexual behaviour at such a time, or to set about informing each other in advance of the risks or to counsel the use of condoms. It is also suggested that there are significant

g negative consequences of disclosure of HIV, and that the imposition of criminal liability could have an adverse impact on public health because those who ought to take advice, might be discouraged from doing so. If the criminal law was to become involved at all, this should be confined to cases where the offender deliberately inflicted others with a serious disease.

h [55] In addition to this material our attention has been drawn to the decisions in *R v Mwai* [1995] 3 NZLR 149, [1995] 4 LRC 719, a decision of the Court of Appeal in New Zealand, and *R v Cuerrier* [1998] 2 SCR 371, [1999] 2 LRC 29, in the Supreme Court of Canada. Both cases arose out of legislative provisions different to our own. Nevertheless, if we may say so, the judgments were illuminating, not least in the

i context of the views expressed in *R v Cuerrier*, which were inconsistent with some of the arguments put to us by the interested organisations. We also notice Professor Spencer’s illuminating conclusion on the question of recklessness:

‘To infect an unsuspecting person with a grave disease you know you have, or may have, by behaviour that you know involves a risk of transmission, and that you know you could easily modify to reduce or eliminate the risk, is to

harm another in a way that is both needless and callous. For that reason, criminal liability is justified unless there are strong countervailing reasons. In my view there are not.' (See NLJ, 26 March 2004, p 471.)

[56] Although we have considered these judgments, and the remaining material to which our attention was drawn, in this court we are concerned only to decide what the law is now, and in this jurisdiction. Having done so, it is for Parliament if it sees fit, to amend the law as we find it to be.

[57] In Judge Philpot's second ruling, he accepted the Crown's argument that the possible consent of the victims was irrelevant. That position, as we have already explained, was not maintained by the Crown before us. For the reasons we have now given, the ruling was wrong in law.

CONCLUSION

[58] We repeat that the Crown did not allege, and we therefore are not considering the deliberate infection, or spreading of HIV with intent to cause grievous bodily harm. In such circumstances, the application of what we may describe as the principle in *R v Brown (Anthony Joseph)* [1993] 2 All ER 75, [1994] 1 AC 212 means that the agreement of the participants would provide no defence to a charge under s 18 of the 1861 Act.

[59] The effect of this judgment in relation to s 20 is to remove some of the outdated restrictions against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it. In this context, *R v Clarence* (1889) 22 QBD 23, [1886–90] All ER Rep 133 has no continuing relevance. Moreover, to the extent that *R v Clarence* suggested that consensual sexual intercourse of itself was to be regarded as consent to the risk of consequent disease, again, it is no longer authoritative. If, however, the victim consents to the risk, this continues to provide a defence under s 20. Although the two are inevitably linked, the ultimate question is not knowledge, but consent. We shall confine ourselves to reflecting that unless you are prepared to take whatever risk of sexually transmitted infection there may be, it is unlikely that you would consent to a risk of major consequent illness if you were ignorant of it. That said, in every case where these issues arise, the question whether the defendant was or was not reckless, and whether the victim did or did not consent to the risk of a sexually transmitted disease, is one of fact, and case specific.

[60] In view of our conclusion that the trial judge should not have withdrawn the issue of consent from the jury, the appeal is allowed. Notwithstanding the arguments to the contrary, we unhesitatingly order a retrial, which should take place at the earliest possible date. Subject to witness convenience and availability, appropriate arrangements are in hand for a trial in early June before a judge of the High Court at Inner London Crown Court. In these circumstances we shall not address the issue of sentence.

Appeal allowed.

Flynn v Scougall

[2004] EWCA Civ 873

COURT OF APPEAL, CIVIL DIVISION

BROOKE, POTTER AND MAY LJJ

22 JUNE, 13 JULY 2004

Practice – Payment into court – Withdrawal or reduction of payment in – Whether application for reduction of payment in operating as automatic stay on acceptance if issued within 21-day period for acceptance and before acceptance – CPR 36.6(5), 36.11(1).

The defendant in personal injury proceedings commissioned an expert medical report on the claimant's injuries. Before receiving the report, the defendant made a payment into court of £24,500 under CPR Pt 36. Rule 36.6(5)^a provided that such a payment could be withdrawn or reduced only with the permission of the court. Under r 36.11(1)^b, the claimant could accept the payment without the court's permission if he gave the defendant written notice of acceptance not later than 21 days after the payment had been made. Six days after making the payment in, the defendant received the expert report. It improved her evidential position in respect of the claimant's injuries. As a result, the defendant issued an application that same day for an order that £14,500 of the money in court should be paid out to her solicitors, reducing the amount in court to £10,000. A letter and fax were also sent that day to the claimant's solicitors, informing them of the application, and saying that the original Pt 36 payment was withdrawn and that the intention was to make a reduced Pt 36 payment of £10,000. Five days later—before the hearing of the defendant's application and within 21 days of the making of the original payment—the claimant gave notice accepting the original payment. The deputy district judge subsequently granted the defendant's application, and ordered payment out of £14,500 to the defendant's solicitors. That order was set aside by the district judge who instead ordered payment out to the claimant's solicitors of the £10,000 in court, and further ordered the defendant to pay the additional £14,500 to the claimant's solicitors. The defendant appealed to the circuit judge. He concluded that it was unjust to allow a claimant to accept a payment into court when he knew that the defendant was withdrawing the offer and had applied to the court for permission to do so. He further held that, where a defendant issued an application to reduce a payment into court within the period for acceptance of the offer and before it had been accepted, there was an automatic stay or suspension of the time for acceptance until after the hearing of the defendant's application. Accordingly, he allowed the appeal, and the claimant appealed to the Court of Appeal.

Held – Where a defendant issued an application to reduce a payment into court within the period for acceptance of the offer and before it had been accepted, CPR Pt 36 provided no warrant for an automatic stay of the time for acceptance.

^a Rule 36.6(5) is set out at [17], below

^b Rule 36.11, so far as material, provides: '(1) A claimant may accept ... a Part 36 payment ... without needing the court's permission if he gives the defendant written notice of acceptance not later than 21 days after the ... payment was made ...'

If, exceptionally, a defendant wished, within the 21 days provided for acceptance, to withdraw or reduce a Pt 36 payment, he should apply for permission to do so and inform the claimant of his application. If the claimant wished to accept the Pt 36 payment within the 21 days without permission, he should give the requisite written notice of acceptance. The stage was then set for the court to decide the defendant's application in the light of the claimant's notice of acceptance. Since allowing the defendant's application would deprive the claimant of an otherwise unfettered right, the fact that the claimant had given notice of acceptance would be an important consideration to be taken into account in deciding whether the defendant should be given permission. In the instant case, the defendant had chosen to make the Pt 36 payment before the expert report had arrived. In doing so, she had secured the advantage of an earlier payment into court, and had taken the risk that the report might improve her evidential position. She had failed to show that she should, in justice, be permitted to reduce her Pt 36 payment so as to deny the claimant's otherwise unfettered right to accept the full payment within 21 days. Accordingly, the appeal would be allowed (see [31], [33], [42]–[45], below).

Manku v Seehra (1985) 7 ConLR 90 approved.

Per curiam. The court has power to entertain a defendant's application to withdraw or reduce a Pt 36 payment which is made after the claimant has given notice of acceptance (see [34], [44], [45], below).

Notes

For time for acceptance of a Pt 36 payment, see 37 *Halsbury's Laws* (4th edn reissue) para 816.

Cases referred to in judgments

Scammell v Dicker [2001] 1 WLR 631, CA.

Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 586, CA.

French (A Martin) (a firm) v Kingswood Hill Ltd [1960] 2 All ER 251, [1961] 1 QB 96, [1960] 2 WLR 947, CA.

Cumper v Potheary [1941] 2 All ER 516, [1941] 2 KB 58, CA.

Chainrai v Boston (11 July 2002, unreported), QBD.

Manku v Seehra (1985) 7 ConLR 90.

Marsh v Frenchay Healthcare NHS Trust (2001) Times, 13 March.

MRW Technologies Ltd v Cecil Holdings Ltd [2001] All ER (D) 381 (Jun).

Appeal

The claimant, John Joseph Flynn, appealed with permission of Brooke LJ granted on 21 November 2003 from the order of Judge Bowers in Newcastle-upon-Tyne County Court on 14 November 2003 allowing an appeal by the defendant, Tracey Scougall, from the order of District Judge Large on 21 May 2003 setting aside the order of Deputy District Judge Mather on 8 April 2003 granting an application by the defendant (i) to reduce from £24,500 to £10,000 a sum paid into court by her under CPR Pt 36 on 14 March 2003 and (ii) for the payment out of £14,500 to her solicitors. The facts are set out in the judgment of May LJ.

Jeremy Freedman (instructed by *Thompsons*, Newcastle) for the claimant.

Quintin Tudor-Evans (instructed by *Silverbeck Rymer*, Liverpool) for the defendant.

a 13 July 2004. The following judgments were delivered.

MAY LJ (giving the first judgment at the invitation of Brooke LJ).

[1] This appeal against the judgment and order of Judge Bowers sitting in the Newcastle-upon-Tyne County Court on 14 November 2003 is a second appeal, for which Brooke LJ gave permission on 21 November 2003. It raises an important point of practice relating to a defendant's payment into court under CPR Pt 36.

FACTS

[2] The facts may be shortly stated. On 20 September 1999, the claimant, a firefighter, was injured when the fire engine in which he was travelling was struck by the defendant's vehicle. The claimant's personal injury claim arising out of this accident was issued on 14 August 2002. It was supported, as the rules require, by a medical report in which Professor Gregg expressed the opinion that the accident had accelerated the claimant's retirement by five years. On 12 October 2002, the defendant served a defence admitting liability.

[3] On 3 January 2003, those acting for the defendant instructed Mr Pinder to report on the claimant's injuries. On 13 January 2003, the court gave directions which included permission to rely on a report by Mr Pinder provided that it was disclosed by 28 February 2003. The claimant's solicitors agreed to extensions of time for the service of this report, the second of which provided that it should be served by 20 March 2003. On 14 March 2003, the defendant made a payment into court of £24,500 net of recoverable benefit of £2,186.28.

[4] Those advising the defendant received Mr Pinder's report on 20 March 2003. This included his opinion that the accident had accelerated the claimant's symptoms by no more than three months. The defendant's solicitors regarded this as affecting the amount of the payment into court. They accordingly issued an application that day for an order that £14,500 of the money in court should be paid out to the defendant's solicitors. This would reduce the amount in court to £10,000. On the same day, the defendant's solicitors sent a letter and fax to the claimant's solicitors informing them of the application to the court and saying that the original Pt 36 payment into court of 14 March 2003 was withdrawn. They said that the intention now was to make a reduced Pt 36 payment into court of £10,000.

[5] On 25 March 2003, before the hearing of the defendant's application to reduce the amount in court, the claimant gave notice accepting the original Pt 36 payment into court. This was within 21 days of the making of that original payment.

[6] On 8 April 2003, Deputy District Judge Mather allowed the defendant's application to reduce the sum in court to £10,000 and ordered payment out of £14,500 to the defendant's solicitors. On 21 May 2003, District Judge Large set aside the order of 8 April. He ordered payment out to the claimant's solicitors forthwith of the £10,000 in court, and ordered the defendant to pay to the claimant's solicitors the additional £14,500 with interest from 25 March 2003. He concluded that a Pt 36 payment must remain open for acceptance for 21 days unless within that time and before acceptance the court gives permission to reduce it. The defendant's original payment was made upon a considered decision. In his view, the defendant should have made a without notice application and applied to have it dealt with as urgent business.

THE APPEAL TO THE JUDGE

[7] The defendant's appeal against this decision was heard by Judge Bowers on 5 September 2003 and his order is dated 14 October 2003. He allowed the appeal and set aside the order of District Judge Large. He gave the claimants until 4 November 2003 to accept, if they chose, the £10,000 in court. a

[8] The essence of Judge Bowers' decision was that he considered it to be unjust to allow a claimant to accept a payment into court when he knows, as in this case, that the defendant is withdrawing the offer which the payment constitutes and has made an application to the court for permission to do so. The judge considered that, where a defendant issues an application to reduce a payment into court within the period for acceptance and before it has been accepted, there is imposed automatically a stay or suspension of the time for acceptance of the payment into court until after the hearing of the defendant's application. b
c

[9] The judge recorded the claimant's argument that the defendant had chosen to seek the benefit of a Pt 36 payment knowing that the medical report from Mr Pinder was due to be delivered within a few days. He could not argue that the contents of the report represented a change of circumstances sufficient to justify a reduction in the sum in court. The judge did not agree. Bearing in mind that the payment was made on the date when the defendant had hoped to be able to serve the report, the judge considered that the contents of Mr Pinder's report constituted good and sufficient reason for the order originally made by the deputy district judge. The claimant appeals against this decision. d
e

CPR PT 36

[10] The first issue in this appeal turns on the proper construction of CPR Pt 36. Part 36 must be looked at in the light of the overriding objective in Pt 1. The rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly (r 1.1(1)). The court must seek to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule (r 1.2). The parties are required to help the court to further the overriding objective (r 1.3). f

[11] Part 36 contains rules about offers to settle and payments into court, and about the consequences where an offer to settle or payment into court is made in accordance with Pt 36 (r 36.1(1)). Part 36 does not prevent a party from making an offer to settle in whatever way he chooses; but if such an offer is not made in accordance with Pt 36, it will only have the consequences specified in Pt 36 if the court so orders (r 36.1(2)). As is well known, broadly speaking the Pt 36 consequences relate to payments or awards of costs and interest. If an offer to settle within Pt 36 is accepted, that effects a compromise. If it is not accepted, there is no compromise and the action proceeds. There are then costs advantages to the party who made the offer, if the outcome of the litigation is less favourable to the offeree than the terms of the offer. g
h

[12] Rule 36.2 distinguishes between 'a Part 36 payment' and 'a Part 36 offer'. Each of these is referred to in that rule as an offer. A Pt 36 payment is thus an offer made by way of payment into court. A Pt 36 payment may only be made after proceedings have started (r 36.3(2)). j

[13] Rule 36.3 provides that, subject to exceptions, an offer by a defendant to settle a money claim will not have the consequences set out in Pt 36 unless it is made by way of a Pt 36 payment. The exceptions relate to an offer made by reference to an interim payment (r 36.5(5)) and a claim subject to deduction of e

a benefits under the Social Security (Recovery of Benefits) Act 1997 where the defendant has applied for, but not received, a certificate of recoverable benefits (r 36.23). The policy of r 36.3 evidently is that a defendant wishing to make an offer to settle a money claim within Pt 36 should do so in a way which enables the claimant to accept the offer in the knowledge that the settlement money is securely available. Part 36 payments are obviously not available for non-money claims nor for offers to settle by claimants, who by definition are not offering to make any payment.

[14] A defendant who makes a Pt 36 payment must file with the court a Pt 36 payment notice stating the matters required by r 36.6(2). A Pt 36 payment is made when written notice of the payment into court is served on the offeree (r 36.8).

c [15] A Pt 36 offer or Pt 36 payment is accepted when notice of its acceptance is received by the offeror (r 36.8(5)). A claimant may accept a Pt 36 offer or a Pt 36 payment made not less than 21 days before the start of the trial without needing the court's permission, if he gives the defendant written notice of acceptance not later than 21 days after the offer or payment was made (r 36.11(1)). If a Pt 36 offer or Pt 36 payment relates to the whole claim and is accepted, the claim will be stayed (r 36.15). Where a Pt 36 payment is accepted, the claimant obtains payment out of the sum in court by making a request for payment in the appropriate practice form (r 36.16).

d [16] Thus, a Pt 36 payment by a defendant is a payment into court constituting an offer to settle a claimant's claim or that part of it to which the payment is expressed to relate. If the offer is made not less than 21 days before the start of the trial, the claimant may accept the payment without the court's permission and obtain payment out of the sum in court without judicial intervention.

[17] Rule 36.6(5) provides: 'A Part 36 payment may be withdrawn or reduced only with the permission of the court.' It is this provision which is central to the present appeal.

[18] A Pt 36 offer has many of the same characteristics as a Pt 36 payment. Its form and content are prescribed by r 36.5. In particular, rr 36.11 and 36.12 provide that a Pt 36 offer made not less than 21 days before the start of the trial may be accepted without needing the court's permission. Differences include g that a claimant as well as a defendant may make a Pt 36 offer; and a defendant may make a Pt 36 offer in relation to a non-money claim (r 36.4). Another difference between a Pt 36 payment and a Pt 36 offer is that a Pt 36 offer may be withdrawn at any time before acceptance even within the 21 days after the offer is made. There is no equivalent for a Pt 36 offer of r 36.6(5). Indeed r 36.5(8) h provides that if a Pt 36 offer is withdrawn it will not have the consequences set out in Pt 36. In *Scammell v Dicker* [2001] 1 WLR 631, this court held that Pt 36 did not exclude the general law of contract that an unaccepted offer can be withdrawn. All that it does is to lay down the requirements that are needed to attain the consequences of making a Pt 36 offer.

j [19] If a Pt 36 offer or Pt 36 payment is made more than 21 days before the start of the trial, in uncomplicated circumstances it remains open for acceptance without the court's permission for 21 days after the offer or payment was made. After that 21 days, the effect of the various provisions in Pt 36 is that it may not be accepted without the court's permission, unless the parties are agreed as to the costs and other consequences of doing so. Thus, the problem which this appeal illustrates can only arise within 21 days after a Pt 36 payment is made.

GROUNDS OF APPEAL AND SUBMISSIONS

[20] The claimant contends that the judge in the present case misconstrued the relevant provisions of Pt 36. Mr Freedman on behalf of the claimant submits that the issues are whether a claimant can be prevented from accepting a payment into court within the period of 21 days following notice of payment in when he is put on notice that the defendant wishes to withdraw some of the money in court and where the defendant has issued an application seeking permission to do so. Was the judge correct in his decision that, if a defendant issues an application for permission to reduce or withdraw a payment into court within the period for acceptance but before it is accepted, there is imposed automatically a stay or suspension of the time for acceptance of the payment into court until after the hearing of the defendant's application?

[21] Mr Freedman submits that rr 36.6(5) and 36.11(1) are clear and unambiguous. The claimant was entitled to accept the payment into court on 25 March 2003. The offer which it constituted had not at that time been withdrawn and it remained available for acceptance, even though the defendant had applied to the court for permission to reduce the amount of money in court and had given notice of this application to the claimant's solicitors. It is submitted that this construction is not unjust. The defendant made a commercial decision to make the payment into court before receiving Mr Pinder's report. The defendant was prepared to take the risk that this payment might subsequently appear to be too great and sought to obtain the advantages of a Pt 36 payment which was subject to the relevant provisions of Pt 36. These included the clear stipulation that the Pt 36 payment might be withdrawn or reduced only with the permission of the court. It is submitted that, if the judge had correctly construed this provision and the general structure of Pt 36, he would not have concluded that it was unjust for the claimant to be permitted to accept the money in court.

[22] There is a respondent's notice which seeks to uphold the judge's decision on different or additional grounds. The notice contends that a Pt 36 payment is a particular type of Pt 36 offer, and that all the general rules which apply to Pt 36 offers apply also to Pt 36 payments. Rule 36.6(5) requires the court's permission to withdraw or reduce the actual money in court, but does not restrict the defendant's right to withdraw or reduce the offer at any time before acceptance. It is contended that to treat Pt 36 payments differently from Pt 36 offers would create unsatisfactory and unnecessary anomalies. A defendant in a money claim is at a disadvantage in comparison with a defendant in a non-money claim and also with a claimant. There is no equality of arms.

[23] Mr Tudor-Evans on behalf of the defendant submits that Pt 36 offers are new procedural devices created by the CPR, although deriving from *Calderbank* offers under the previous regime [see *Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93]. A claimant can make a Pt 36 offer to settle any issue in the proceedings including an offer to settle his money claim for a stated amount. A defendant can make a Pt 36 offer to settle liability or non-money claims, but cannot make a Pt 36 offer to settle a money claim for a fixed sum. He has to make a Pt 36 payment. *Scammell v Dicker* establishes that a Pt 36 offer may be withdrawn at any time before acceptance. Pt 36 offers are subject to contractual principles relating to offer and acceptance. Mr Tudor-Evans submits that the essential nature of a Pt 36 payment is that it is an offer open for acceptance by a claimant. There is no reason why uniquely a Pt 36 payment cannot be withdrawn within the 21-day period and why it should not be essentially contractual in nature. It is therefore submitted that Pt 36 should be construed to

- a allow a defendant to withdraw a Pt 36 payment within the 21 days during which it is open for acceptance. This, it is suggested, can be achieved by construing r 36.6(5) to mean that a Pt 36 payment can only be withdrawn or reduced with the court's permission once it has become effective. Mr Tudor-Evans' alternative construction is that a defendant can withdraw the offer comprised in a Pt 36 payment at any time, but must obtain the court's permission to remove the money from court. It is submitted in the further alternative that the judge's solution is correct as a mechanism to avoid injustice and lack of equality of arms. b It is suggested that the fallacy of the claimant's submission is indicated by the concession, correctly made, that if a defendant were to make an obvious mistake in a Pt 36 payment, the court must retain the power to intervene to correct the mistake. This would occur, for instance, if a defendant intended to make a Pt 36 payment of £10,000, but erroneously paid £100,000 into court. c

DISCUSSION AND DECISION

- [24] The CPR are a new procedural code and, generally speaking, cases decided under the former Rules of the Supreme Court (RSC) are not helpful in interpreting the new code. Nevertheless, the essential structure of the rules relating to payments into court did not change with the CPR. Some reference to earlier authority is therefore appropriate. d

- [25] Part 36 contains a structure whose main purpose is to enable and encourage parties to litigation to reach sensible and economic compromises. As Devlin LJ said in *A Martin French (a firm) v Kingswood Hill Ltd* [1960] 2 All ER 251 at 252, [1961] 1 QB 96 at 103: e

- ‘... a payment into court is simply an offer to dispose of the claim on terms. If the defendant were free to formulate the terms himself, he could make his offer in whatever form he liked. But if he seeks to effect his compromise under the rules which permit a payment into court, he must make his offer according to the rules.’ f

The offer is then subject to the terms of the relevant rules.

- [26] The rules use the language of offer and acceptance and contain provisions relating to the withdrawal of both a Pt 36 payment and a Pt 36 offer. Further, if an offer within Pt 36 is accepted in accordance with Part 36, a compromise results. But, as Goddard LJ said in *Cumper v Pothecaray* [1941] 2 All ER 516 at 520, [1941] 2 KB 58 at 67: g

- ‘... there is nothing contractual about payment into court. It is wholly a procedural matter and has no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract.’ h

- This, in my view, remains the position with Pt 36 payments. This is not, I think, inconsistent with the decision in *Scammell v Dicker*, which concerned Pt 36 offers for which the analogy with contract is closer. In so far as Henriques J may have expressed a different view in *Chainrai v Boston* (11 July 2002, unreported), I am inclined to disagree. The facts and issue in that case were most unusual and his view on this point did not, I think, dictate the result. j

[27] Whether or not the structure of Pt 36 payments is to be characterised as contractual, the issue in the present appeal, as in *Scammell v Dicker*, concerns withdrawal, and Pt 36 has express provisions relating to withdrawal of both a Pt 36 offer and a Pt 36 payment. A defendant who wishes to make a Pt 36 payment has to make an offer to which the relevant provisions of Pt 36 are

attached. One of these is that a Pt 36 payment may be withdrawn or reduced only with the permission of the court (r 36.6(5)). In my judgment, this provision is clear and it relates to the offer which the Pt 36 payment comprises. I reject the submission that the offer and the payment into court are separate and that r 36.6(5) relates to the latter but not to the former. On the contrary, the defendant has chosen to make an offer by means of a Pt 36 payment with an attribute that it may be withdrawn or reduced only with the court's permission. By contrast, the provision which relates to the withdrawal of a Pt 36 offer is unqualified.

[28] By r 36.11, a claimant may accept a Pt 36 payment not later than 21 days after the payment was made without the court's permission. The normal expectation, implicit in the rules, is that the offer which the payment comprises will remain available for acceptance throughout that period. The problem which this appeal raises could not arise after the expiry of the 21 days. A claimant who then wishes to accept a Pt 36 payment and a defendant who wishes to withdraw or reduce it each have to apply to the court for permission, and each have the opportunity of submitting that the other should not be given permission.

[29] The rules do not spell out what may happen when equivalent conflicting wishes of a claimant and defendant arise within the 21 days. On the face of it, r 36.11 entitles the claimant to accept a subsisting Pt 36 payment without permission within the 21 days, even though he knows that the defendant wants to withdraw or reduce it. Equally on the face of it, r 36.6(5) entitles the defendant to apply within the 21 days for permission to withdraw or reduce the Pt 36 payment and empowers the court to entertain the application, and to grant it if, exceptionally, it is persuaded that it is just to do so. The hearing of the application could, but for administrative reasons may well not, take place within the 21 days.

[30] In my judgment, each of these constructions (of rr 36.11 and 36.6(5)) is correct. Each of the provisions is clear and unambiguous and neither taken alone is amenable to modification by construction or implication to accommodate the other so as to avoid the clash which is capable of arising. This means that one or both of the parties might think it advantageous to jump in before the other to establish a position of forensic advantage. The defendant may rush to make his application to withdraw and might, as the district judge in the present case suggested, try to pre-empt the claimant by making some urgent application without notice. The claimant may rush to give notice accepting the Pt 36 payment. Rule 1.3 suggests that on the contrary the parties should co-operate to avoid an unseemly adversarial scramble and the truculent correspondence which might follow it. Rule 1.2(b) suggests that the court must interpret the relevant rules as a whole to produce a just and economic result. The only question is whether the defendant should be given permission to withdraw or reduce a Pt 36 payment which he has only just made and which, unless the court gives him permission to do this, the claimant is entitled to accept without permission.

[31] I do not consider that the judge's valiant attempt to resolve the dilemma is satisfactory or correct. He has, I think, invented an automatic stay for which the detailed provisions of Pt 36 provide no warrant. I can conceive that his solution might generate abuse by unscrupulous defendants.

[32] A preferable solution is that adopted by Judge John Newey QC conducting Official Referees' business in *Manku v Seehra* (1985) 7 ConLR 90. The facts of that case were close to those in the present appeal. A defendant made a payment into court in the light of the outcome of an experts' meeting between surveyors instructed by each of the parties. The defendant then sought the opinion of another surveyor. In the light of this second opinion, he applied for

a leave to withdraw his notice of payment in. The plaintiff gave notice accepting the payment in on the same day as the defendant's summons was delivered to the plaintiff's solicitors. Judge Newey held that the plaintiff remained lawfully entitled to give notice of acceptance. He also held that the court had power to allow withdrawal of a notice of payment in even when the plaintiff has a right to accept it. He expressed (at 95) his solution to the clash as follows:

b "The second question is whether a court may allow withdrawal of a notice of payment in, if between the time when the defendant served his summons seeking leave to withdraw and the hearing of it the plaintiff has given notice of acceptance. The Rules do not state that the issue of a summons for leave prevents the plaintiff from giving notice of acceptance. R. 3(4) does provide
c that acceptance has the effect of staying the proceedings. I think that it would be most unfortunate if a plaintiff were able to defeat a defendant's application for leave to withdraw a payment in by giving notice of acceptance before the defendant's summons could be heard. Since the plaintiff's acceptance would not have terminated the action, but merely
d stayed it, I think that the court may notionally remove the stay and proceed to hear the application. A plaintiff's acceptance does not prevent the court from allowing a defendant to withdraw, but is obviously an important consideration to be taken into account in deciding whether he should be given leave to do so.

e [33] The essential structure of the relevant provisions of the RSC which Judge Newey was considering was the same as the equivalent provisions in CPR Pt 36. In my view, Judge Newey's solution can and should be applied to Pt 36. There is no need for an unseemly rush to establish procedural advantage. If, exceptionally, a defendant wishes within the 21 days to withdraw or reduce a
f Pt 36 payment, he should apply for permission to do so and inform the claimant of his application. If the claimant wishes to accept the Pt 36 payment within the 21 days without permission, he should give the requisite written notice of acceptance. The stage is then set for the court to decide the defendant's application in the light of the claimant's notice of acceptance. Since to allow the defendant's application would deprive the claimant of an otherwise unfettered
g right, the fact that the claimant had given notice of acceptance would be, as Judge Newey said, an important consideration to be taken into account in deciding whether the defendant should be given permission. It would be an additional consideration to those which may arise if a defendant's application is made after the 21 days has expired. If the court gives the defendant permission, there is
h power to make any necessary order or direction to achieve its consequences.

[34] In the present case, the claimant's notice of acceptance was after the defendant's application to withdraw and was obviously prompted by it. The logic of my analysis is that the court also has power to entertain a defendant's application to withdraw or reduce a Pt 36 payment which is made after the claimant has given notice of acceptance and where necessarily the claimant's
j acceptance was not prompted by the defendant's application.

[35] On this analysis, although I have disagreed with part of his reasoning, the judge in the present case exercised a power which was in substance available to him. Mr Freedman submits nevertheless that the judge reached the wrong discretionary conclusion. He should not have given the defendant permission to reduce the Pt 36 payment.

[36] The standard of persuasion which a defendant applying for permission to withdraw or reduce a Pt 36 payment has to achieve has been variously stated. In *Cumper v Potheary* [1941] 2 All ER 516 at 522–523, [1941] 2 KB 58 at 69–70, Goddard LJ said that the defendant must show that there are good reasons for his application, such as the discovery of further evidence which puts a wholly different complexion on the case or a change in legal outlook brought about by a new judicial decision. He said that, apart from matters such as fraud or mistake affecting the original payment, the court should consider whether there is a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing or reducing his payment.

[37] In *Manku v Seehra*, Judge Newey referred to *Cumper v Potheary* and subsequent cases. He said of the case before him, that the defendant's application was not based on the discovery of new evidence nor a change in legal outlook. The defendant was relying on a last minute review of available information by a fresh expert. He refused the defendant's application.

[38] In *Marsh v Frenchay Healthcare NHS Trust* (2001) Times, 13 March, Curtis J considered a defendant's application under CPR 36.6(5) to withdraw or reduce a Pt 36 payment which the claimant had accepted, where shortly afterwards inquiry agents had taken videos of the claimant doing various tasks which were said to call in question the credibility of the case he had made. Curtis J considered that, under the CPR, the standard propounded in *Cumper v Potheary* should be discarded in favour of a flexible approach to achieve the overriding objective.

[39] In *MRW Technologies Ltd v Cecil Holdings Ltd* [2001] All ER (D) 381 (Jun), Garland J heard an appeal against a master's order giving a defendant permission under r 36.6(5) to withdraw a Pt 36 payment. He said, in my view correctly, that the same considerations apply to giving permission to withdraw money in court as to refusing permission to take it out. He inclined, with reference to Curtis J's decision in *Marsh v Frenchay Healthcare NHS Trust*, to a more flexible approach to take account of the overriding objective. But he also considered that Goddard LJ's phrase 'a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing or reducing his payment' (see *Cumper v Potheary* [1941] 2 All ER 516 at 523, [1941] 2 KB 58 at 70) was to be adopted as consistent with the overriding objective. I agree.

[40] In the present case, the judge referred both to change of circumstances sufficient to justify a reduction and to the overriding objective. But his erroneous decision that the defendant's application operated as an automatic stay meant that he gave no, or too little, weight to the fact that the application had been made within the 21 days and that to grant it would deprive the claimant of an otherwise unfettered right to accept the payment. This requires this court to consider afresh the judge's exercise of discretion, which in any event I consider to be, or to come close to being, plainly wrong.

[41] The evidence before the judge and this court is that of the defendant's solicitor attached to the application verified by a statement of truth. This relates the facts about Mr Pinder's report and the delay in obtaining it which I summarised at the beginning of this judgment. Mr Freedman accepts that, if Mr Pinder's opinion were accepted without qualification, the damages would be less than £24,500. He maintains that Professor Gregg's opinion would sustain a larger award than £24,500. This court does not have either of the medical reports. We are unable to reach any considered view of our own. But I do not think it is

- a necessary to do so. It is clear that the difference between the two experts was nothing out of the ordinary in personal injury litigation.
- [42] The defendant chose to make the Pt 36 payment before Mr Pinder's report arrived. In doing so, she secured the advantage of an earlier payment into court and took the risk that Mr Pinder's report might improve her evidential position. The fact that it may have done so was not, in my view, even close to a sufficient change of circumstance, any more than was the second surveyor's report in *Manku v Seehra*. It was not based on the discovery of new evidence nor a change in legal outlook. Rather, the defendant was relying on a further review of available information by a fresh expert. I do not consider that the defendant has shown that she should in justice be permitted to reduce her Pt 36 payment so as to deny the claimant's otherwise unfettered right to accept the full payment
- b
- c within the 21 days.

CONCLUSION

[43] For these reasons, I would allow the appeal and make appropriate consequential directions or orders.

d **POTTER LJ.**

[44] I agree.

BROOKE LJ.

[45] I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Matthews and others v Kent & Medway Towns Fire Authority and others

[2004] EWCA Civ 844

COURT OF APPEAL, CIVIL DIVISION

JONATHAN PARKER, LONGMORE AND MAURICE KAY LJJ

31 MARCH, 1 APRIL, 2 JULY 2004

Employment – Employee – Part-time employee – Prevention of less favourable treatment – Retained firefighters employed part-time – Whether retained firefighters treated less favourably than full-time firefighters – Whether employed under same type of contract – Whether engaged in same or broadly similar work – Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551, regs 2(3), (4).

The fire services employed both full-time firefighters and 'retained firefighters' who worked part-time. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 provided that a part-time worker had the right not to be treated by his employer less favourably than the employer treated a 'comparable full-time worker' as regarded the terms of his contract. Regulation 2(4)^a defined a 'comparable full-time worker' in relation to a part-time worker as being, inter alia, where both workers were employed by the same employer 'under the same type of contract' and engaged in the same or broadly similar work. Six categories of people who were to be regarded as being employed under different types of contract were set out in reg 2(3). Category (a) was 'employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship' and categories (a)–(e) differentiated variously between employees and workers, between contracts for a fixed term, contracts of apprenticeship, and contracts not for a fixed term. Category (f) covered 'any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract'. The applicants were retained firefighters who brought proceedings in the employment tribunal under the 2000 regulations claiming that they were treated less favourably by the respondent employers than comparable full-time firefighters in relation to pension arrangements, pay, and sick pay. The employment tribunal dismissed their claims, finding: (i) that retained firefighters and full-time fire fighters were employed under different types of contract; and (ii) that they were not engaged in the same or broadly similar work as full-time firefighters as the full-time workers had measurable additional job functions. The Employment Appeal Tribunal dismissed their appeal and they appealed to the Court of Appeal. The retained firefighters submitted that they fell within category (a) in reg 2(3), as did full-time firefighters. The employers contended that the retained firefighters fell within category (f) because it was reasonable for the employers to treat them differently on the ground that they had a different type of contract.

Held – (1) Regulation 2(3)(f) of the 2000 regulations provided a residual category of 'other' descriptions of workers who fell outside the categories in

^a Regulation 2, so far as material, is set out at [4], below

- a reg 2(3)(a)–(e). The six categories in para (3) were mutually exclusive and category (f) was confined to descriptions of workers who did not fall within any of the other categories. To enable an employer to remove an employee from one of categories (a)–(e) because it was reasonable to treat him differently on the ground that alleged comparators had a different type of contract would severely limit the scope of the protection provided by the 2000 regulations. Categories
- b (a)–(e) were defined by reference to status and tenure, such that it would be surprising if, in relation to category (f), the draftsman had intended to widen the criteria of types of contract to embrace any reasonable differences in treatment. Accordingly, the retained firefighters being employed under contracts which were neither for a fixed term nor contracts of apprenticeship fell within reg (2)(3)(a) and were therefore employed under the same type of contract of
- c employment as their full-time colleagues (see [12], [13], [28]–[30], [32], below).
- (2) Retained firefighters were not engaged in the same or broadly similar work as full-time firefighters within the meaning of reg 2(4)(a) of the 2000 regulations. The employment tribunal had been entitled to find that, in addition to fighting fires and responding to other emergencies, there were measurable additional job
- d functions carried out by full-time firefighters but not by retained firefighters, and to conclude that full-time firefighters had fuller, wider jobs than retained firefighters. The appeal would therefore be dismissed (see [19]–[24], [31], [32], below).

Notes

- e For less favourable treatment of part-time workers, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) paras 61, 62.
- Regulation 2(3) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI/1551, was substituted by reg 2(a) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- f (Amendment) Regulations 2002, SI 2002/2035, with effect from 1 October 2003. The amended regulation removes the distinction between fixed-term and permanent contracts for the purpose of ascertaining what are different types of contract for the purpose of the 2000 regulations, but amended reg 2(3)(d) has the same wording as unamended reg 2(3)(f).
- For the Part-Time Workers (Prevention of Less Favourable Treatment)
- g Regulations 2000, SI 2000/1551, reg 2, see 7 *Halsbury's Statutory Instruments* (2003 issue) 385.

Cases referred to in judgments

- British Telecommunications plc v Sheridan* [1990] IRLR 27, CA.
- h *Dorothy Perkins Ltd v Dance* [1977] IRLR 226, [1978] ICR 760, EAT.
- Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269, [2001] ICR 819.
- R v West Yorkshire Fire and Civil Defence Authority, ex p McCalman* (4 May 1999, unreported).
- j *Yeboah v Crofton* [2002] EWCA Civ 794, [2002] IRLR 634.

Appeal

Mr BR Matthews and eleven other retained firefighters appealed from the decision of the Employment Appeal Tribunal (Judge Birtles, C Baelz and B Switzer) handed down on 7 August 2003 and promulgated in a revised version on 18 August 2003 dismissing the appeal of the appellants from the decision of the

employment tribunal on 22 July 2002 dismissing the appellants' claims against the Kent & Medway Towns Fire Authority, the Royal Berkshire Fire and Rescue Services (the respondent employers) and the Secretary of State for the Home Department under reg 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The facts are set out in the judgment of Maurice Kay LJ.

Brian Langstaff QC and Martin Seaward (instructed by *Thompsons*) for the appellants.

John Bowers QC (instructed by *Beachcroft Wansbroughs*) and *Nicholas Cronias* of *Beachcroft Wansbroughs* for the respondent employers.

Nicholas Paines QC and Raymond Hill (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

2 July 2004. The following judgments were delivered.

MAURICE KAY LJ (giving the first judgment at the invitation of Jonathan Parker LJ).

[1] It is a commonplace that one of the characteristics of the current labour market is flexibility. This has led to an increase in employment relationships based on part-time working, temporary employment, seasonal work and the like. In this country and elsewhere employees who were engaged under such arrangements were generally denied or were unable to qualify for the range of employment rights which have been bestowed by legislation over the last 40 years. Their contractual terms were often less advantageous. So far as part-time workers are concerned, they have now been provided with a degree of protection by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 (the regulations). The regulations were promulgated pursuant to s 19 of the Employment Relations Act 1999 and are designed to implement Council Directive (EC) 97/81 (OJ 1998 L14 p 9), which in turn was concerned to give effect to the Framework Agreement on Part-Time Work which was concluded between the Union of Industrial and Employers' Confederations of Europe, the European Trade Union Confederation and the European Centre of Enterprises with Public Participation. Clause 1 of the Framework Agreement provides:

'The purpose of this Framework Agreement is: (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.'

[2] It is well known that the fire services in this country employ both full-time firefighters and 'retained firefighters'. The latter group are, in common parlance, part-time firefighters. There are over 11,000 of them throughout the country. It is obviously in the nature of fire and rescue services that demand for them is unpredictable and urgent. The purpose of maintaining a large pool of retained firefighters is clearly to ensure that there will be sufficient firefighters to cope with

a demands, whilst at the same time avoiding the need to maintain a larger full-time establishment which would be overmanned save at peak periods.

[3] In this appeal the appellants are representative of all the retained firefighters throughout the country. They claim that they are treated less favourably than comparable full-time firefighters in that they are denied access to statutory pension arrangements, they are denied increased pay for additional responsibilities and their sick pay arrangements are calculated on a less favourable basis. Although the retained firefighters work part-time, the first issue in this appeal is whether they are 'part-time workers' within the meaning of reg 2. If they are, the second issue is whether their full-time colleagues are 'comparable full-time workers' within the meaning of that regulation.

c THE REGULATIONS

[4] The important provisions for present purposes are regs 2 and 5 which I now set out in reverse order. Regulation 5 provides:

d '(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—(a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—(a) the treatment is on the ground that the worker is a part-time worker, and (b) the treatment is not justified on objective grounds.

e (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.'

f Regulation 5 therefore raises the questions: who is a full-time worker? Who is a part-time worker? And who is a comparable full-time worker? The answers are to be found in reg 2, which is in these terms:

(1) A worker is a full-time worker ... if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

g (2) A worker is a part-time worker ... if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.

h (3) For the purposes of paragraphs (1), (2) and (4), the following shall be regarded as being employed under different types of contract—(a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship; (b) employees employed under a contract for a fixed term that is not a contract of apprenticeship; (c) employees employed under a contract of apprenticeship; (d) workers who are neither employees nor employed under a contract for a fixed term; (e) workers who are not employees but are employed under a contract for a fixed term; (f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

j (4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—(a) both workers are—(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
(b) the full-time worker works or is based at the same establishment as the part-time worker ...'

No issue arises in the present case as to reg 2(4)(b). The threshold issue which does arise in relation to retained firefighters concerns the meaning of 'type of contract' in reg 2(1), (2), (3)(f) and (4)(a)(i).

THE DECISION OF THE EMPLOYMENT TRIBUNAL

[5] Proceedings in the employment tribunal were in the form of a test case in which 12 retained firefighters proceeded against two employers, namely Kent & Medway Towns Fire Authority and Royal Berkshire Fire and Rescue Service. The Secretary of State for the Home Department was also a respondent to the applications. Following a lengthy hearing the employment tribunal produced its decision on 22 July 2002. It stated that—

'(1) it finds and declares that the applicant retained firefighters are employed under different types of contract within the meaning of reg 2(3) ... from the named comparator whole-time firefighters and their claims are therefore unsuccessful and dismissed; further or alternatively

(2) it finds and declares that the applicant retained firefighters and the comparator whole-time firefighters are not engaged in the same or broadly similar work within the meaning of reg 2(4)(a) ... and the claims on this further or alternative ground are unsuccessful and dismissed.'

The carefully, constructed decision falls into two main parts. Paragraphs 7–73 are concerned with 'the similarities and/or differences in the actual day-to-day work and actual job functions as between the retained firefighters and the whole-time firefighters on the basis of the evidence'. The part from para 74 then takes the form of an analysis of the contractual terms and conditions. Finally, there are set out the conclusions on the issues which arise on this appeal.

THE DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

[6] The appellants appealed to the Employment Appeal Tribunal (EAT) (Judge Birtles, Mrs C Baelz and Ms B Switzer) ([2003] IRLR 732, [2004] ICR 257). The EAT handed down its judgment on 7 August 2003 and promulgated a revised version on 18 August 2003. It dismissed the appeals, stating ([2003] IRLR 732 at 736, [2004] ICR 257 at 267 (para 40)):

'There was clearly ample material upon which the employment tribunal could find that the retained fire fighters and full-time fire fighters were employed under different types of contract of employment and that it was reasonable for the employer to treat them differently.'

It further rejected grounds of appeal to the effect that the decision of the employment tribunal was flawed on the basis that it had taken irrelevant factors into account or had not taken into account or given sufficient weight to relevant factors or was perverse. This aspect of the appeal had related to the issue of 'the same or broadly similar work' within the meaning of reg 2(4)(a)(ii).

THE GROUNDS OF APPEAL TO THE COURT OF APPEAL

[7] The appellants' notice propounded three grounds of appeal in the following terms:

a 'Ground 1: The EAT should have concluded that the appellants were employed under the same type of contract as full-time firefighters as required by reg 2(3). The construction adopted by the EAT gives no proper force to the word "other" in "any other description of worker" in reg 2(3).

b Ground 2: The EAT should have held that the tribunal took the wrong approach in determining whether the appellants were "engaged in the same or broadly similar work" as full-time firefighters as required by reg 2(4). The tribunal should have concentrated, but did not, upon the issue whether the work done was similar or broadly similar and concluded that this task required the identification of a principal or core of similarity in job function. If this approach had been adopted then the appellants would necessarily have succeeded because firefighting is the central role of all operational firefighters.

c Ground 3: The EAT should have held that the tribunal's decision as to facts was wrong in law because the tribunal had taken into account matters which were irrelevant in performing a balancing exercise.'

d The appeal was presented to us by Mr Langstaff QC under two headings and the form of this judgment will now reflect that.

ISSUE 1: 'DIFFERENT TYPES OF CONTRACT': THE CONSTRUCTION ISSUE

e [8] The central issue in a case such as this is whether a full-time worker is a 'comparable full-time worker' within the meaning of reg 2(4). It is a prerequisite of comparability that the full-time worker and the part-time worker with whom he is being compared are 'employed by the same employer *under the same type of contract*' (see reg 2(4)(a)(i)). Regulation 2(3) lists employees and workers who are to be regarded as being employed under different types of contract. Before the employment tribunal, the case for the appellants was that both they and the full-time firefighters fell within the same category in reg 2(3), namely

f '(a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship'. It was common ground that neither group came within reg 2(3)(b), (c), (d), or (e). The case for the respondents was that, whereas full-time firefighters fall fairly and squarely within (a), retained firefighters are employed under a different type of contract, namely—

g '(f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.'

h [9] In its survey of the day-to-day work and job functions of full-time and retained firefighters and its analysis of their respective contractual terms and conditions, the employment tribunal found 'many differences' and 'many special features of the working patterns'. As a result it concluded that the retained firefighters are employed under a different type of contract. They fall within (f) because it was reasonable for the respondents to treat them differently on the

j ground that they have a different type of contract. Retained firefighters are 'a very special, anomalous, atypical and possibly unique group of employees'. Accordingly, as the two groups are not employed under the same type of contract, the retained firefighters are not entitled to compare themselves with their full-time colleagues.

[10] The EAT agreed with this conclusion. It added ([2003] IRLR 732 at 736, [2004] ICR 257 at 265 (para 37)) that the presence of the criterion of

reasonableness in (f) shows that its purpose 'is to remove a group of workers from (a)–(e) where it is reasonable to treat them differently from other workers'.

[11] We have received a number of sophisticated and intricate submissions about reg 2(3)(f) from Mr Langstaff and, on behalf of the Secretary of State, from Mr Paines QC (whose submissions on this aspect of the appeal were substantially adopted by Mr Bowers QC on behalf of the employer respondents). In my judgment, the problem is not as complex as some of these submissions suggest. I have come to the contrary conclusion to that reached by the employment tribunal and the EAT. I have done so for the following reasons.

[12] *First*, it is plain that the categories (a)–(f) are mutually exclusive. They are specifically stated to be regarded as employments 'under different types of contract'. *Secondly*, the fact that (f) refers to any 'other' description of worker must mean that it is confined to descriptions of workers who do not fall within any of (a)–(e). On the face of it, retained firefighters are employed under contracts which are neither for a fixed-term nor contract of apprenticeship and which therefore fall within (a). *Thirdly*, to enable an employer to remove an employee from one of (a)–(e) because it is reasonable to treat him differently on the ground that alleged comparators have a different type of contract would severely limit the scope of the protection provided by the regulations. It is always open to an employer to justify less favourable treatment on objective grounds under reg 5(2)(b) once the threshold tests of the same type of contract and engagement in the same or broadly similar work have been satisfied. It is neither necessary nor desirable to bring forward an objective test based on reasonableness to enable an employer to remove an employee who would otherwise fall into one of (a)–(e). To do so would unduly complicate eligibility and would run counter to the purpose of the legislation. *Fourthly*, such an approach forms no part of the directive which gave rise to the regulations. *Fifthly*, reg 2(3)(f) is not without a purpose if my construction of it is correct. Rather than providing a mechanism to enable an employee to be removed from one of (a)–(e), its purpose is to provide a residual category of 'other' descriptions of worker who, for whatever reason, fall outside categories (a)–(e). Such workers can be treated differently but only on the ground that they have a different type of contract. In the course of submissions there was some debate as to who might fall into this residual category and rival submissions were made about, for example, home workers, project workers who are employed for the indeterminate duration of a project, temporary workers, seasonal workers, casual workers, seconded workers, quasi-apprentices and agency workers. I am prepared to accept that in most specific cases workers of such descriptions would take their places somewhere in categories (a)–(e). Nevertheless categories and borderlines are notoriously elusive in employment law (see *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 at [42], [43], [2001] IRLR 269 at [42], [43], [2001] ICR 819) and it is consistent with a legislative intention in the field of employment protection to provide a residual category, whether with a view to inclusion in or exclusion from the protection. *Sixthly*, there is force in Mr Langstaff's submission that categories (a)–(e) are defined by reference to status (employee, worker who is not an employee, apprentice) and tenure (open-ended, fixed-term, duration of apprenticeship), such that it would be surprising if, in relation to (f), the draftsman had intended to widen the criteria of *types of contract* to embrace any reasonable differences in treatment.

[13] For all these reasons I consider that the employment tribunal and the EAT were wrong to place the retained firefighters in category (f). They properly

a belong in category (a) and are therefore employed under the same type of
contract of employment—that is neither for a fixed-term nor a contract of
apprenticeship—as their full-time colleagues. That therefore leads to the second
issue: are the two groups engaged in the same or similar work? (Before turning
to that issue I add as a footnote that reg 2(3) has now been amended by the
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
b (Amendment) Regulations 2002, SI 2002/2035 with the result that fixed-term
contracts have now been removed and provided for in the Fixed-Term
Employees (Prevention of Less Favourable Treatment) Regulations 2002,
SI 2002/2034. What had been reg 2(3)(f) in the original 2000 regulations is now
reg 2(3)(d) in the second 2000 regulations in relation to part-time workers).

c ISSUE 2: THE SAME OR BROADLY SIMILAR WORK

[14] If full-time and retained firefighters are employed 'under the same type of
contract', the next question is whether they are 'engaged in the same or broadly
similar work having regard, where relevant, to whether they have a similar level
of qualification, skills and experience' (see reg 2(4)(a)(ii)). The conclusion and
reasoning of the employment tribunal is set out in the following passages:

d '152. In reaching our conclusion as to whether the retained firefighter
applicants are rightly to be held as "engaged in the same or broadly similar
work" we would have regard again to many of our main conclusions of fact
about the particular methods of working of the retained firefighter service
and to the conclusions of fact which we have reached about the way the
e whole operation has been geared to focus the working duties of the retained
firefighter substantially on the emergency call-out firefighting role. That
central firefighting role was not in dispute before us as being the central and
most important job function of the retained firefighter and being certainly a
major part of the job for the whole-time firefighter. We have accepted ...
f however that there are measurable additional job functions which are
carried out by the whole-time firefighter ... and on that ground alone we
would find that it is a fuller wider job than that of the retained firefighter.

153. Additionally we find that because of entry standards, probationary
standards ... and ongoing training in the main areas which we have set out
g ... again there are material differences in the "level of qualification and skills"
between the retained firefighter and the whole-time comparator. Whilst we
were not called upon to make the comparison there is obviously simply no
comparison between retained ranks above station officer since promotion is
not permitted ... above that level. We exclude from this part of our
assessment the question of "experience" because we fully take on board and
h accept ... that retained firefighters, particularly those who put in a large
number of part-time hours, can develop an impressive level of experience.

154. Putting together, however, the fuller wider role and the higher level
of qualification and skills which we find to be the inevitable inference from
the evidence before us, our conclusion is that were we called upon to
j consider the case under reg 2(4) the retained firefighter would not establish
comparability with his full-time counterpart under sub-s 2(4)(a)(ii).'

The EAT found no legal error in the conclusion and reasoning of the
employment tribunal.

[15] In advancing the grounds of appeal in his skeleton argument and in his
oral submissions, Mr Langstaff referred to both misdirection and perversity. An

overview of the way in which he puts the case is as follows. (1) The core role of all firefighters, whether full-time or retained, is to fight fires. This must not be lost sight of in the comparison. (2) The employment tribunal erred by, for example, taking into account differences in the process of recruitment *to the job* and in promotion *from the job* which have no relevance to the work done *in the job*. (3) It accorded significant relevance to qualifications, skills and experience in an inappropriate way. (4) It failed to consider the differential job descriptions. (5) One way or another, it 'failed to see the wood for the trees'.

[16] The use of this metaphor in comparability cases goes back to the judgment of Kilner Brown J in *Dorothy Perkins Ltd v Dance* [1977] IRLR 226, [1978] ICR 760 which was concerned with similar provisions in the Equal Pay Act 1970. Mr Langstaff seeks to rely on these passages:

'Having then identified the parties, having then acquainted themselves with the nature of the contractual employment, the next thing that has to be done is to look at the position in very broad general terms. The old saying that it is sometimes difficult to see the wood because of the trees is particularly applicable in this type of investigation ... look at the wood ... if it sees one tree which is outstandingly different from the rest ... see whether or not [they] are doing something which may be significantly different.'

Mr Langstaff observes that whereas the employment tribunal found the firefighting role to be 'the central and most important job function of the retained firefighter', it was no more than 'a major part of the job role of the whole-time firefighter'. He submits that it was perverse to draw such a distinction. He refers to the undisputed evidence of Mr Baars, deputy chief fire officer for Berkshire, which was recorded in the notebook of junior counsel as follows (its accuracy not being disputed):

'In terms of the core business of firefighting, retained firefighters and whole-time firefighters do the same job. There are core competencies and additional competencies. The opportunity for retained firefighters to acquire additional competencies is severely limited.'

Mr Langstaff then seeks to bring into the picture a passage from the judgment of Burton J in *R v West Yorkshire Fire and Civil Defence Authority, ex p McCalman* (4 May 1999, unreported) to the effect that 'their [ie whole-time firefighter's] "principal duty" or ... core obligation had been firefighting'.

[17] It is not necessary to rehearse in this judgment the very detailed findings of the employment tribunal. It sat for ten days to hear the case and the members later met for a further five days in chambers to deliberate about their decision. Mr Langstaff's complaint is not about particular findings of fact. It is about the approach of the tribunal—what it took into account and what it did not—and whether its overall conclusion was perverse.

[18] Having criticised the employment tribunal for failing at the outset to identify the core duty of both full-time and retained firefighters to be fighting fires and for failing to find their respective job descriptions to be broadly similar, Mr Langstaff submits that the employment tribunal ought not to have accorded relevance to differences in recruitment procedures because 'the same or broadly similar work' is concerned with what is done in the course of employment and not with how one is appointed to do it. Similarly it erred by taking promotion into account because the correct comparison is between employees who currently do the same job, not with expectations of when one may cease to do it

a by reason of promotion. He concedes that qualifications, skills and experience may be relevant—indeed, reg 2(4)(a)(ii) says as much—but submits that their relevance in the present case is not established because the differences do not change the work of firefighting done by full-time firefighters into something different from that done by retained firefighters. The differences in qualifications, skills, and experience relate more to the ‘non-occurrence’ duties than to the core
b obligation of fighting fires.

[19] Notwithstanding the skill with which they were made, I do not accept these submissions. For one thing, I do not consider that the regulations demand the identification of core obligations as the first stage of the inquiry. On the contrary, they leave to the employment tribunal how it goes about deciding
c of ‘core obligations’ can be misleading when one group performs a single function and the other performs several.

[20] More importantly, Mr Langstaff’s submissions seem to me to misunderstand the reasoning of the employment tribunal. It was entitled to find that, in addition to the fighting of fires and responding to other emergencies,
d there are ‘measurable additional job functions’ carried out by full-time but not retained firefighters. It is those functions, which include educational, preventive and administrative tasks (such as the issuing of fire certificates) which substantially account for the differences in qualifications and skills. Of course, the full-time firefighter has the working time for all these things. Fires and other emergencies are not so numerous as to take up all his working time, whereas
e typically the retained firefighter is called upon as a response to fires and other emergencies. In my judgment, having found ‘measurable additional functions’, the employment tribunal was entitled to conclude ‘on that ground alone’ that the full-time firefighter has a ‘fuller, wider job’ than the retained firefighter. It is plain from the words ‘on that ground alone’ that the employment tribunal reached its
f decision that the two groups are not engaged in the same or broadly similar work even before account was taken of such matters as qualifications and skills. Differences in relation to entry standards, probationary standards, probationary training and subsequent training were ‘additional’ matters which militated towards the same conclusion.

[21] All these were matters which I consider the employment tribunal was
g entitled to take into account when considering ‘the same or broadly similar work’. In the same way, it was entitled to consider differences in recruitment procedures and promotion prospects. It is a fact that full-time firefighters are recruited to do a job with ‘measurable additional functions’ and they are overwhelmingly the recruitment pool for promotion to the higher grades.

h [22] To the extent that Mr Langstaff seeks to argue perversity, he faces obvious difficulties. The approach required of the EAT was most recently reiterated by Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ 794 at [93], [2002] IRLR 634 at [93]:

j ‘Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has “grave doubts” about the decision of the Employment Tribunal, it must proceed with “great care” (see *British Telecommunications plc v Sheridan* [1990] IRLR 27 at 30 (para 34)).’

Applying that test, the EAT was plainly right to conclude that the employment tribunal was entitled to conclude as it did on the issue of 'the same or broadly similar work'. It is incumbent on this court, too, to focus on the decision of the employment tribunal (see *Yeboah's* case [2002] IRLR 634 at [11]). If it conducted the proceedings and decided the point in accordance with the law, no question of law arises for correction by this court, even if it concludes that it might have decided the case differently.

CONCLUSION

[23] It follows that, although I consider that the employment tribunal and the EAT erred on the first issue, I am satisfied that they did not on the second issue, by reference to the approach, to the matters taken or not taken into account, or to perversity. That I would allow the appeal on the first issue only may therefore present the appellants with something of a pyrrhic victory but it may have happier consequences for other part-time workers in other cases. In the circumstances a cross-appeal on the issue of less favourable treatment under reg 5 does not arise.

LONGMORE LJ.

[24] I agree with Maurice Kay LJ that these appeals should be dismissed but since we are differing from both the employment tribunal and the Employment Appeal Tribunal (EAT) ([2003] IRLR 732, [2004] ICR 257) on the construction of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 (the regulations) I will put into my own words the reasons for my agreement on that question of construction.

[25] The regulations were intended to implement the EU part-time work directive, Council Directive (EC) 97/81 (OJ 1998 L14 p 9). Regulation 5 is the operative regulation and provides that a part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker as regards the terms of his contract. Regulation 2 contains the relevant definitions; sub-para (1) and (2) define full-time and part-time workers by reference to the employer's custom and practice in relation to workers employed by him 'under the same type of contract'; sub-para (4) provides that a full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place, both workers are employed by the same employer 'under the same type of contract'.

[26] There is no definition of the phrase 'under the same type of contract' but sub-para (3) of reg 2 (in words which appear to have no counterpart in the directive) gives categories of persons who are to be regarded as employed under different types of contract in the following words:

'For the purposes of paragraphs (1), (2) and (4), the following shall be regarded as being employed under different types of contract—(a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship; (b) employees employed under a contract for a fixed term that is not a contract of apprenticeship; (c) employees employed under a contract of apprenticeship; (d) workers who are neither employees nor employed under a contract for a fixed term; (e) workers who are not employees but are employed under a contract for a fixed term; (f) any other description of worker

- a that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.'

The argument here concerned sub-para (3)(f). It is common ground that full-time firemen fall within sub-para (3)(a) and that, but for sub-para (3)(f), part-time or 'retained' firemen would also fall within sub-para (3)(a) since neither full-time nor part-time firemen are employed under fixed-term contracts or contracts of apprenticeship. The respondent employers and the Secretary of State, however, contended that retained firemen are workers whom it is reasonable for the employers to treat differently from their full-time firemen on the ground that the full-time firemen have a different type of contract. The retained firemen thus come within sub-para (3)(f) and are therefore not employed under the same type of contract for the purpose of sub-para (4) of reg 2.

[27] The employment tribunal accepted this contention, largely as a result of (a) the obligations imposed on the retained firemen in the form of call-outs to occurrences whenever called, attendance for training purposes and attendance for drill for two to three hours per week; (b) the different types of payment or fees which the retained fireman is entitled to receive and (c) differences in work actually done (see paras 78–79 and 142 of their decision). The EAT agreed and helpfully spelled out ([2003] IRLR 732 at 736, [2004] ICR 257 at 266–267 (paras 39(iv) and (v))) the precise matters which the employment tribunal must have had in mind.

[28] There are, to my mind, serious difficulties about accepting this construction of reg 2(3), because it effectively permits the employer to decide for himself who is and is not to be regarded as a comparable full-time worker. If an employer can 'reasonably' treat part-time workers differently from full-time workers and say that the ground on which he is so doing is that part-time workers have a different type of contract from full-time workers, there will be little or no scope for an employment tribunal to assess for itself, as it is obliged to do under reg 5, whether the employer is treating the part-time worker less favourably than a comparable full-time worker as regards 'the terms of his contract'. All the more will this be the case if it is 'the terms of his contract' on which the employer is entitled to rely for the purpose of asserting that it is reasonable to treat his part-time workers differently for the purposes of reg 2(3)(f).

[29] Mr Paines QC for the Secretary of State, who undertook the burden of the argument on this issue, submitted that, unless the regulation had the construction for which he was contending, it was impossible to give it a sensible meaning. I do not accept this. As Mr Langstaff QC for the retained firemen submitted, sub-para (3) was intended to specify different types of contract in, at any rate, primarily an objective sense. It is, however, notoriously difficult for any draftsman to ensure that his categories are exhaustive particularly when the concept of a contract of service is not only elusive in itself but can continue to give rise to peculiar difficulties of definition (see eg *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269, [2001] ICR 819 in relation to agency workers). The ingenuity of employers (or their lawyers) may well be such that it is possible to draft a particular kind of contractual arrangement for part-time workers (outside categories (a)–(e)) which does, in fact, constitute a different type of contract from that given to full-time workers (as opposed to one that merely had different terms). It would then be a question whether it was

reasonable for an employer to have entered into such an arrangement. It is, in my view, this situation that is envisaged by sub-para (3)(f). a

[30] It may be said that this is a somewhat strained construction of the regulation. It is, however, a preferable construction to one that would effectively entitle the employer to decide for himself whether or not the regulations were applicable to his part-time workers. Since the wording of reg 2(3) has no counterpart in the original directive, it would be particularly unfortunate if the courts adopted a construction of sub-para (f) which made it difficult for the directive to have its intended effect. b

[31] I have nothing to add to what Maurice Kay LJ has said on issue 2.

JONATHAN PARKER LJ.

[32] I agree with both judgments. c

Appeal dismissed.

Kate O'Hanlon Barrister.

a Parsons and another v George and another
[2004] EWCA Civ 912

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, CLARKE AND DYSON LJJ

b 24 JUNE, 13 JULY 2004

Landlord and tenant – Business premises – Application for new tenancy – Amendment – Whether court having power to allow tenant to amend claim for new tenancy by adding or substituting party after expiry of limitation period – Landlord and Tenant Act 1954, s 29(3) – CPR 19.5.

c *Practice – Parties – Substitution after expiry of limitation period – Rule of procedure empowering court to permit change of parties after expiry of limitation period under any enactment allowing such a change or under which such a change was allowed – Whether rule only applying to enactments which expressly allowed change of parties after expiry of limitation period – CPR 19.5(1)(c).*

d The claimant tenants held a lease that was subject to Pt II of the Landlord and Tenant Act 1954. The executors of the original lessor, as landlord, served a notice on the tenants under Pt II of the 1954 Act terminating the tenancy. The tenants served a counter-notice on the executors' solicitors, stating that they were not willing to give up possession. A few weeks later, the freehold was transferred to P. Shortly afterwards, the executors' solicitors, who were also acting for P, informed the tenants' solicitors of the transfer. The tenants subsequently brought proceedings for a new tenancy, naming the executors as defendants. Those proceedings were brought within the period prescribed by s 29(3)^a of the Act. The executor's solicitors filed an acknowledgment of service, stating that the executors were objecting to the new tenancy on the grounds that they were not the competent landlord. After the expiry of the s 29(3) limitation period, the tenants applied to the court for an order substituting P for the executors as defendant to the proceedings. On the hearing of the application, the deputy district judge considered whether CPR 19.5^b was applicable. By virtue of para (1), that rule applied to a change of parties after the end of a period of limitation under, inter alia, an enactment which allowed such a change, or under which such a change was allowed (para (1)(c)). Paragraph (2) empowered the court to add or substitute a new party only if the relevant limitation period was current when the proceedings had been started and the addition or substitution was necessary. Under para (3), the addition or substitution of a party was necessary only if the court were satisfied, inter alia, that the new party was to be substituted for a party who was named in the claim form in mistake for the new party (para (3)(a)). The deputy district judge held that the 1954 Act was not an enactment within the meaning of para (1)(c) since it contained no provision **e** allowing or disallowing the substitution or adding of parties. He therefore concluded that r 19.5 was not engaged, and further held that he had no power to allow the substitution of P under other provisions of the CPR. Accordingly, he dismissed the application. On the tenants' appeal, the Court of Appeal

a Section 29, so far as material, is set out at [6], below

b Rule 19.5 is set out at [19], below

considered whether r 19.5(1)(c) was indeed confined to enactments that expressly allowed a change of parties after the end of a relevant limitation period.

Held – On its true construction, CPR 19.5(1)(c) applied not only to enactments which expressly allowed a change of parties after the end of the relevant limitation period, but also to those which did not prohibit such a change. Plainly, something was allowed if it was expressly allowed. There were, however, many contexts in which it was a legitimate use of language to say that something was allowed merely because it was not prohibited. The context in the instant case was that the 1954 Act contemplated applications for new tenancies under s 29(3). Although the Act did not regulate the manner in which such applications should or could be made, save to say that claims had to be brought within the limitation period prescribed by s 29(3), it was not unusual for a claimant who was seeking a new tenancy to apply for permission to change the parties after the end of the prescribed limitation period. Such applications were an incident of claims for new tenancies, and fell within the general ambit of s 29(3), even though that subsection made no specific provision in relation to them. It followed that such applications were allowed by the Act because they were not prohibited by it. In the instant case, the conditions in CPR 19.5(2) were both satisfied. The relevant limitation period was current, ie had not expired, when the proceedings had been started. The tenants had always intended to sue the persons who answered the description of competent landlord, and named the executors because they mistakenly believed that they answered that description. At all material times, the executors' solicitors had also been acting for P. They had to have understood that the tenants were intending to apply for a new tenancy from the competent landlord, and that they had named the executors by mistake. In those circumstances, para (3)(a) was satisfied. It would also be manifestly unjust in the circumstances not to allow the amendment. The power to substitute P as defendant would therefore be exercised, and accordingly the appeal would be allowed (see [35], [36], [38], [39], [42], [44]–[47], below).

Notes

For applications for new tenancies of business premises and for adding and substituting parties after the end of a relevant limitation period, see respectively 27(1) *Halsbury's Laws* (4th edn reissue) para 574 and 37 *Halsbury's Laws* (4th edn reissue) para 259.

For the Landlord and Tenant Act 1954, s 29, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 151.

Cases referred to in judgments

Davies v Elsby Brothers Ltd [1960] 3 All ER 672, [1961] 1 WLR 170, CA.

Evans Construction Co Ltd v Charrington & Co Ltd [1983] 1 All ER 310, [1983] 1 QB 810, [1983] 2 WLR 117, CA.

Horne-Roberts v SmithKline Beecham plc [2001] EWCA Civ 2006, (2002) 65 BMLR 79, [2002] 1 WLR 1662.

Ketteman v Hansel Properties Ltd [1988] 1 All ER 38, [1987] AC 189, [1987] 2 WLR 312, HL.

Leond Maritime Inc v MC Amethyst Shipping Ltd, The Anna L [1994] 2 Lloyd's Rep 379. *Liff v Peasley* [1980] 1 All ER 623, [1980] 1 WLR 781, CA.

Mitchell v Harris Engineering Co Ltd [1967] 2 All ER 682, [1967] 2 QB 703, [1967] 3 WLR 447, CA.

- a *Payabi v Armstel Shipping Corp, The Jay Bola* [1992] 3 All ER 329, [1992] QB 907, [1992] 2 WLR 898.
- Piper v Muggleton* [1956] 2 All ER 249, [1956] 2 QB 569, [1956] 2 WLR 1093, CA.
- Sardinia Sulcis, The* [1991] 1 Lloyd's Rep 201, CA.
- Signet Group plc v Hammerson UK Properties plc* [1997] CA Transcript 973, (1997) Times, 15 December.

- b **Cases also cited or referred to in skeleton arguments**
- Shelley v United Artists Corp Ltd* [1990] 1 EGLR 103, CA; *rvsg* [1989] 1 EGLR 98.
- Thurrock BC v Secretary of State for the Environment, Transport and the Regions* [2001] CP Rep 55, CA.

c Appeal

- Lorraine Sylvia Parsons and John Bryan Parsons, the claimants in proceedings brought against the defendants, Philip William George and Ivor Bernard Loochin (as executors of the late Elsie Fanny Stedman), under Pt II of the Landlord and Tenant Act 1954 for the grant of a new tenancy over premises known as
- d Manstead House, 1072 High Road, Chadwell Heath, Romford, Essex, appealed with permission of District Judge Lawrence from his order in the Romford County Court on 26 November 2003 dismissing the claimants' application to substitute Pamela Audrey Purcell as defendant to the proceedings. By order of Judge Richardson on 14 January 2004, the appeal was transferred to the Court of Appeal. The facts are set out in the judgment of Dyson LJ.

- e Michelle Stevens-Hoare (instructed by Cartwright, Cunningham Haselgrove & Co, Woodford Green) for the claimants.
- Katherine McQuail (instructed by Birkett Long, Chelmsford) for the defendants.

Cur adv vult

- f 13 July 2004. The following judgments were delivered.

DYSON LJ (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

- g [1] This appeal raises the question whether the court has power to permit a tenant who is applying for a new tenancy under Pt II of the Landlord and Tenant Act 1954 to amend his claim form to add or substitute a party after the end of the period specified by s 29(3) of the 1954 Act as being the period after which an application may not be entertained by the court. Deputy District Judge Lawrence decided that there is no such power, whether under CPR 19.2, 19.5 or 3.10. He
- h gave permission to appeal. On 14 January 2004, Judge Richardson ordered that the appeal be transferred to this court on the grounds that it raised an important point of principle and practice.

THE FACTS

- j [2] By a lease dated 12 July 1991 between Mrs Elsie Stedman as lessor and the claimants as lessees, the premises known as Mansted House, 1072 High Road, Chadwell Heath, Romford, Essex were demised for a term of 12 years from 25 December 1990. The demised premises have at all material times been used as a school. The lease was, therefore, subject to Pt II of the 1954 Act. Mrs Stedman died on 30 August 1998. The defendants are the executors of Mrs Stedman's will. Upon the expiry of the 12-year term created by the lease, the tenancy continued

by reason of s 24(1) of the 1954 Act. Messrs Birkett Long have at all material times acted as solicitors for the defendants and Mrs Pamela Audrey Purcell. By a notice dated 26 March 2003 served by Birkett Long under s 25 of the 1954 Act, the defendants terminated the tenancy on 4 October 2003. The notice, which named the landlord as 'Philip William George and Ivor Bernard Loochin as executors of the late Elsie Fanny Stedman', stated that the defendants would not oppose an application for a new tenancy. The covering letter sent by Birkett Long started:

'Dear Sir & Madam

Mrs Pamela Audrey Purcell

Termination Lease Mansted House Chadwell Heath

We act for your landlords, the trustees of the late Mrs E F Stedman.'

On 2 April, the claimants served a counter-notice on Birkett Long stating that they were not willing to give up possession. Birkett Long wrote to the claimants' solicitors on 10 April saying: 'We acknowledge receipt of your counter-notice and await hearing from you further.' The heading to this letter referred to Mrs Purcell, but not to the defendants. On 16 April, the claimants' solicitors wrote to Birkett Long putting forward the claimants' offer to buy the freehold for £90,000. By their reply dated 28 April, Birkett Long stated that their client was not interested in selling the property at the figure put forward, asking the claimants' solicitors to note that the freehold had been transferred by the defendants to Mrs Purcell. The transfer was dated 23 April. Birkett Long wrote on 6 May saying that they were continuing to act for Mrs Purcell.

[3] On 25 June the claimants issued a claim form applying for a new tenancy under s 29 of the 1954 Act. They named the defendants as 'Philip William George and Ivor Bernard Loochin as executors of the late Elsie Fanny Stedman'. The claim form was duly served by the court on 2 July 2003. On 1 August, Birkett Long filed an acknowledgement of service, stating that the defendants were objecting to a new tenancy on the grounds that they were not the 'competent landlord' (ie 'the landlord' within the meaning of s 44(1) of the 1954 Act). They wrote to the claimants' solicitors asking for confirmation that the claim would be discontinued since it had been issued against the wrong party. It was in response to this letter that on 15 September, the claimants applied to the court for an order that Pamela Audrey Purcell be substituted for the defendants because 'by virtue of a mistake the said Philip William George and Ivor Bernard Loochin were incorrectly named as the defendants herein when proceedings were issued'.

[4] It is common ground that at all material times until 23 April 2003 the defendants were the landlord as defined by s 44, and that upon the execution of the transfer to Mrs Purcell on 23 April 2003, she became the landlord as so defined. This reflects the decision in *Piper v Muggleton* [1956] 2 All ER 249 at 252, [1956] 2 QB 569 at 578 where Jenkins LJ, giving the judgment of the court, said that it is necessary that at every stage of the proceedings the person joined as 'the landlord' should in fact answer that description according to the statutory definition, and that if there is a change of interest by which one person ceases to be, and another becomes the landlord, then that other person becomes the 'landlord' for the purposes of all further steps.

PART II OF THE 1954 ACT

[5] Section 24(1) provides:

'A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act;

a and subject to the provisions of section twenty-nine of this Act, the tenant under such a tenancy may apply for a new tenancy—(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy ...'

[6] Section 29(1) provides that on an application under s 24(1) for a new tenancy, the court shall make an order for the grant of a new tenancy. Section 29(3) provides:

b 'No application under subsection (1) of section twenty-four of this Act shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section twenty-five of this Act ...'

c [7] Section 44 defines the expression 'the landlord' where it appears in Pt II of the 1954 Act. CPR PD 56, para 3.4 provides that 'The person who, in relation to the claimant's current tenancy, is the landlord as defined by section 44 of the 1954 Act must be a defendant.'

d CHANGE OF PARTIES AFTER THE EXPIRY OF A RELEVANT LIMITATION PERIOD: GENERAL

[8] The question of whether to grant permission to add a new cause of action or a new defendant after the expiry of a relevant period of limitation has vexed the courts for many years. Various attempts have been made to balance the competing interests of claimants and defendants. On the one hand, it may be unjust to a defendant to add a person as a party to proceedings if this would deny him an accrued limitation defence. Thus it was that there was a long-established practice at common law that a claimant would not be permitted to join a person as defendant to an existing action at a time when the defendant could have relied on a statute of limitation as barring the claimant from bringing a fresh claim against him: see, for example, *Liff v Peasley* [1980] 1 All ER 623 at 632, 639, [1980] 1 WLR 781 at 791, 799 per Stephenson LJ and Brandon LJ respectively. The reason for this rule of practice was explained by the House of Lords in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38, [1987] AC 189 as being that there would be no 'useful purpose' in allowing the amendment, since the new defendant was not deemed to have become a party before the actual date of the joinder, and would therefore have an unanswerable defence to the claim.

g [9] On the other hand, there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after the expiry of the relevant limitation period. A common example of such a case is where the claimant has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled, and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence).

h IN THE PRE-CPR PERIOD

[10] Before the introduction of RSC Ord 20, r 5, the balance was tilted very heavily in favour of defendants. This is well illustrated by *Davies v Elsby Brothers Ltd* [1960] 3 All ER 672, [1961] 1 WLR 170 where a writ had been issued against 'Elsby Brothers (a firm)'. In fact, the firm's business had been taken over by Elsby Brothers Ltd before the proceedings had been issued. By the time the plaintiff applied for leave to amend the writ to change the name of the defendant, the limitation period had expired. This court held that the amendment involved the addition of a new defendant, and was not merely the correction of a misnomer.

Accordingly, applying the long-established rule of practice to which I have referred, the court held that the amendment should not be allowed.

[11] RSC Ord 20, r 5(2) to (5) were introduced to overcome the obvious injustice of such decisions. These rules were subsequently amended, but it is not necessary for the purposes of present appeal to trace the history in detail. The subsequent amendments did not significantly alter the effect of the rules. A challenge to their validity (on the grounds that they were ultra vires the rules committee) was rejected by this court in *Mitchell v Harris Engineering Co Ltd* [1967] 2 All ER 682, [1967] 2 QB 703. The court held that, as a matter of construction, the rule permitted an amendment in the circumstances therein specified and that the amendment related back to the date of the issue of the proceedings (in that case, the issue of the writ): see [1967] 2 All ER 682 at 721, [1967] 2 QB 703 at 719 per Lord Denning MR. In other words, the court interpreted the new rules as permitting a departure from the long established rule of practice to which I have referred. This view of the effect of *Mitchell's* case was expressed in *Signet Group plc v Hammerson UK Properties plc* [1997] CA Transcript 973, (1997) Times, 15 December, approving what Phillips J had said in *Leond Maritime Inc v MC Amethyst Shipping Ltd, The Anna L* [1994] 2 Lloyd's Rep 379 on this point.

[12] RSC Ord 20, r 5 as it stood on the eve of the introduction of the CPR provided as follows:

'5.—(1) Subject to Order 15, rules 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

In this paragraph "any relevant period of limitation" includes a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.'

[13] There were several decisions on the application of Ord 20, r 5 to claims for a new tenancy under s 29(3) of the 1954 Act. I propose to refer to two of them. In *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, [1983] 1

a QB 810, a lease was made between C as landlord and E as tenant. It was subject to Pt II of the 1954 Act. C assigned the reversion to B. Both C and B were members of the same group of companies. E then entered into a new three-year lease with B. After the expiry of the term created by that lease, C (who acted as B's managing agent) wrote to E enclosing a notice under s 25 of the 1954 Act. On receipt of the notice, E wrote to C saying that it was not prepared to give up possession and would apply to the county court for a new tenancy. It made an application for a new tenancy, but erroneously named C as the landlord. The judge allowed E to join B as an additional respondent to the application. That decision was upheld by this court on appeal (Donaldson and Griffiths LJ, Waller LJ dissenting). Donaldson LJ said that this was a mistake which fell within the meaning of Ord 20, r 5(3). He said:

c 'In applying RSC Ord 20, r 5(3), it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances. In the instant case I have not the slightest difficulty in accepting Mr Greenwood's assertion that he intended to sue the relevant landlord under the 1954 Act. After all, he was responding on behalf of his lessee clients to a notice to quit given on behalf of the landlord and it would have been surprising, to say the least, if he had thought that it was appropriate to respond by claiming a new lease from the managing agents or any other stranger to the landlord and tenant relationship. Accordingly I would conclude that he made a genuine mistake of a character to which RSC Ord 20, r 5(3) can apply.' (See [1983] 1 All ER 310 at 317, [1983] 1 QB 810 at 821-822.)

[14] He then went on to say that, since neither C nor B was misled or could have had any doubt as to the identity of the person intended to be sued, justice required the court to exercise its discretion in favour of E and allow the amendment.

[15] Griffiths LJ said:

h 'Is the rule to be limited to mere misspelling or some other slip such as leaving out one word in the long title of a company so that looking at the name on the proceedings the nature of the mistake can readily be seen; or is it to be more liberally construed so that it will cover the case when entirely the wrong name has been used? I see no reason why it should not include a case where entirely the wrong name has been used, provided it was not misleading, or such as to cause any reasonable doubt as to the identity of the person intended to be sued. The identity of the person intended to be sued is of course vital. But in this case I have no doubt that the identity of the person intended to be sued was the current landlord Bass Holding Ltd. The wording of the rule makes it clear that it is not the identity of the person sued that is crucial, but the identity of the person *intended* to be sued, which is a very different matter.' (See [1983] 1 All ER 310 at 320, [1983] 1 QB 810 at 825.)

[16] By the time of this decision, Parliament had also intervened to regulate the manner in which the balance between the competing interests of claimants and defendants should be struck in relation to allowing 'new claims'. This was done by the enactment of s 35 of the Limitation Act 1980. This provides that for the purposes of the 1980 Act, any new claim made in the course of any action shall be deemed to be a separate action, and to have been commenced in the case of any new claim (other than such a claim in or by way of third party proceedings) on the same date as the original action (s 35(1)(b)). A new claim includes the addition or substitution of a new party (sub-s (2)). Except as provided by s 33 or rules of court, the court may not allow a new claim within s 35(1)(b), other than an original set-off or counterclaim, to be made 'in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim' (sub-s (3)). Subsection (4) provides that rules of court may provide for allowing a new claim to which sub-s (3) applies to be made, but only if the conditions specified in sub-s (5) are satisfied, and subject to any further restrictions the rules may impose.

[17] The second authority to which I wish to refer is *Signet Group plc v Hammerson UK Properties plc* [1997] CA Transcript 973, (1997) Times, 15 December. In that case, at all material times the landlord was Hammerson UK Properties plc and the tenant Ernest Jones Ltd (a company in the Signet Group of Companies). An application was made for a new tenancy within the four-month period prescribed by s 29(3) of the 1954 Act. The applicants named in the application were 'Signet Group plc' and not 'Ernest Jones Ltd'. This was an error. Hammerson had not been misled and was in no reasonable doubt as to the identity of the person intending to sue. Application was made under RSC Ord 20, r 5(3) for leave to amend the name on the application. The four-month period had by now expired. This court followed *Evans'* case and held that on the facts it was just to allow the amendment.

[18] Two important features should be noted about s 35 of the 1980 Act. First, it introduces a statutory relation back to the date of the original action where, pursuant to the rules, a new party is added or substituted after the expiry of a limitation period, if the limitation period is one prescribed by the 1980 Act itself. This is clear from the words 'after the expiry of any time limit *under this Act*' (my emphasis). Secondly, there is nothing in the 1980 Act which purports to take away from the court the power it previously had pursuant to RSC Ord 20, r 5 to allow an amendment after the expiry of a limitation period which is not prescribed by the 1980 Act: see also the *Signet* case.

CHANGE OF PARTIES AFTER THE EXPIRY OF A RELEVANT LIMITATION PERIOD: THE POSITION UNDER THE CPR

[19] It is now time to turn to the CPR, since the outcome of this appeal turns on the application of the CPR and not RSC Ord 20, r 5. The rules which are central to the arguments in the present appeal are CPR 3.10, 19.2 and 19.5. So far as material, these provide:

'3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error ...

19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

a (2) The court may order a person to be added as a new party if—(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

b (3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) The court may order a new party to be substituted for an existing one if—(a) the existing party's interest or liability has passed to the new party; and (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings ...

c 19.5 (1) This rule applies to a change of parties after the end of a period of limitation under—(a) the Limitation Act 1980; (b) the Foreign Limitation Periods Act 1984; or (c) any other enactment which allows such a change, or under which such a change is allowed.

d (2) The court may add or substitute a party only if—(a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary.

e (3) The addition or substitution of a party is necessary only if the court is satisfied that—(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party; (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.'

f [20] The current version of CPR 19.5(1) was introduced by the Civil Procedure (Amendment) Rules 2000, SI 2000/221. The original version provided as follows:

'19.5 (1) This rule applies to a change of parties after the end of a period of limitation under—(a) the Limitation Act 1980; (b) the Foreign Limitation Periods Act 1984; (c) section 190 of the Merchant Shipping Act 1995; (d) any other statutory provision.'

g THE JUDGMENT

h [21] The deputy district judge held that, if CPR 19.5 was engaged, the period prescribed by s 29(3) of the 1954 Act was a 'relevant limitation period' within the meaning of CPR 19.5(2). But he decided that CPR 19.5 was not engaged because the 1954 Act is not an enactment within the meaning of CPR 19.5(1)(c) since the 1954 Act 'contains no provision allowing or disallowing the substitution or adding of parties'. It seems that this interpretation of CPR 19.5(1)(c) and the 1954 Act reflected what was common ground between the parties before the judge (as it was before us). On behalf of the claimants, however, it was submitted that the judge had the power to grant the claimants' application under CPR 19.2 for the very reason that the case did not fall within CPR 19.5. Reliance was placed on the words in CPR 19.2(1): '... this rule applies ... except where the case falls within rule 19.5 ...' The judge decided that he had no jurisdiction to grant the application under CPR 19.2, although he did not explain why he was of that view. He did, however, say that if he had jurisdiction to allow the application under CPR 19.2, he would have exercised it in favour of the claimants. He said:

j

‘... I would order a substitution of parties in all the circumstances, particularly given the fact that the same solicitors acted for the new landlords and the old landlords, and were involved in the whole process.’ a

[22] Finally, the judge also held that he had no power to allow the substitution of Mrs Purcell for the defendants under CPR 3.10. He considered that the addition or substitution of a party consequent on a mistake was not a procedural error of the kind envisaged by CPR 3.10. But if he had jurisdiction to deal with the matter under CPR 3.10, he would have done so, since— b

‘The application was made promptly. There is no suggestion that failure was intentional and it was explained that it was simply that the solicitor failed to spot or to remember that the landlord had changed, the earlier notices having been issued under the old landlord. There is a good explanation for that failure in that sense. There is no suggestion that the party in default has not complied with other rules. It is quite clear that the failure to comply was caused not by the party but his legal representative. There is no suggestion that any trial date or likely trial date is going to be prejudiced if relief is given.’ c

DISCUSSION d

[23] The starting point is that the period specified in s 29(3) of the 1954 Act is a limitation period, so that CPR 19.5 is engaged if the 1954 Act is an enactment which satisfies CPR 19.5(1)(c). So much is, I understand, common ground.

[24] It is clear that this limitation period was a ‘relevant limitation period’ within the meaning of RSC Ord 20, r 5(2), and that the court would have had jurisdiction to allow the amendment sought in the present case if the application had been made under that rule. That is made plain, for example, by the decisions in *Evans’s* case and the *Signet* case, whose facts are strikingly similar to those in the present case. e

[25] It would be surprising if the effect of the CPR was to deny to the court jurisdiction to allow the addition or substitution of parties after the expiry of a relevant limitation period in circumstances where the court had previously enjoyed such jurisdiction. And yet that is the effect of the judge’s decision in the present case. There is nothing to indicate that this was the intention of the Civil Procedure Rules Committee (the CPRC). The most recent and comprehensive review of the pre-CPR law in this area to which we have been referred is that in the judgment of this court given in the *Signet* case by Lord Woolf MR. That review contains no suggestion that the court was of the view that the jurisdiction was exorbitant and should be curtailed. Quite the reverse. They disagreed with the view expressed by Hobhouse J in *Payabi v Armstel Shipping Corp, The Jay Bola* [1992] 3 All ER 329, [1992] QB 907 that the only relation back that was available was that allowed by the rules made to give effect to s 35 of the 1980 Act, and that *Evans’s* case could not stand with *Liff v Peasley* [1980] 1 All ER 623, [1980] 1 WLR 781. They observed that RSC Ord 20, r 5(2) to (5) were introduced ‘to alleviate the injustice’ of the established rule of practice to which I have referred ‘whether the relation back theory or the no usefulness theory is correct’. f

[26] In fact, in my judgment the original version of CPR 19.5(1) did not curtail the pre-CPR jurisdiction. As we have seen, this provided that the rule applied to a change of parties after the end of a period of limitation ‘under’ the three statutes specified in sub-paras (a), (b) and (c) and ‘(d) any other statutory provision’. On the face of it, therefore, the rule purported to give the court jurisdiction to allow a change of parties after the expiry of any statutory limitation period. There could g h i

a be no doubt that under that rule, the court would have had jurisdiction to allow the amendment sought in the present case. Why did the CPRC amend CPR 19.5(1)? In particular, why was para (1)(d) replaced by the new para (1)(c)? In my view, the answer is that para (1)(d) was expressed in such wide terms that it could be interpreted as giving the court jurisdiction to allow a change of parties after the end of a limitation period even if the relevant statute did not permit this to be done. The object of the new para (1)(c) was to ensure that the court cannot allow a change of parties after the end of a limitation period if the statute which prescribes the limitation period does not allow that to be done. When interpreting CPR 19.5(1)(c), therefore, it is important to bear in mind that (i) an application such as that with which we are concerned could have succeeded under the original version of CPR 19.5(1), and (ii) the object of the amendment introduced by the new sub-para (c) was as I have described, and was not to disable the court from allowing such an application. With that introduction, I turn to the current version of CPR 19.5(1) and its application in the present case.

d [27] If the judge was right, the current version of CPR 19.5 effected a very significant reduction in the jurisdiction to allow the addition or substitution of parties after the expiry of a relevant limitation period, whether under RSC Ord 20, r 5 or the original version of CPR 19.5.

e [28] Section 29(3) of the 1954 Act stands by no means alone as a limitation period which is not prescribed by the 1980 Act, and which is therefore outside the scope of s 35 of that Act. There are many statutory limitation periods which are not mentioned in the 1980 Act. They apply to a diverse range of claims. More than 50 were listed in table 2 to the Law Commission Consultation Paper *Limitation of Actions* (1998) (Law Com no 151) ranging from s 210 of the Common Law Procedure Act 1852 to s 111 of the Employment Rights Act 1996. Some of these statutes allow for an extension of time of the limitation period in question, but most do not. If the judge is right, the court would have had jurisdiction to allow the addition or substitution of a party after the expiry of any of these limitation periods if the conditions of RSC Ord 20, r 5 or the original version of CPR 19.5 were satisfied, but since the introduction of the current form of CPR 19.5, it no longer has such power. To put the same point another way, on this argument the effect of CPR 19.5 is to reverse decisions such as *Evans'* case and the *Signet* case, unless the power to add or substitute parties after the end of a relevant limitation period is given by CPR 19.2. For the reasons that I give at [30], below, I consider that CPR 19.2 gives no such power.

g [29] Since there are no grounds for supposing that the CPRC intended to change the rules so as to deny to the court the jurisdiction it previously enjoyed, I approach the construction of CPR 19.5(1)(c) on the basis that, if at all possible, it should be construed as not having that effect.

j [30] The general scheme of CPR Pt 19 is clear enough. CPR 19.2 to 19.5 are in section I of CPR Pt 19 which is headed 'Addition and Substitution of Parties'. The sub-heading of CPR 19.2 is 'Change of parties—general'; and the sub-heading of CPR 19.5 is 'Special provisions about adding or substituting parties after the end of a relevant limitation period'. On the face of it, therefore, one would expect that all the provisions relating to the addition or substitution of parties after the end of a relevant limitation period are to be found in CPR 19.5 and nowhere else. This expectation is confirmed by the text of CPR 19.2(1) which provides that CPR 19.2 (ie the general rule) applies 'except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period)'. It is inherently improbable that the CPRC intended

that CPR 19.5 should apply to a change of parties after the end of a limitation period under statutes referred to in CPR 19.5(1), and that CPR 19.2 should apply to a change of parties after the end of a limitation period under other statutes which are not referred to in CPR 19.5(1). The natural interpretation of CPR 19.2 and 19.5, when they are read together, is that CPR 19.5 was intended to be the code which governs the position in relation to a change of parties after the end of any relevant limitation period; and that CPR 19.2 was intended to be the code which governs the position in relation to a change of parties in any other case. There are important differences between the two codes. This is hardly surprising, since the effect of an amendment under CPR 19.5 is to deprive a defendant of a limitation defence. Thus, the conditions that must be satisfied before the court can exercise its discretion to allow an amendment under CPR 19.5 are more stringent and more difficult to satisfy than the corresponding conditions under CPR 19.2. And yet if the judge is right, not only are there two (mutually exclusive) rules which deal with the same subject matter (the change of parties after the end of a relevant limitation period), but they prescribe different conditions for the exercise of the discretion to allow a change of parties. This is arbitrary and cannot have been intended.

[31] A further difficulty with the judge's interpretation is that it appears to allow no content to CPR 19.5(1)(c). When asked to identify enactments which come within the scope of the subparagraph, counsel were only able to point to s 5 of the Carriage by Air Act 1961. It is not necessary to examine this provision. Suffice it to say that it does not seem to me that it expressly allows a change of parties after the end of the two-year limitation period prescribed by s 5(1) of that Act. If the judge is right, there is (at most) one statutory provision which falls within sub-para (c).

[32] I turn now to consider the language of CPR 19.5(1). Subparagraph (a) refers to the 1980 Act, which contains provisions which allow for a change of parties after the end of any of the limitation periods prescribed by that Act: see s 35 ([16], above). Subparagraph (b) refers to s 1(3) of the Foreign Limitation Periods Act 1984 which provides that s 35 of the 1980 Act shall apply in relation to foreign law time limits applicable by virtue of s 1(1)(a) of the 1984 Act.

[33] The central question that arises in relation to CPR 19.5(1)(c) is whether the only enactments that fall within the subparagraph are ones which expressly allow a change of parties after the end of a relevant limitation period (as does s 35(3) of the 1980 Act). At first sight, it may be said with some force that, if CPR 19.5(1) is read in isolation, this is the obvious and indeed only tenable interpretation of the words in sub-para (c). I shall refer to this as 'the narrow interpretation'. But the words must be read in their context and against the background of the previous rules to which I have referred.

[34] In my view, there is a possible wider interpretation of sub-para (c) which is consistent with the pre-CPR regime and the original version of CPR 19.5(1), and which avoids the difficulty of having two different sets of rules for applications for permission to change parties after the end of a relevant limitation period. Incidentally, this wider interpretation also provides an explanation for the apparently curious feature of the subparagraph that it is expressed both in the active and passive sense 'any other enactment which allows such a change, or under which such a change is allowed'. At first sight, there seems to be no difference in meaning between these two formulations.

[35] In my judgment, it is possible to interpret CPR 19.5(1)(c) as referring to any enactment which allows or which does not prohibit a change of parties after

a the end of a relevant limitation period. Plainly, something is allowed if it is expressly allowed. But there are many contexts in which it is a legitimate use of language to say that something is allowed merely because it is not prohibited. Thus, in a restaurant which does not prohibit smoking, it could properly be said (at least until recently) that smoking is allowed, even if there is no sign which says 'smoking is allowed'. People who visit restaurants expect to be allowed to smoke

b the unless smoking is prohibited, because smoking is an activity that is customarily carried on by those who visit restaurants. Smoking may be said to be an incident of restaurant life which is allowed unless it is prohibited. The same point can be made in relation to walking on lawns in public parks or gardens. On the other hand, it would be considered to be a strange use of the word 'allow' to say that visitors to a restaurant are allowed to sing in the restaurant unless they

c are prohibited from doing so. Singing in restaurants is allowed only if it is expressly permitted. I suggest that the reason for this is that visitors to a restaurant do not need to be banned from singing in order to understand that they are not allowed to sing there. It cannot sensibly be said that singing is an incident of restaurant life which is allowed unless it is prohibited. These examples

d demonstrate that the context will determine whether it is a legitimate use of language to say that something is 'allowed' simply because it is not prohibited.

[36] The context in the present case is that the 1954 Act contemplates applications for new tenancies under s 29(3). It is true that the 1954 Act does not regulate the manner in which such applications should or may be made, save to say that claims must be brought within the limitation period prescribed by

e s 29(3). But it is not unusual for a claimant who is seeking a new tenancy to apply for permission to change the parties after the end of the prescribed limitation period. Such applications are an incident of claims for new tenancies and fall within the general ambit of s 29(3) of the 1954 Act, although that subsection makes no specific provision in relation to them. I would hold, therefore, that

f such applications are allowed by the 1954 Act because they are not prohibited by it.

[37] This wider interpretation of CPR 19.5(1)(c) also provides an explanation for the fact that there are two limbs to the subparagraph. It seems to me that the first limb 'which allows such a change' is referring to an enactment which expressly allows such a change, whereas the second limb 'or under which such a

g change is allowed' is referring to a statute which does not prohibit such a change. I put this suggestion forward with some diffidence. But it is desirable to find an interpretation which accounts for the two formulations. On the narrow interpretation, there is no explanation.

[38] For the reasons that I have sought to explain, therefore, I conclude that

h CPR 19.5(1)(c) bears the wider meaning to which I have referred. As I have explained at [30], above, I do not consider that this application fell to be dealt with under CPR 19.2. Since for the reasons that I shall now give I would allow the appeal under CPR 19.5(1), it is not necessary for me to deal with the submissions based on CPR 3.10.

j
CPR 19.5 APPLIED TO THIS CASE

[39] The first question is whether the conditions in CPR 19.5(2) were both satisfied in the present case. There is no issue about sub-para (a): the relevant limitation period was 'current' (ie had not expired) when the proceedings were started. But there is an issue about sub-para (b). Ms McQuail submits that the substitution of Mrs Purcell as defendant is not 'necessary' within the meaning of

CPR 19.5(2)(b) as explained by para (3) because none of the conditions stated in para (3) is satisfied in this case. a

[40] The condition stated in para (3)(a) is that the new party is to be substituted for a party who was named in the claim form 'in mistake for the new party'. She submits that there was no such mistake in the present case. The claimants identified the individuals whom they believed to be the landlord within the meaning of s 44 of the 1954 Act ('the competent landlord') and named them as the defendants. They did not seek to sue Mrs Purcell, and mistakenly described her by the names of the defendants. b

[41] I reject this narrow view of the meaning of para (3)(a). Its language is not significantly different from that of RSC Ord 20, r 5(3). I bear in mind that the CPR is a 'new procedural code' (CPR 1.1(1)), and that decisions under the former rules will only occasionally provide assistance to the interpretation of the CPR. The meaning of s 35(6)(a) of the 1980 Act and of CPR 19.5(3)(a) was considered by this court in *Horne-Roberts v SmithKline Beecham plc* [2001] EWCA Civ 2006, (2002) 65 BMLR 79, [2002] 1 WLR 1662. As appears from the judgment of Keene LJ (at [40]–[45]), the court adopted the test suggested by Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 at 207 that the power to change a party after the expiry of a limitation period can be exercised where a party has been wrongly identified, but 'it was possible to identify the intending claimant or intended defendant by reference to a description which was more or less specific to the particular case'. Thus, for example, if it is clear that the claimant intended to sue his employer or the competent landlord, but by mistake named the wrong person, an application to substitute the person who in fact answers the description of employer or competent landlord would come within CPR 19.5(3)(a). c

[42] In other words, the court rejected the argument that CPR 19.5(3)(a) is directed only at cases of misnomer in the strict sense, and adopted a more liberal approach such as that applied in *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, [1983] 1 QB 810 and *Signet Group plc v Hammerson UK Properties plc* [1997] CA Transcript 973, (1997) Times, 15 December. That is the approach that should be adopted in the present case. The claimants always intended to sue the persons who answered the description of competent landlord, and named the defendants because they mistakenly believed that they answered that description. At all material times, Birkett Long were acting as solicitors for the defendants and Mrs Purcell. They must have understood that the claimants were intending to apply for a new tenancy from the competent landlord, and that they had named the defendants by mistake. In these circumstances, I would hold that para (3)(a) was satisfied on the facts of this case. d

[43] It is not, therefore, necessary to consider whether the conditions in CPR 19.5(3)(b) are satisfied. e

[44] I turn finally to the question whether, as a matter of discretion, the power to substitute Mrs Purcell as defendant should be exercised in this case. As has been seen, the judge said that he would have exercised his discretion in favour of the claimants under CPR 19.2 and 3.10 if he had the jurisdiction to do so. It must follow that he would also have exercised his discretion in the same way under CPR 19.5 if he considered that he had jurisdiction to do so under that rule. Ms McQuail does not submit that such an exercise of discretion would have been plainly wrong. Indeed, I do not understand her to challenge this part of the judgment at all. In my view, she is right not to do so. It would be manifestly unjust to the claimants not to allow the amendment in the circumstances of this case. The claimants' error was obvious, and must have been understood by f

- a* Birkett Long. Mrs Purcell was not misled in any way and the amendment would cause her no prejudice. If the amendment is not allowed in a case such as this, it is difficult to see in what circumstances it would ever be right to exercise the power given by CPR 19.5.

[45] For all these reasons, I would allow this appeal.

- b* **CLARKE LJ.**

[46] I agree.

SIR ANDREW MORRITT V-C.

[47] I also agree.

Appeal allowed.

Celia Fox Barrister.

Marlwood Commercial Inc v Kozeny and others a

Omega Group Holdings Ltd and others v Kozeny and others

[2004] EWCA Civ 798 b

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, RIX AND LONGMORE LJ

21 MAY, 25 JUNE 2004 c

Discovery – Production of documents – Use of documents other than in proceedings for the purpose of which they were disclosed – Serious Fraud Office requesting from parties documents disclosed in proceedings – Serious Fraud Office acting on request of Secretary of State acting in response to request received from overseas authority – Whether documents to be produced to Serious Fraud Office – Criminal Justice Act 1987, s 2(3) – CPR 31.22. d

The claimants were non-resident companies which had entered into agreements, which were expressly governed by English law, with other non-resident companies (the third and fourth defendants) which were said to be controlled by the first defendant, who was resident in the Bahamas. The claimants brought proceedings against the defendants in the High Court complaining of fraudulent misrepresentation. In the course of those proceedings the defendants disclosed certain documents pursuant to their obligations under the CPR. The documents were brought to the United Kingdom from abroad. A criminal investigation into the affairs of the first defendant was being carried on by the District Attorney of New York. The District Attorney made a request for assistance in obtaining evidence in the United Kingdom to the Secretary of State. Under the Criminal Justice (International Co-operation) Act 1990 the Secretary of State was empowered, if it appeared to him that such a request related to an offence involving serious or complex fraud, to refer the request to the Director of the Serious Fraud Office. The Secretary of State requested the director under the 1990 Act to exercise her powers under s 2^a of the Criminal Justice Act 1987 to by notice require the person under investigation or any other person to produce specified documents. The director served notices calling for production of copies of documents (excluding privileged documents) disclosed by the defendants to the claimants in the High Court proceedings. The notice was served on the claimants' solicitor, who applied to the court under CPR 31.22, which provided that a party to whom a document had been disclosed could use the document only for the purpose of the proceedings in which it was disclosed, except where, inter alia, the court gave permission. The notice was also served on the defendants' solicitor, who indicated that her clients were applying for an order on public policy grounds, to prevent either solicitor providing documents which prosecuting authorities in New York could use against the first defendant. The judge allowed the claimants' application and the defendants appealed, e
f
g
h
j

a Section 2, so far as material, is set out at [4], below

a contending, inter alia, that the judge had been wrong to conclude that the interests of a foreign criminal investigation should take precedence over the public interest in civil justice, especially in a case which concerned a foreign litigant.

b **Held** – The public interest in the investigation or prosecution of a specific offence of serious or complex fraud took precedence over the merely general concern of the courts to control the collateral use of compulsorily disclosed documents. In the absence of other factors, the court's discretion should, as a matter of principle, prima facie be exercised in favour of compliance with a notice under s 2(3) of the 1987 Act; by itself the additional factor that the documents had been brought within the jurisdiction for the purposes of disclosure by a foreign litigant himself brought compulsorily before the English court should not be regarded as a reasonable excuse for non-compliance with the notice; and the courts should be prepared to grant permission under CPR 31.22 for their collateral use in production to the Director of the Serious Fraud Office, even following the request of a foreign authority to the Secretary of State under the 1990 Act.

c Accordingly, the appeal would be dismissed (see [42], [49]–[52], [57], below).

d *Home Office v Harman* [1982] 1 All ER 532 applied.

Per curiam. The fact that a Serious Fraud Office notice is served on a solicitor rather than his client does not give that solicitor or his client any special protection (see [48], below).

e Notes

For subsequent use of disclosed documents, see 37 *Halsbury's Laws* (4th edn reissue) para 565.

f For the investigative powers of the Director of the Serious Fraud Office, see 11(1) *Halsbury's Laws* (4th edn reissue) para 653 and Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 653.

For the Criminal Justice Act 1987, s 2, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 914.

Cases referred to in judgment

g *A v A, B v B* [2000] 1 FCR 577.

A-G for Gibraltar v May [1999] 1 WLR 998, CA.

Arrows Ltd, Re [1992] BCLC 126, [1992] Ch 545, [1992] 2 WLR 923.

Arrows Ltd (No 4), Re, Hamilton v Naviede [1994] 3 All ER 814, [1995] 2 AC 75, [1994] 3 WLR 656, HL.

h *Bank of Crete SA v Koskotas (No 2)* [1993] 1 All ER 748, [1992] 1 WLR 919.

Crest Homes plc v Marks [1987] 2 All ER 1074, [1987] AC 829, [1987] 3 WLR 293, HL.

Home Office v Harman [1982] 1 All ER 532, [1983] 1 AC 280, [1982] 2 WLR 338, HL.

R v Clowes [1992] 3 All ER 440, CCC.

j *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677, [1977] QB 881, [1977] 3 WLR 63, CA.

Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1993] 4 All ER 456, [1994] 1 AC 438, [1993] 3 WLR 756, HL.

Smith v Director of Serious Fraud Office [1992] 3 All ER 456, [1993] AC 1, [1992] 3 WLR 66, HL.

Appeal

The defendants, Viktor Kozeny, Oily Rock Group Ltd and The Minaret Group Ltd, appealed from the decision of Moore-Bick J on 9 February 2004 ([2004] EWHC 189 (Comm), [2004] All ER (D) 121 (Feb)) allowing the applications of the claimants, Marlwood Commercial Inc, Omega Group Holdings Ltd, Pine Street Investments Ltd, Pinford Portfolio Inc, Helendale Trading Corp, Telos Finance Ltd, Pharos Finance Ltd and Water Street Management Ltd for permission pursuant to CPR 31.22(1)(b) to produce documents disclosed in litigation between the claimants and the defendants to the Serious Fraud Office pursuant to a notice served on the defendants on behalf of the Director of the Serious Fraud Office under s 2(3) of the Criminal Justice Act 1987. The Director appeared as an interested party. The facts are set out in the judgment of the court.

Dominic Dowley QC (instructed by *Macfarlanes*) for the claimants.

Huw Davies (instructed by *SJ Berwin*) for the defendants.

Khawar Qureshi (instructed by the *Serious Fraud Office*) for the director.

Cur adv vult

25 June 2004. The following judgment of the court was delivered.

RIX LJ.

[1] This appeal concerns the resolution of a conflict between the public interest in proper disclosure of documents in civil litigation on the one hand and the separate public interest in the investigation of allegations of serious fraud on the other hand. The conflict in this case arises in an international context on both sides of that conflict, for the documents in question have been brought into this jurisdiction from abroad by a foreign litigant, and the investigation in question is being conducted abroad from where the request for assistance in the production of those documents originates.

[2] The request for assistance dated 18 December 2002 was made by the New York County District Attorney (the attorney) to the Foreign Office in connection with the attorney's investigation into the affairs of Mr Viktor Kozeny, who is a defendant in these proceedings. That request has led to the Secretary of State, acting under s 4(2A) of the Criminal Justice (International Co-operation) Act 1990, to request the Director of the Serious Fraud Office (the SFO) to exercise her powers under s 2 of the Criminal Justice Act 1987 to obtain the evidence requested by the United States authorities, here the attorney. That in turn has led to the service of notices on behalf of the director of the SFO on the solicitors to the parties in these proceedings: a notice dated 5 March 2003 which has been served on the claimants' solicitor, Mr Charles Lloyd of Macfarlanes, and a further notice dated 4 April 2003 which has been served on the defendants' solicitor, Ms Catherine Bailey of SJ Berwin. The documents in question are those which have been disclosed by Mr Kozeny, and companies said to be controlled by him, as defendants in these proceedings. Thus Mr Lloyd possesses those documents as solicitor to the claimant parties to whom they have been disclosed; and Ms Bailey possesses them as solicitor to the defendants who have brought them within this jurisdiction for the purpose of disclosure.

[3] The SFO notices have led to two applications. Mr Lloyd, on behalf of the claimants asks the court for permission pursuant to CPR 31.22(1)(b) to produce the documents to the SFO pursuant to its notice. Ms Bailey, on behalf of the

a defendants, asks the court to direct both Mr Lloyd and herself not to comply with the notices respectively issued to them. Moore-Bick J has granted the first application, that of Mr Lloyd pursuant to r 31.22, and has refused the second application. Permission to appeal has been granted by Clarke and Wall LJJ, following an oral hearing, not so much on the prospective merits of the appellant defendants but because their appeal raises questions of principle of potential importance to a significant number of future cases.

THE STATUTES

[4] The 1987 Act is described as an 'Act to make further provision for the investigation of and trials for fraud'. Section 1 makes provision for the setting up of the SFO and the appointment of its director. Section 1(3) states that the director may investigate 'any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud'. Section 2 provides for the director's investigation powers and contains, as amended, inter alia the following provisions:

d '(1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, or, on a request made by an authority entitled to make such a request, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

e (1A) The authorities entitled to request the Director to exercise his powers under this section are ... (b) the Secretary of State acting under section 4(2A) of the Criminal Justice (International Co-operation) Act 1990, in response to a request received by him from an overseas court, tribunal or authority (an "overseas authority").

f (1B) The Director shall not exercise his powers on a request from the Secretary of State acting in response to a request received from an overseas authority within subsection (1A)(b) above unless it appears to the Director on reasonable grounds that the offence in respect of which it has been requested to obtain evidence involves serious or complex fraud ...

g (3) The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate ...

h (9) A person shall not under this section be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to furnish the name and address of his client ...

j (13) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both ...

[5] One important issue debated on this appeal is as to the width of the exception there provided of 'reasonable excuse'.

[6] Section 3(3) also provides a qualified exception to obligations of secrecy imposed by enactment:

'Where any information is subject to an obligation of secrecy imposed by or under any enactment other than an enactment contained in the Taxes Management Act 1970, the obligation shall not have effect to prohibit the disclosure of that information to any person in his capacity as a member of the Serious Fraud Office but any information disclosed by virtue of this subsection may only be disclosed by a member of the Serious Fraud Office for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere and may only be disclosed by such a member if he is designated by the Director for the purposes of this subsection.'

[7] A submission has been made on behalf of the Director of the SFO, who has been given permission to intervene in these proceedings, that s 3(3) overrides the need for any permission to be obtained from the court under CPR 31.22 for the use of disclosed documents outside the proceedings in which they have been disclosed.

[8] Part I of the 1990 Act makes provision to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations. Section 3 is concerned with overseas evidence for use in the United Kingdom, and s 4 is concerned with the reverse situation which is the subject matter of this present appeal. It provides, *inter alia*, as follows:

'(1) This section has effect where the Secretary of State receives—(a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside the United Kingdom or a prosecuting authority in such a country or territory; or (b) from any other authority in such a country or territory which appears to him to have the function of making requests of the kind to which this section applies, a request for assistance in obtaining evidence in the United Kingdom in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory ...

(2A) ... if the Secretary of State is satisfied—(a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and (b) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there, and it appears to him that the request relates to an offence involving serious or complex fraud, he may, if he thinks fit, refer the request or any part of the request to the Director of the Serious Fraud Office for him to obtain such of the evidence to which the request or part referred relates as may appear to the Director to be appropriate for giving effect to the request or part referred ...

(5) In this section "evidence" includes documents and other articles ...'

CPR 31.22

[9] Rule 31.22 provides:

'(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree ...'

- a [10] The rule there laid down supersedes the common law implied undertaking not to use documents disclosed in the course of civil litigation save for the purpose of the proceedings in which they were disclosed, save with the permission of the court or the consent of the document owner (see *Home Office v Harman* [1982] 1 All ER 532, [1983] 1 AC 280). A majority of their Lordships in *Harman*'s case held that the implied undertaking was not brought to an end by the reading of the documents in open court: r 31.22(1)(a) (and, before it, RSC Ord 24, r 14A) reverses that rule.
- b

THE PROCEEDINGS

- c [11] These proceedings arise out of agreements for investment in instruments related to the privatisation of the Republic of Azerbaijan's state-owned undertakings including the state-owned oil and gas industry. Azerbaijan's government issued vouchers to its own nationals entitling them to subscribe for shares in the privatisation offerings. These vouchers were freely transferable, save that foreign investors who wished to purchase them had first to buy options from the state to entitle them to obtain a corresponding number of vouchers in the market.
- d

- e [12] The claimants (here the respondents) are companies incorporated in the British Virgin Islands which act for investment funds based in New York. In 1998 they entered into agreements with two companies said to be controlled by Mr Kozeny to acquire such options and vouchers with a view to taking substantial holdings in the privatised undertakings. Mr Kozeny (the first defendant) is resident in the Bahamas. His two companies (the third and fourth defendants) are incorporated in the British Virgin Islands. The agreements were expressly governed by English law. Pursuant to them, the claimants paid Mr Kozeny's companies some \$180m. In 1999 and 2000 they brought these proceedings (there are two separate actions which have been consolidated) in England pursuant to England's long-arm procedures. They complain that they were induced to enter into the agreements and to transfer funds by fraudulent misrepresentations, that some of those funds were misapplied, and that the options and vouchers purchased were worthless. There were four defendants, Mr Kozeny, the two companies said to be controlled by him, and (the second defendant) a Mr Charles Towers-Clark, but the proceedings against him have been settled.
- f
- g

[13] In their defence, served in March 2001, the defendants pleaded illegality, viz bribery of the Azeri authorities with the full knowledge and consent of the claimants. That complicity is denied by the claimants.

- h [14] In November 2000 and March 2001 the defendants disclosed 82 files of documents pursuant to their CPR Pt 31 obligations. The documents were brought to this country from abroad.

THE ATTORNEY'S REQUEST AND THE DIRECTOR'S NOTICES

- i [15] The attorney's request to the Secretary of State named Mr Kozeny as the person under investigation. The Secretary of State in response to that request referred the matter to the Director of the SFO who in turn decided to accede to the Secretary of State's request. The notices on the director's behalf stated that there appeared to be good reason to exercise the powers conferred by s 2(3) of the 1987 Act and called for production of the following documents as appearing to be relating to matters relevant to the investigation:

'Copies of any documents, excluding those to which legal professional privilege attaches, disclosed by the First, Third and Fourth defendants to the Claimants by Lists of Documents in the High Court of Justice, Queen's Bench Division, Commercial Court (Action numbers 1999 Folio No 1515 and 2000 Folio No 199).'

[16] On receipt of the notice by Mr Lloyd, Macfarlanes wrote to SJ Berwin to ask for the defendants' agreement to the production of the requested documents. In its absence, Mr Lloyd applied for the court's permission under CPR 31.22. On receipt of the second notice sent to Ms Bailey, she indicated that while her personal position was neutral, her clients were applying for an order, grounded in considerations of public policy, to prevent either Mr Lloyd or herself from providing documents which prosecuting authorities in New York could use against Mr Kozeny. She pointed out that the grand jury in New York had indicted Mr Kozeny in relation to the same matters as had been alleged against him in the English proceedings.

[17] The validity of the notices was not in issue.

THE SUBMISSIONS

[18] On behalf of the defendants, Mr Huw Davies submitted that the court had to balance the public interest in investigating fraud against the public interest in full disclosure as an element in the obtaining of a fair trial for all parties to litigation. Just as s 2(13) of the 1987 Act provided a defence in terms of 'reasonable excuse', a broad expression which could easily encompass the public interest in the due administration of justice, so the jurisprudence on r 31.22 and the previous common law rules relating to use of disclosed documents outside the proceedings in which disclosure is made demonstrate the importance of the rule in favour of restricting their collateral use and the need for 'special circumstances' to override that rule. Given the importance of the principles at stake, affirmed by this court in giving permission to appeal, we should be prepared not merely to review the decision below, but even to hold a rehearing and to exercise a fresh discretion, if indeed the judgment below depended upon the judge's discretion. If an error on the part of the judge was, however, needed, it could be found in his assumption that the public interest relied upon by the defendants was founded only in the confidentiality of documents produced under compulsion, whereas in truth it extended to the due administration of justice as a whole. For, if parties, and especially foreign parties whose documents were not even in this jurisdiction, could not be relied upon to make full and proper disclosure, safe in the knowledge that their documents would only be used for the purpose of the litigation in question, then the foundations of a fair trial and of the administration of justice for all parties concerned in the litigation were in peril. In these circumstances, this court should say that the judge was wrong to conclude that the interests of a foreign criminal investigation should take precedence over the public interest in civil justice in this country, especially in a case which concerned a foreign litigant. In any event, there was no need to favour the foreign request for co-operation in the absence of evidence relating to the attorney's ability to seek co-operation from the Bahamas, where Mr Kozeny is resident: either the documents are available there, in which case there is no need for the intervention in this country; or they are not available there, in which case there is still less to be said for using their compulsory production in litigation here for collateral purposes.

a [19] On behalf of the Director of the SFO, on the other hand, Mr Khawar Qureshi submitted that the judge had in any event taken the public interest in the administration of justice into account, and had nevertheless rightly said that the preference in favour of international co-operation in the investigation of serious fraud, was to be derived from the statute itself. 'Reasonable excuse' was to be limited to rare circumstances such as national security, diplomatic relations and the administration of central government (see *Re Arrows Ltd* [1992] BCLC 126 at 130–131, [1992] Ch 545 at 552 per Hoffmann J), or what he described as instances of public interest immunity. As for the fact that Mr Kozeny resided abroad, that reflected the realm of merely private rights and did not compete with the public considerations in issue. In any event, the main concern of this appeal was not so much in the result, but in the setting of guidelines for future cases. In that connection, this court should make it clear that, subject to such rare and extreme examples of public interest immunity, it was essentially a matter for the Secretary of State's discretion whether to make a request of the director and for the director's discretion whether to serve a notice: it was in the statutory considerations which underlay the exercise of those discretions that the person under investigation was protected (and there was no complaint on that score in the present case). Moreover, r 31.22 was irrelevant, for two reasons: first, compliance with the notice of the director of the SFO was not 'use' of the documents for which permission was required; and secondly, s 3(3) of the 1987 Act in any event overrode any statutory obligation of secrecy.

b

c

d

e [20] On behalf of the claimants, Mr Dominic Dowley QC adopted a neutral stance, save to submit that they were entitled to come to court for it to exercise its judgment for the purposes of r 31.22 and/or s 2(13) of the 1987 Act: it should not be left to a litigant to have to decide for itself what, on pain of criminal sanction, should be regarded as a 'reasonable excuse'.

f THE AUTHORITIES

[21] The 1987 Act imposes on a person served with a notice under s 2(3) a statutory duty, sanctioned by the criminal law, to provide the documents in question unless he has a 'reasonable excuse' for failing to do so (s 2(13)). There is no statutory definition of reasonable excuse. Subject to the director's submission that s 3(3) overrides the restriction now contained in r 31.22, it might seem that that restriction, subject to its being lifted, could and should amount to a reasonable excuse.

g

[22] It will be instructive therefore to see what the authorities have to say both about reasonable excuse for the purposes of s 2(13) of the 1987 Act and about the circumstances in which the court has been willing to release a party from the restriction which used to be imposed by an implied obligation and is now governed by the rules of court.

h

[23] In *Re Arrows Ltd* [1992] BCLC 126, [1992] Ch 545 the issue was whether a s 2 SFO notice should take precedence over a liquidators' examination of a managing director under s 236 of the Insolvency Act 1986, or whether on the other hand a court direction under r 9.5(4) of the Insolvency Rules 1986, SI 1986/1925 that no disclosure should be made of the record of that examination should provide reasonable excuse for failure to respond to the notice. Hoffmann J held that it was in the public interest that the secrecy of the examination should be preserved, that the balance came down in favour of preserving that public interest in preference to the public interest in the investigation of fraud, and that the giving of the direction was a reasonable excuse

j

under s 2(13). In reaching these conclusions Hoffmann J had to consider a submission made on behalf of the SFO that the defence of reasonable excuse was a narrow one, limited to the express exceptions acknowledged in s 2 itself, in particular the unqualified exception in favour of legal professional privilege contained in s 2(9), and otherwise only extending to some personal explanation, such as illness: 'It was not a vehicle through which the court could create new general exceptions' (see [1992] BCLC 126 at 130, [1992] Ch 545 at 551).

[24] Hoffmann J rejected that submission as being 'too extreme', continuing:

'It requires one to hold that, with the sole exception of legal professional privilege, Parliament intended to sacrifice every aspect of the public interest which might require confidentiality to the overriding needs of the investigation of fraud.'

And ruling that—

'a "reasonable excuse" in s 2(13) must include any case in which a person is required or entitled under some other rule of law to withhold the information.' (See [1992] BCLC 126 at 130, [1992] Ch 545 at 552.)

[25] Moreover, even though s 3(3) itself overrode every statutory obligation of secrecy imposed under any enactment other than the Taxes Management Act 1970, that was because such statutes were expressed in absolute terms, whereas the concepts of public interest implicit in the common law still remained to permit a more nuanced approach to what had ultimately to be a matter of balance. Hoffmann J expressed this thought in the following paragraph ([1992] BCLC 126 at 131, [1992] Ch 545 at 552):

'I do not think that the answer is quite so simple. Section 3(3) deals with statutory obligations of secrecy but not, in my judgment, the heads of public policy which may justify non-disclosure. When one considers the various heads of policy, such as national security, diplomatic relations and the administration of central government, which have been held to justify non-disclosure even for the purposes of justice, I find it impossible to suppose that the only public interest which Parliament thought capable of taking precedence over the investigation of fraud was the efficient collection of the revenue. The reason, in my judgment, why s 3(3) overrides most statutory obligations of secrecy is that these are expressed in absolute terms, or at any rate in terms which permit no exception for the needs of the SFO. But the doctrine of public policy, which may well underlie some of the statutory provisions, permits a balance to be struck between the public interest in preserving secrecy and the public interest in the investigation of fraud. There is no reason why these heads of public policy should have to be excluded from the concept of "reasonable excuse" and in my judgment s 3(3) does not have this effect.'

[26] Ultimately, that balance was struck in that case in favour of the liquidators' examination. The remainder of the judgment was concerned with the consideration of the factors which went into the weighing of that balance. Hoffmann J concluded ([1992] BCLC 126 at 132, [1992] Ch 545 at 554):

'It thus seems to me that the balance comes down clearly in favour of the direction being given. Put shortly, the liquidators may be assisted thereby and the SFO have nothing to lose. I should in conclusion point out

a two differences from the balancing exercise which Phillips J had to perform in *R v Clowes* ([1992] 3 All ER 440). First, this is not a “class action”. The considerations of public interest relate to this specific liquidation and this specific examination. Secondly, we are not concerned here with the protection of the liberty of the subject, which is seldom outweighed by any other considerations of public interest.’

b [27] In *Re Arrows Ltd* (No 4), *Hamilton v Naviede* [1994] 3 All ER 814, [1995] 2 AC 75 the SFO made a similar submission about the overriding nature of s 3(3), to the effect that the court had no discretion to prevent the SFO from using transcripts of a liquidators’ examination in a criminal trial. The House of Lords rejected that submission. Lord Browne-Wilkinson cited Hoffmann J’s analysis in *Re Arrows* (No 1) with approval, saying ([1994] 3 All ER 814 at 825, [1995] 2 AC 75 at 100):

‘Section 3(3) overrides statutory obligations of secrecy expressly imposed by the statute: it does not override obligations arising under the general law on the grounds of policy.’

d [28] However, in the meantime it had already been held in *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456, [1993] AC 1 that the 1987 Act had by implication overridden the common law privilege against self-incrimination.

e [29] Turning to the authorities on the principle underlying the decision in *Harman*’s case, we note first of all that although their Lordships were divided on the point whether there could be any contempt of court in collateral use of disclosed documents once they had been read aloud in court, a point on which first RSC Ord 24, r 14A and now CPR 31.22 have reversed the decision of the majority, they were at one that the underlying rationale of the implied obligation was to be found in the overall interests of justice. Thus Lord Diplock (who was

f of the majority) said ([1982] 1 All ER 532 at 534, [1983] 1 AC 280 at 300):

‘The use of discovery involves an inroad, in the interests of achieving justice, on the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court.’

g Lord Keith of Kinkel (also of the majority) said ([1982] 1 All ER 532 at 541, [1983] 1 AC 280 at 308):

h ‘The implied obligation not to make improper use of discovered documents is, however, independent of any obligation existing under the general law relating to confidentiality. It affords a particular protection accorded in the interests of the proper administration of justice.’

j And Lord Scarman (who was of the minority) quoted Lord Denning MR in *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 at 687, [1977] QB 881 at 896 as follows ([1982] 1 All ER 532 at 543, [1983] 1 AC 280 at 312):

‘Compulsion [to disclose] is an invasion of a private right to keep one’s documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires.’

[30] The House of Lords revisited the subject in *Crest Homes plc v Marks* [1987] 2 All ER 1074, [1987] AC 829 for the purpose of considering the circumstances in which the implied obligation, being owed to the court, could be released by the court. The claimant brought separate proceedings in two successive years against the same defendant, alleging breach of copyright, and obtained Anton Piller orders in each action. The defendant's disclosure in the second action provided evidence of contempt of court on his part in the first action. The claimant applied for permission to use that disclosure for the purpose of contempt proceedings. The House of Lords granted permission. Lord Oliver of Aylmerton ([1987] 2 All ER 1074 at 1082, [1987] AC 829 at 859) said that it was for the party seeking release from the implied undertaking 'to demonstrate cogent and persuasive reasons' for such permission; and he continued ([1987] 2 All ER 1074 at 1083, [1987] AC 829 at 860):

'... [these authorities] ... illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse LJ observed in the course of his judgment in the instant case, each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions.'

[31] So far none of these authorities raise any special problem or provide any special insight into what we understand to be the real gravamen of Mr Davies' submissions, which is to focus on the transnational aspect of Mr Kozeny and thus his documents becoming subject to this jurisdiction. The next two authorities do, however, consider certain aspects of such a situation. Thus in *Bank of Crete SA v Koskotas (No 2)* [1993] 1 All ER 748, [1992] 1 WLR 919 the plaintiff bank obtained disclosure in England against an English and several foreign banks with branches in England in connection with allegations of large-scale fraud against the defendant. The Bank of Greece appointed a special investigator to inquire into the affairs of the plaintiff bank, so that misappropriated funds could be traced. The plaintiff bank applied for permission to use the disclosed material to enable it to comply with its duties under Greek law for the purposes of the investigator's report. Permission had been previously given to allow use of the documents in any civil proceedings arising out of the disclosure, as well as to rebut false evidence given by the defendant in criminal proceedings in Greece. Millett J extended permission to embrace the purposes of the new application. He reasoned as follows ([1993] 1 All ER 748 at 754-755, [1992] 1 WLR 919 at 926-927):

'Save in exceptional circumstances, it would not be right to authorise the bank voluntarily to make use of the material for any other purpose ... However, *voluntary* disclosure is one thing; disclosure under compulsion of law is another. By enabling the bank to obtain information which it needs for the successful prosecution of its civil remedies, the court should not place the bank in an impossible position in which it must either infringe its undertaking to this court or find itself in breach of its duties under Greek law ... If the governor [of the Bank of Greece] obtains them, it will be a matter for Greek law to determine whether or not he should provide them to the examining magistrate and what use if any the examining magistrate should

a make of them. Such questions involve considerations of public policy, but in my judgment they are questions of Greek public policy, and they should be determined accordingly without the restraining hand of this court. If, under Greek law, either the governor of the Bank of Greece or the examining magistrate can compel the production of the audit reports, so be it. It is frequently the case that material obtained by a party to English civil proceedings may be required to be produced in criminal proceedings in England. By a parity of reasoning, I see no reason why the English court should be astute to prevent a party who has obtained material in this country by the use of the coercive powers of the English court from producing such material in a foreign jurisdiction if compellable to do so.'

c [32] In *A-G for Gibraltar v May* [1999] 1 WLR 998 the foreign claimant obtained a freezing order against the English defendant and an affidavit of assets. The defendant was extradited to Gibraltar on charges, inter alia, of conspiracy to defraud. The Attorney General applied for permission to use the affidavit of assets as part of the evidence for the prosecution in Gibraltar. The defendant resisted the application on the basis that it would unfairly prejudice him in Gibraltar, where he would have had a privilege against self-incrimination. The Court of Appeal allowed the Attorney General's appeal against the judge's acceptance of that argument. Hirst LJ said (at 1009–1010) that he fully recognised the great importance of the privilege against self-incrimination, but—

e 'At the end of the day it seems to me that the Gibraltar court will be in a much better position than we are to give appropriate weight to all relevant considerations, telling either way, including not only the full and proper protection of the first defendant against any injustice, but also the importance of ensuring, subject always to fairness, that all relevant material is available to the jury in the criminal trial.'

f [33] Neither of those two cases was concerned with documents brought from abroad into this jurisdiction by a foreign defendant. That appears to be the novel feature of the present appeal. Moreover in the *Bank of Crete* case the competing duty requiring disclosure, since it originated from abroad, was not one which the English court could control. In the present case, on the other hand, it is in the power of the English court to prefer one obligation to the other. Nevertheless, both authorities suggest, if only implicitly, that the English court will give considerable weight to the needs of a foreign jurisdiction in the investigation or prosecution of fraud, and will, in the absence of positive evidence of injustice or unfairness, trust the foreign court and foreign law to protect the disclosing party against undue prejudice.

h [34] A discussion in the context of ancillary relief family proceedings of the preference for the public interest in the investigation of unlawful conduct over the public interest in non-disclosure may be found in *A v A, B v B* [2000] 1 FCR 577, noted in the White Book (*Civil Procedure*) (2004 edn) vol 1, pp 753–755 (para 31.22.1 in the notes under r 31.22).

j THE JUDGMENT BELOW

[35] Moore-Bick J ([2004] EWHC 189 (Comm), [2004] All ER (D) 121 (Feb)) began by dealing with the argument that a decision permitting or enforcing production of the documents to the SFO would be against the public interest in that it would deter foreign litigants first from choosing this country as a forum for resolving their disputes and secondly from bringing their documents to this

country for the purpose of making proper disclosure. He rejected the first half of that submission as a matter of fact and also on the ground that, if there is a conflict between international co-operation in the investigation of fraud and enhancing the attraction of this country as a forum for international litigation, it was a matter for Parliament to decide rather than the courts. As for the submission's second strand, the judge rejected the notion that the foreign litigant was in any different position from that of domestic residents: in the case of both resident and foreign litigants alike it was clear that the 1987 Act overrode any right to confidentiality in documents. In any event, the public interest in disclosure was 'one which the courts are well equipped to protect'; litigants of all kinds sometimes failed to comply; in the case of fraud there was already a powerful incentive to suppress disclosure; and there was no reason to think that knowledge of the SFO's powers under s 2 would make much difference.

[36] In other words, the judge considered that in practical terms there was no real difference of substance between foreign and domestic litigants in relation to the obligation of disclosure, and that in principle the 1987 Act had made the choice for the courts in preferring the investigation of fraud to the confidentiality of private documents. He then emphasised this latter point in the following reasoning (at [27]):

'The 1987 Act itself makes it clear that the public interest in investigating serious fraud, and in assisting the authorities of other countries in their investigations into serious fraud, much of which is international in character, is so great that it takes priority over almost all statutory obligations of secrecy and almost all private rights of confidentiality. It is sufficient to take priority over the privilege of self-incrimination and must equally be sufficient to take priority over the public interest in ensuring that litigants comply with the duty of disclosure. Although one can contemplate situations in which the public interest in maintaining the confidentiality of information might be so great as to override the interest in the investigation and prosecution of serious fraud, so that public policy would favour withholding the relevant information, such situations are likely to be rare and each case will have to be considered on its merits. It is not suggested, however, that there are any special features of this case that would justify that conclusion.'

[37] The judge then dealt with a specific factual argument which has not resurfaced on this appeal, which was that it would be unfair to permit the enforcement of the s 2 notice in circumstances where the New York investigations and indictment had been instigated by the claimants in these proceedings following on from their access here to the defendants' documents. The judge considered that there was an insufficient basis for suggesting that the claimants had acted in any improper manner; and that in any event it was for the Secretary of State to decide whether there were proper grounds for asking the director to act, and for the foreign court to decide what use to allow the foreign prosecuting authorities to make in evidence of documents provided to them.

[38] The judge therefore considered that the fact that Ms Bailey had possession of the documents as the defendants' solicitor did not amount to reasonable excuse for refusing to accede to the director's notice to her; and similarly that the court ought to grant permission under CPR 31.22 to Mr Lloyd, as the claimants' solicitor, to comply with the notice served on him.

[39] In the latter respect, the judge rejected the director's submission that no such permission was needed. Compliance with the notice involved 'use' of the

- a documents, and s 3(3) of the 1987 Act did not itself expressly override the obligation imposed by r 31.22, since that was an obligation restricting use rather than imposing an obligation of secrecy.

DISCUSSION AND CONCLUSION

- b [40] We would pay tribute to the judge's analysis, but seek to put the matter in our own words as follows, with here and there a somewhat different emphasis.

- c [41] First, if we put out of mind for the moment the fact that the defendants are foreign litigants in these courts, and concentrate only on the conflict between the public policy expressed by the 1987 Act and the public policy expressed by what is now encapsulated in r 31.22, we are doubtful that the matter is simply resolved by Parliament's decision. That would of course be the case if the SFO were right to say, as Mr Qureshi has submitted again on the director's behalf, that s 3(3) directly overrides r 31.22. However, we agree that it does not, for reasons which we will revert to below, but essentially for the reason that the r 31.22 obligation, like the implied undertaking which it has replaced, is an obligation owed to the court rather than to the disclosing litigant. It is owed to the court d because, as was made clear in *Harman's* case, it protects not merely the confidentiality of the litigant's documents but reflects the due administration of justice itself. We do not think that r 31.22's overruling of the precise point in dispute in *Harman's* case has changed that basic consideration, as the citations from the speeches including that of Lord Scarman demonstrate.

- e [42] The position remains therefore that there are two public interests involved, which may come into conflict: that in the investigation of serious fraud (and the requirement that the suspected fraud must be serious or complex is built into the fabric of the 1987 Act), and that in the due administration of civil justice. The public interest in the latter is not overridden by the 1987 Act, any more than the public interests exemplified by Hoffmann J in *Re Arrows (No 1)*. Moreover, we f reject Mr Qureshi's submission that it is only in the rare cases of what Hoffmann J there described as 'national security, diplomatic relations and the administration of central government' ([1992] BCLC 126 at 131, [1992] Ch 545 at 552) that a reasonable excuse may be found. Hoffmann J was only giving examples (he used the expression 'such as') and was in any event perhaps concerned to give obvious examples of public interest immunity in order to make his point that the demands g of the 1987 Act were not all-encompassing. His decision in *Re Arrows (No 1)* itself shows that a reasonable excuse may be found in considerations of the public interest which go wider than the trilogy of his examples.

- h [43] In any event, it can hardly be said that the due administration of civil justice is not in itself a weighty public interest. Its importance can be gauged by the fact that the courts have said that where permission is sought for release from the obligation imposed by the rule against collateral use of disclosed material, it is for the applicant to make good his case, cogently and persuasively, that there are special circumstances which justify such permission and that permission will not occasion injustice to the person giving disclosure (see *Crest Homes plc v Marks* j [1987] 2 All ER 1074, [1987] AC 829). If permission is needed and would not be granted, we cannot see why that would not amount to reasonable excuse in the case of a person who thus remained bound by the obligation expressed in r 31.22.

- [44] Secondly, the two cases of Ms Bailey and Mr Lloyd are intertwined. If the fact that the documents have only come into this country from abroad is a relevant consideration, then it should bear equally on both cases. It is true that, in Ms Bailey's case, since she holds the documents as the defendants' own

solicitor, the rule against collateral use is not directly relevant. Nevertheless it is not far away, for it appears to be common ground that the only reason why the documents have been brought to this country is for the purpose of disclosure in these proceedings. a

[45] Thirdly, there is no element in this case, other than the fact that the defendants are foreign litigants and the documents have therefore been brought here from abroad for the purpose of disclosure, which is relied on as entering into the justice of the decision balancing the two public interests concerned. For example: it is not said that there is any particular reason for anticipating some element of injustice in the use to which the documents may be put by the attorney; nor is it said that there is some special factor which arises either under the law of New York or under the law of the Bahamas or under the reciprocal arrangements, such as they may be, between New York or the United States of America and the Bahamas, which would make compliance with the attorney's request and the director's notice unjust or unfair; nor is it said that disclosure of the documents to the attorney would prejudice the defendants in their litigation in England. Since ultimately the public interest in the due administration of justice is based on the interests of justice, and all the authorities considered in this judgment speak of the need to balance the two public interests in play, the absence of any special reason for fearing injustice is an important consideration. If any argument had been founded on the danger of injustice, questions might have arisen as to whether the law of the foreign jurisdiction could be safely left to determine questions, for instance of admissibility: and the *Bank of Crete* and *A-G for Gibraltar* cases would suggest that in principle it could be. As it is, such issues do not arise. b
c
d
e

[46] Fourthly, the balancing exercise is thus left as an essentially pure one in which the public interest in the investigation of fraud reflected in the 1987 Act, coupled in this case with the public interest in mutual international assistance reflected in the 1990 Act, has to be balanced against the public interest in the administration of justice reflected in CPR 31.22, coupled in this case with the consideration that the defendants and their documents have been brought to this country from abroad. There are no authorities which determine the outcome of that balancing exercise. f

[47] If that last factor, the defendants' residence abroad, were left out of account, there would be a straightforward question whether an English litigant could resist compliance with a s 2 notice, whether in other words he would have a reasonable excuse for failing to produce his documents, simply on the ground that the documents in question had been previously produced on disclosure to another litigant in English proceedings. In our judgment, it is impossible to think that he would. He would be in any event amenable to the requirements of a s 2 notice. There would be nothing to counterbalance the policies of the 1987 and 1990 Acts. If on the other hand the notice happened to be served on the party to whom he had disclosed his documents, that party could in theory rely on r 31.22 as a reasonable excuse: but in effect his only argument would be that permission to disclose should not be granted where the Director of the SFO could just as easily obtain the documents from their owner, an argument which it is difficult to imagine would hold much weight. In any event, there is every reason for supposing that (in the absence of any special factor) in the individual case the public interest in the investigation and prosecution of serious fraud outweighs the general concern of the courts to control the collateral use of documents produced compulsorily on disclosure. Thus the very fact that the document owner would g
h
j

a be amenable to the requirement to produce would lead the court to give permission under r 31.22(1)(b).

[48] We have considered the question whether the fact that an SFO notice is served on a solicitor rather than his client would or should give that solicitor or his client some special protection. In principle we do not think so. Section 2(3) of the 1987 Act says that the notice may require 'the person under investigation
b of any other person' to produce the specified documents. It is often the case that a person's documents are kept for him by his agent. A solicitor is one among a number of such agents who keep documents for their principals. In particular, in a case where, as here, the specified documents can be defined by reference to disclosure lists in litigation, solicitors may be the most convenient and practical source of such documents. They may well be holding the originals. They will be
c able to tender advice on what comes within or outside the s 2(9) exception in favour of privileged documents. Solicitors can be relied upon to keep the required documents safe.

[49] We come then to the case where the litigant whose documents are sought is a foreign defendant, made subject against his will to the jurisdiction of
d these courts only by England's long-arm statute. (We observe in passing that this is the extreme case of the foreign litigant in England. Some may be claimants, who thus invoke the jurisdiction themselves. Some, like the third and fourth defendants in the present case, as we understand the matter, have at any rate agreed that their contractual rights should be decided by English law. Others again may have entered into English jurisdiction clauses. Still other cases will be
e covered by international convention, such as the Brussels and Lugano Conventions.) In such a case it is classical doctrine that great care should be taken in bringing before the English court a foreigner who owes no allegiance here, indeed it is for that very reason that in recent decades the English courts have developed the doctrine of *forum non conveniens* (see *Seaconsar Far East Ltd v Bank*
f *Markazi Jomhouri Islami Iran* [1993] 4 All ER 456 at 466, [1994] 1 AC 438 at 455). It follows that we do not think that the director could serve a notice on the defendants in this country directly, for they have no presence here other than as parties to the litigation in question. That is why, no doubt, the notices in this case have been served instead on the parties' solicitors. In such circumstances, we consider that it is clearly relevant to the court's overall consideration of where the
g balance of public interest and public policy lies that the case concerns a foreign litigant whose documents have only come within the jurisdiction under the compulsion of the rules relating to English jurisdiction and disclosure.

[50] On balance, however, we are firmly persuaded that, in the absence of other factors, the court's discretion should, as a matter of principle, *prima facie*
h be exercised in favour of compliance with the s 2(3) notice: that is to say that, by itself, the additional factor that the documents have been brought here for the purposes of disclosure by a foreign litigant himself brought compulsorily before the English court should not be regarded as a reasonable excuse for non-compliance with the notice; and the courts should be prepared to grant
j permission under r 31.22 for their collateral use in production to the Director of the SFO, even following the request of a foreign authority to the Secretary of State under the 1990 Act. We say this for the following reasons.

[51] *Ex hypothesi*, there is suspicion of serious or complex fraud. The 1990 Act and the bilateral treaties which lie behind it reflect the well-understood fact that in today's world such fraud is often international in its ramifications and can only be investigated by co-operation between the authorities of the international

community of nations. There are safeguards built into the operation of the 1987 and 1990 Acts. Thus upon a request to the Secretary of State from a foreign tribunal or authority, the Secretary of State can only refer that request to the Director of the SFO if he is satisfied of certain matters, e.g. that an offence has been committed in the foreign country in question or that there are reasonable grounds for suspecting that such an offence has been committed and that either proceedings for that offence have been instituted there or that an investigation into that offence is being carried on there. The Secretary of State also has to be satisfied that the request relates to an offence involving serious or complex fraud. Under the 1987 Act, the Director of the SFO can only investigate a suspected offence which appears to him on reasonable grounds to involve serious or complex fraud. Moreover, he can only exercise his s 2 powers, even on a referral of a request from foreign authorities by the Secretary of State, if it appears to the director that there is good reason to do so for the purpose of investigating the affairs of a particular person; and if he wishes documents to be produced he must specify them.

[52] In such circumstances, and in the absence of any other factors argued to constitute some injustice, it seems to us again that the public interest in the investigation or prosecution of a specific offence of serious or complex fraud should take precedence over the merely general concern of the courts to control the collateral use of compulsorily disclosed documents. If such an offence had been suspected of having been committed in this country, the public interest would be in seeing that it could be investigated here if this is where the relevant documents were. And if the offence had been committed abroad, the same interest in the comity of nations and the same respect which one sovereign has for another, which in the general context of long-arm jurisdiction might operate in favour of the foreign resident, in such a case operate against him. In such circumstances the public interest in proper disclosure in civil litigation does not require that documents necessary to the investigation or prosecution of serious fraud should be unavailable. Moreover, as Moore-Bick J reasoned below, the court's exceptional permission for relaxing the rule against collateral use in cases of serious fraud in the international context does not give cause for thinking that proper disclosure in the general run of cases will be undermined.

[53] We have again considered whether the fact that the notices in this case have been served on the parties' solicitors is significant or critical. It would have been critical if such notices could not be served on solicitors rather than their principals, but for the reasons we have expressed in [48], above, that is not the position. Nevertheless, we have treated this fact as significant for the reasons already referred to in [49], above: the parties themselves are not present within this jurisdiction, and the only reason why the documents have been brought within it is for the purpose of the parties' litigation here.

[54] In the present case it is submitted that the documents could be obtained in the Bahamas, and that therefore there is no need for the director's notice in England. Alternatively, it is submitted that, if the documents could not be obtained in the Bahamas, there is no reason why the United States authorities should sidestep such difficulties by applying to the Secretary of State in England. In truth, however, nothing whatsoever is known about the position in the Bahamas. If it be the case that the documents could be obtained there, and the presumption must be that the law in the Bahamas is the same as it is here, then there would seem to be no reason why they should not be obtained here. In any

a event, there is no evidence that the law in the Bahamas would present any impediment to the documents being obtained there.

[55] Finally, there is Mr Qureshi's submission that s 3(3) of the 1987 Act overrides r 31.22. If that were the case, then no question of balancing public interests arises. However, we would reject that submission for the same reasons as appealed to the judge. First, the court's control under r 31.22 is against collateral use, not merely in favour of secrecy. Thus in *Home Office v Harman* [1982] 1 All ER 532 at 538, [1983] 1 AC 280 at 304 Lord Diplock spoke of the implied undertaking as being 'that he himself will not use or allow the documents or copies of them to be used for any collateral ... purpose'.

b [56] Secondly, since the obligation under r 31.22 is owed to the court, it is not merely an obligation of secrecy: it is, as stated above, a rule giving control of the documents to the court (or the parties) in support of the due administration of justice.

c [57] In sum, we would dismiss this appeal.

Appeal dismissed.

Melanie Martyn Barrister.

Chelminski v Gdynia American Shipping Lines (London) Ltd

[2004] EWCA Civ 871

COURT OF APPEAL, CIVIL DIVISION

PILL, LONGMORE AND SCOTT BAKER LJJ

18 JUNE, 6 JULY 2004

Employment Appeal Tribunal – Practice – Appeals – Time period for bringing appeal – Rule of procedure providing that time for bringing appeal running from date on which extended reasons sent – Whether time running from date of posting or from date of deemed delivery – Interpretation Act 1978, s 7 – Employment Appeal Tribunal Rules 1993, SI 1993/2854, r 3(3)(a).

The respondent employee brought a claim against the appellant employer in an employment tribunal. The tribunal struck out the employer's notice of appearance and made orders in the employee's favour. Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171, the extended reasons for the tribunal's decision could be sent by post. Those reasons were duly put into the post on 19 June 2003. By virtue of r 3(3)(a)^a of the Employment Appeal Tribunal Rules 1993, SI 1993/2854, the period within which the employer could bring an appeal to the Employment Appeal Tribunal (EAT) was 42 days from the 'date' on which the extended reasons had been 'sent' to it. The employer filed a valid notice of appeal on 1 August 2003. The Registrar of the EAT subsequently held that the appeal had been brought out of time since the time for filing had expired on 31 July—a decision that was correct if the expression 'date ... sent' in r 3(3)(a) of the 1993 rules meant the date when the reasons had been put into the post. If, however, it meant the date of deemed delivery by post, as the employer contended, time had not expired until 2 August, and the appeal to the EAT would therefore have been brought in time. After the EAT upheld the registrar's decision, the employer appealed to the Court of Appeal, contending that s 7^b of the Interpretation Act 1978 was engaged because the sending of the extended reasons by post had been authorised by a statutory provision. Section 7 provided that where, inter alia, subordinate legislation authorised any document to be served by post, service was deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Held – For the purposes of r 3(3)(a) of the 1993 rules, time ran from the date of posting the extended reasons, not from the date of deemed delivery by post. The word 'sent' in r 3(3)(a) was to be given its ordinary meaning, and that was unaffected by s 7 of the 1978 Act. Section 7 was engaged to the extent that it was relevant if a decision were to be required as to when service was effected. That raised a different question from that of when the document was sent, and s 7 had no bearing on that issue. Accordingly, the appeal would be dismissed (see [10], [11], [16]–[18], below.)

Immigration Advisory Service v Oommen [1997] ICR 683 and *Scotford v Smithkline Beecham* [2002] ICR 264 overruled.

a Rule 3, so far as material, is set out at [2], below

b Section 7 is set out at [5], below

Notes

- a For institution of appeal, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 733.
For the Interpretation Act 1978, s 7, see 41 *Halsbury's Statutes* (4th edn) (2004 reissue) 874.
For the Employment Appeal Tribunal Rules 1993, SI 1993/2854, see 7 *Halsbury's Statutory Instruments* (2003 issue) 300.

b **Cases referred to in judgments**

Hammersmith and Fulham London BC v Ladejobi [1999] ICR 673, EAT.

Immigration Advisory Service v Oommen [1997] ICR 683, EAT.

Scotford v Smithkline Beecham [2002] ICR 264, EAT.

Sian v Abbey National plc [2004] IRLR 185; [2004] ICR 55, EAT.

- c *T & D Transport (Portsmouth) Ltd v Limburn* [1987] ICR 696, EAT.

Appeal

The appellants, Gdynia American Shipping Lines (London) Ltd, appealed with permission of Mummery LJ granted on 4 Feb 2004 from the decision of the Employment Appeal Tribunal (Judge Peter Clark) on 16 December 2003 upholding the decision of the Registrar of the Employment Appeal Tribunal on 29 October 2003 whereby he (i) held that the appellants were out of time in bringing an appeal from the decision of an employment tribunal at London Central, promulgated on 19 June 2003, striking out their appearance to a claim made by the respondent, Anna Chelminski, and making various orders in her favour, and (ii) refused to grant an extension of time within which the appeal could be brought. The facts are set out in the judgment of Pill LJ.

Paul McGrath (instructed by *Radcliffe LeBrasseur*) for the appellants.

Naomi Cunningham (instructed by *Free Representation Unit*) for the respondent.

Cur adv vult

6 July 2004. The following judgments were delivered.

PILL LJ.

- g [1] This is an appeal from a decision of the Employment Appeal Tribunal (EAT), given on 16 December 2003 by Judge Peter Clark, in which he upheld a decision of the Registrar of the EAT made on 29 October 2003. The registrar held that a purported appeal to the EAT was out of time. He also refused an extension of the time within which the appeal could be brought. The effect of the decision was that Gdynia American Shipping Lines (London) Ltd (the appellants) could not pursue an appeal against a decision of an employment tribunal held at London Central, and promulgated on 19 June 2003, striking out the appellants' notice of appearance to a claim by Mrs A Chelminski (the respondent). Having struck out the notice of appearance, the employment tribunal made a declaration that an equality clause was to be implied in the respondent's contract of employment with the appellants. The employment tribunal also ordered the appellants to pay the respondent arrears of pay of £45,425 plus interest.

j [2] The one point now pursued in this appeal is whether the appeal to the EAT was instituted outside the time limit provided by r 3(3)(a) of the Employment Appeal Tribunal Rules 1993, SI 1993/2854, which governs the present case. That depends on the construction of r 3(3)(a) which provides:

'The period within which an appeal to the Appeal Tribunal may be instituted is ... 42 days from the date on which extended written reasons for the decision or order of the employment tribunal were sent to the Appellant.'

[3] The extended written reasons for the decision of the employment tribunal were put into the post on 19 June 2003. It is conceded on behalf of the appellants that, on that date, staff at the employment tribunal complied with rr 12(5) and 23(4) of the Employment Tribunal Rules of Procedure (as set out in Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171). Rule 12(5) provides what shall be sent to the parties and r 23(4) provides that, subject to para (6), which has no application in the present case, all notices and documents required by the rules to be sent or given to a party 'may be sent by post'. (Power to 'deliver' to or at specified addresses is also conferred.) The rules plainly authorise the employment tribunal to send the relevant documents by post.

[4] While a notice of appeal was filed on 30 July 2003, it is accepted that it was not valid because it was not accompanied by the decision and extended reasons of the employment tribunal, as required by r 3(1) of the 1993 rules. A valid notice of appeal was filed, and an appeal thereby instituted, on 1 August 2003. If the expression 'date ... sent' in r 3(3) of the 1993 rules means the date when the decision was put into the post by the employment tribunal, time expired on 31 July 2003. If it means the date of deemed delivery by post, time did not expire until 2 August 2003.

[5] On behalf of the appellants, Mr McGrath submits that 'date ... sent' means the date of deemed delivery by post. It is submitted that since the sending of the relevant documents by post is authorised, s 7 of the Interpretation Act 1978 is engaged. Section 7 provides:

'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

The word 'Act' in s 7, by virtue of s 23 of the 1978 Act, includes subordinate legislation such as the 1993 rules.

[6] Mr McGrath submits that s 7 makes it clear that delivery is bound up with the process of sending a document. A document sent is deemed to be sent on the date that it is deemed to be delivered. The meaning of the word 'sent' in r 3(3)(a) of the 1993 rules is determined by s 7 of the 1978 Act. The effect of the section is that the 'date sent' is the date when the documents would have been delivered in the ordinary course of post, that is 21 June 2003. If time runs from that date, an appeal validly lodged on 1 August 2003 was in time.

[7] There are conflicting decisions on the point in the EAT. Mr McGrath relies on the statement of the EAT, Popplewell J presiding, in *T & D Transport (Portsmouth) Ltd v Limburn* [1987] ICR 696 at 699, that the words in s 7 indicate that the receipt of the document is inevitably bound up with the sending of it. That was, however, a case in which it was the date of receipt of a notice which was under consideration.

a [8] Counsel also relies on the decision of the EAT, Keene J presiding, in *Immigration Advisory Service v Oommen* [1997] ICR 683 at 691. The case was decided on different rules but the same point arose and the submission now made by Mr McGrath was accepted. In *Scotford v Smithkline Beecham* [2002] ICR 264, the EAT, Mr Recorder Langstaff QC presiding, reached the same conclusion.

b [9] For the respondent, Ms Cunningham submits that s 7 of the 1978 Act does not operate in the manner advocated by Mr McGrath. The section begins with two subordinate clauses which merely set out when the later operative clauses are to operate. The operative clauses merely set out the circumstances in which and the time at which 'service is deemed to be effected'. That does not affect the meaning of the word 'sent' and 'sent' cannot be read as 'received'.

c [10] In my judgment, the word 'sent' in r 3(3) of the 1993 rules is to be given its ordinary meaning and that is unaffected by s 7 of the 1978 Act. That section is concerned with the circumstances in which service is deemed to be effected and when, in such circumstances, it is effected. Section 7 is engaged to the extent that it is relevant if a decision were to be required as to when service is effected. That raises a different question from the question when the document was sent and the rules provide that it is the date of sending from which time begins to run. The deeming provisions of s 7 operate when service, or sending, by post is authorised but they operate to determine the date on which service is deemed to be effected and have no bearing on the issue in this case, which is when the documents were sent. The section does not bear upon the date of sending, which is the date provided by the rules as the date from which time is calculated. It would have been relevant in the present case if r 3(3)(a) had provided that time ran from the date when service was effected.

e [11] Morison J was in my judgment correct when he stated in *Hammersmith and Fulham London BC v Ladejobi* [1999] ICR 673 at 678 that—

f 'there is no room for the application of section 7 to the interpretation of rule 3(2)^c. Rule 3(2) is clear. It is the date when the document was sent to the appellant that time starts to run.'

Burton J was also correct in reaching the same conclusion in *Sian v Abbey National plc* [2004] IRLR 185, [2004] ICR 55.

g [12] Mr McGrath fairly comments that Morison J made an inappropriate reference to an immaterial rule and that he placed reliance in his reasoning on the words 'unless the contrary intention appears' in s 7 of the 1978 Act.

h [13] Having stated the words cited above, Morison J went on to say ([1999] ICR 673 at 678) that 'if section 7 were capable of applying to rule 3(2), it seems to me plain that a contrary intention does appear from the structure of the rules'. In my judgment, the expression 'unless the contrary intention appears' does not assist the argument. The 'contrary intention' contemplated in the section is an intention in relation to whether and when 'service is deemed to be effected'. The present issue is not as to whether and when service is deemed to be effected but
j the different issue as to when documents were 'sent'. The purpose of s 7 is such that it is not necessary to look for a contrary intention in present circumstances and that further stage in the reasoning of Morison J was in my view unnecessary,

c Editor's note: r 3(2) was the provision establishing the time period for bringing an appeal prior to the insertion of the current r 3 by the Employment Appeal Tribunal (Amendment) Rules 2001, SI 2001/1128.

as was his reference to a different rule. The fact he embarked on further reasoning does not affect the soundness of his conclusion cited above.

[14] The EAT Practice Direction on this point, that of 2002, not surprisingly reflects the view of a former and the present Presidents of the EAT, Morison J and Burton J.

[15] I agree with counsel for both parties that the issue is to be determined as one of statutory construction and is not affected by considerations of convenience. Burton J has, however, in *Sian v Abbey National plc* [2004] IRLR 185 at 188, [2004] ICR 55 at 61–62 (para 15), stated reasons why the conclusion which he rightly preferred is administratively the more sensible and convenient.

[16] *Immigration Advisory Service v Oommen* [1997] ICR 683 and *Scotford v Smithkline Beecham* [2002] ICR 264 were in my view wrongly decided on this point. I would dismiss this appeal.

LONGMORE LJ.

[17] I agree.

SCOTT BAKER LJ.

[18] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Taylor v Nugent Care Society

[2004] EWCA Civ 51

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, TUCKEY AND WALL LJ

19 JANUARY 2004

Practice – Striking out – Abuse of process – Group litigation – Claimant bringing proceedings and making late application to join existing group action subject to group litigation order – Claimant’s application refused – Whether claimant’s existing parallel claim abuse of process.

A number of young men who alleged they had been the subject of indecent assaults and other inappropriate acts while in the care of the defendant commenced a group action against the defendant in 1997. A group litigation order was made. A cut-off date was set by which claimants would have to join the group action. In December 2001 the claimant commenced proceedings against the defendant approximately two-and-a-half years subsequent to the cut-off date. Two days after the proceedings were served the claimant made an application for permission to join the group action. That application was refused by the district judge. The claimant was granted permission to appeal, and his appeal was listed as one of a series of similar appeals before a High Court judge. Having heard the judgments in respect of some of those appeals, the claimant withdrew his appeal. In December 2002 the defendant successfully applied to have the claimant’s claim struck out as an abuse of the process of the court. The claimant appealed. The issue before the Court of Appeal was whether it was an abuse of process for a claimant who had commenced proceedings which raised an issue covered by a group litigation order, but who had been refused permission to join the group action out of time, to proceed with his claim notwithstanding that refusal.

Held – A claimant who did not join a group action which covered issues which would be involved in his litigation was none the less subject to the management powers of the court. If he brought proceedings in parallel to a group order the court was entitled to manage his proceedings in a way which took account of the position of those who had joined the group action, and those litigants (whether claimants or defendants) were entitled to have their interests given higher priority than those of a defendant who had not joined the group action. In the instant case the dismissal of the claimant’s action had been a disproportionate reaction to his failure to take the steps which he should have taken earlier which would have resulted in his becoming part of the group litigation. Had the claimant commenced his proceedings and not then applied to join the group litigation the court would have taken into account in considering any application to dismiss his claim the delay which had occurred before the commencement of his proceedings but would only have struck them out if there had been delay which could properly be described as abusive after the proceedings had been commenced. The court could take other action to protect the position of a defendant if it was faced with separate and parallel proceedings by a claimant,

such as an order staying the claimant's action until after the completion of the group action, or part of it, with conditions upon which the court would be prepared to remove the stay including, for instance, a requirement that the claimant should be bound by generic decisions in the group action so far as they affected the claimant's case. The court also had very wide powers in relation to costs. Accordingly, the appeal would be allowed, the claim restored, and a stay imposed until the claimant brought an application for directions as to the future management of his claim by the High Court judge in charge of management of the group action (see [15]–[19], [21], [22], below). a
b

Notes

For group litigation orders and their effect, see 37 *Halsbury's Laws* (4th edn reissue) paras 278–280. c

Case referred to in skeleton arguments

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

Appeal d

Mark Taylor (formerly Housley) appealed with permission of Mantell LJ from the decision of Moses J on 15 May 2003 striking out his claim for negligence and breach of statutory duty against the defendant, the Nugent Care Society (formerly Catholic Social Services). The facts are set out in the judgment of Lord Woolf CJ. e

Richard Maxwell QC and *Paula Sparks* (instructed by *Jackson & Canter*, Liverpool) for the claimant.

Edward Faulks QC (instructed by *Hill Dickinson*, Liverpool) for the defendant. f

LORD WOOLF CJ.

[1] The issue in this case is whether it is an abuse of the process of the court for a claimant who has commenced proceedings, where those proceedings raise an issue covered by a group litigation order (GLO), if he is refused permission to join the GLO out of time, to proceed with his claim, notwithstanding that refusal. g

[2] The background to this appeal is that the defendants, the Nugent Care Society, successfully applied to Moses J on 15 May 2003 for an order that the claimant's claim be struck out as an abuse of the court's process pursuant to CPR 3.4(2)(b) and/or the court's inherent jurisdiction. Moses J also refused the claimant's application to adjourn in order to obtain further evidence as to the claimant's capacity to manage his litigation. The latter point has not been the subject of argument on this appeal. h

[3] The case has a considerable history. In the 1970s a number of young men who were then residing at different institutions were the subject of indecent assaults and other inappropriate acts. As a result of complaints which were made, information became available to the police that young men who were in the care of the defendants were complaining of such abuse. i

[4] The claimant made a statement to the police at Warrington suggesting that on 16 February 1995 he had been subject to abuse while in the defendants' care. He subsequently made a claim to the Criminal Injuries Compensation Board in about February 1996 and that claim was upheld in 2000. In the

a meantime other individuals who alleged that they had been treated in this way commenced a group action in 1997. In respect of that group action an order in due course was made by Lord Bingham of Cornhill CJ establishing a GLO. That GLO was the subject of directions which were given by Douglas Brown J on 16 December 1998. The group action was entitled 'The North-West Child Abuse Cases'.

b [5] In the directions which Douglas Brown J gave he provided a cut-off date by which claimants would have to join the group action. That date was 31 May 1999. He also gave other directions, including a date by which individual statements of particulars had to be given, and that date was 30 September 1999.

c [6] On 1 October 1999, District Judge Fairclough, who was one of the two district judges given responsibility for giving management directions in relation to those actions to which the GLO applied, extended time for the compliance with Douglas Brown J's order for certain claimants. 31 December 1999 was the last date for the individual defences.

d [7] The claimant, having succeeded in obtaining an award from the Criminal Injuries Compensation Board, commenced proceedings with a claim form on 17 December 2001. Previously in September 1998 he had obtained a medical report. The date on which he commenced his proceedings was approximately two-and-a-half years subsequent to the cut-off date provided for joining the GLO. The proceedings were served on 23 January 2002. Two days later the claimant made an application for permission to join the group action.

e That application came before District Judge Fairclough who dismissed the application on 21 February 2002. In his judgment the district judge identified perfectly appropriate reasons for taking the course that he did. However, permission to appeal against his decision was given to the claimant on 17 June 2002. That appeal came before Poole J on 18 July 2002. It was one of a series of appeals that were before the judge on that occasion and it appears that, f having heard the judgment given by Poole J in respect of other decisions which had been made in the group action, the claimant decided not to proceed with his appeal and accordingly the district judge's order stood.

g [8] On 20 December 2002 the defendants made an application that the claimant's claim should be struck out as an abuse of the court's process or under the court's inherent jurisdiction. That is the application which was successful before Moses J and which leads to this appeal in respect of which the single judge has given permission to appeal to this court.

h [9] The provisions which are contained in the Civil Procedure Rules (CPR) dealing with group litigation were an innovation which was introduced by an amendment to the CPR made in 2000. It was the experience of the courts that if litigation involving a substantial number of claimants was to be managed in the appropriate way, it was essential that there should be some procedure which provided the courts with very wide powers to manage the proceedings. It was in the court's interest for the proper dispatch of other litigation that the court should have those powers. It was also in the interests of litigants that the courts should have those powers because it would enable the court to deal with this sort of litigation in a more efficient and economic manner than would otherwise be possible. It would enable the court to provide more expeditious justice. It is therefore of the greatest importance to the proper conduct of litigation before the civil courts that, where the court decides that there should

be a GLO (and that decision requires the directions of the Lord Chief Justice), that that decision is supported by the courts. a

[10] In giving his judgment Moses J was very conscious of the issues to which I have just referred. He dealt with the issues which were before him with very considerable care. In due course he gave a judgment which is a model for the clarity with which it is expressed. He started by dealing with the particular circumstances of the claimant's claim. He pointed out that no explanation of any cogency or weight whatever had been put forward for the delay in issuing the claim form by the claimant prior to the cut-off date. b

[11] Having dealt with the claimant's individual circumstances he went on to deal with the position more generally. In the course of so doing he said:

'[15] Is it an abuse for this claimant to seek to bring individual proceedings at the time he does, having failed in his application to join the group action? Secondly, even if it is an abuse, is it a proportionate response of this court to prevent him bringing any action at all, because that would be the result of an order to strike out, in pursuing his claim and seeking to vindicate his rights as a result of the treatment he suffered in the care home. c

[16] The starting point must be that there is no obligation upon a claimant to join a group action. There is nothing within the rules that requires a claimant to do so. However, the overriding objective in the CPR, and the rules in relation to group actions themselves, do have the consequence that an individual may be prevented from joining a group at a later date than that which is specified in the group directions, or in issuing separate proceedings, if such may be the result, unfairness or injustice may ensue, not only to the litigants in the group action, but in relation to litigants generally, having regard to the overriding objective, and if the effect of preventing him from pursuing his claim would not be disproportionate (see the comment in *Civil Procedure* (the White Book) (2003) vol 1, p 406 (para 19.13.1)). The starting point must be the decision of District Judge Fairclough in refusing this claimant permission to join the group action out of time. He had regard to the effect on resources and time that would be engaged should the claimant be allowed to join the group action so long after the time he ought to have sought to join it in the absence of any cogent explanation for the delay. He took the view that if he joined, the claimant's joinder would be bound to have an effect upon the group action. d

[17] In my judgment, that effect can hardly be significantly less, were he to bring proceedings outside the group action ... e

He went on to set out the disadvantages of not adhering to the requirements of a GLO. He indicated that he accepted the evidence of Mr Spencer, filed on behalf of the defence, indicating that there will be adverse effects upon the defendants' limited resources in meeting the claims as a result of those resources having to be diverted to deal with an individual parallel claim brought by the present claimant. He then added: f

'[21] There is, in my judgment however, a more general point. It is true that there is no obligation, as I have said, upon a claimant to join a group g

a action. But if he does not do so, but is aware of it, then he does run the risk
b of being deprived of the opportunity to bring independent action should it
be unjust and unfair if he would be permitted to do so. This claimant,
specifically, in seeking to join the group action, accepted that there would
be prejudice to that group action, and I refer to the quotation I have
already cited at [12] which was part of the argument in support of his
c joining the group action. After all, he thought it was to his own benefit that
he should join the group action, to the benefit of the defendants, and to the
benefit of the court. That is no less true now than it was then.

d [22] The whole purpose of group actions is designed to enable resources
to be directed where they can best be directed both for the advantage of
the parties and of the courts. Were a claimant who had sought, but been
disappointed, in his application to join a group action, permitted to bring
e separate action without any good reason other than a way of overcoming
his previous failure to join a group action, the damage not only to that
particular group action, but to the system of group actions, seems to me to
be plain.

f [23] One has only to contrast the position of this claimant with the
position of other claimants, no doubt suffering under similar tragic
circumstances to that which the claimant appears to have suffered, to see
that that is a relevant issue and a significant issue in considering the fairness
and justice of the case. Those who joined the group action but failed to
g comply with orders, have been deprived of the opportunity of pursuing
their claims; their claims have been struck out. Some were allowed
extensions; others were not and indeed the judge commented upon that
and the need to maintain the discipline of the pursuit of the group action
when he, Poole J, considered an appeal from the district judge.

h [24] The result of not striking out this claim would be to give an
advantage to this claimant over and above those whose cases at least had
the merit of joining the group action at the appropriate time. If it was right
to strike out some of their cases because they had failed to comply with
time limits, it seems difficult to see why they should not be allowed now
to be in exactly the same position as this claimant and bring individual
i actions.’

j [12] Moses J subsequently indicated that the fundamental basis upon which
he was striking out the action derives from the fact that this claimant
unsuccessfully sought to join the group action, failed because of delay and the
effect upon the group action, and yet sought to launch proceeding
independently in a parallel manner when the same effect would occur in
relation to the group action brought on behalf of others. That statement of
Moses J has to be amended to reflect the fact that the claimant had already
commenced proceedings to join the group action before the application to
strike out was made.

[13] Finally, Moses J considered whether striking out the claim was a
disproportionate response. As to that he said that he could identify no method
of preserving the integrity of the group action and its proper conduct while
permitting the claimant to proceed. He said (at [29]):

‘... if I were to refuse this application, any further directions in relation to the proper conduct of the matter would be bound to be subject, in fairness to the defendant and other litigants involved, to the same restraints and restrictions and time limits as those involved in the group action. Yet District Judge Fairclough, in his unappealed judgment, has already pointed out that would not be possible.’

[14] Of the many points made by Moses J in the course of that judgment, at first sight perhaps the most powerful argument would be that claimants who were part of the group action and who did not comply with the directions given by Douglas Brown J had their actions struck out for not so doing. I have no doubt that if those claimants were to begin a separate action, having had their previous action struck out, that could indeed be an abuse of process. However, on consideration it seems to me that there is a significant distinction between a claimant who becomes part of a group not complying with a direction given by a judge (as happened as to directions here by Douglas Brown J) and the position of the claimant. In the former case the claimants had disobeyed an order of the court, whereas in the case of the present claimant he had never been subject to an order of the court which he had disobeyed.

[15] The provisions contained in CPR Pt 19 dealing with group litigation have no requirement which would enable a court to make an order requiring a claimant to join a group action if the claimant chose not to do so. A claimant is perfectly entitled to decide to bring an action without taking that step. The fact that he has that right does not mean, however, that there are no good reasons why he should join a GLO which covers issues which will be involved in his litigation. If a claimant does not join such a GLO when it would cover his proceedings, then he is none the less subject to the management powers of the court. If he brings the proceedings in parallel to a GLO, the court is fully entitled to manage the proceedings which he brings in a way which takes account of the position of those who have joined the GLO. This it is intended should generally happen in the case of proceedings which are suitable for the regime which the GLO creates. Those litigants who join the group action are entitled to have their interests (whether they are claimants or defendants) given higher priority than those of a defendant who does not take that course. This is not only because of the fact that they are likely to be large in number, but also because by joining the group action they are co-operating with the proper management of the proceedings, whereas the litigant who does not take that course is not so doing. The general sentiments expressed by Moses J in his judgment which I have cited are statements which I would firmly indorse.

[16] However, notwithstanding that, I have come to the conclusion that Moses J wrongly decided that the claimant's action had to be dismissed. In my judgment that is so, first of all, because to dismiss the claimant's case was a disproportionate reaction to his failure to take the steps which he should have taken at an earlier date which would have resulted in his becoming part of the group litigation. However, while that is so, it is also necessary to consider whether his claim could have been dismissed if he had commenced his proceedings and not then applied to join the group litigation. In my judgment, on the material available, this was not a situation where it would then have been appropriate to dismiss his claim as an abuse of the process of the court. In considering any such application the court would have taken into account the

a delay which had occurred before the commencement of his proceedings, but the court would only strike out the proceedings if there had been delay which, taking into account the background, could properly be described as abusive after the proceedings had been commenced. Otherwise the situation was one where, if the proceedings were to be brought to an end they would normally have to be brought to an end because of the claimant's failure to comply with the requirements of the Limitation Acts and the periods prescribed for bringing proceedings, bearing in mind the generous discretion which courts have to set aside those limitation periods in appropriate cases. In this case the issue of limitations is not before us, and it was not in the lower court suggested that the proceedings could have been struck out for non-compliance with the limitation requirements. Accordingly, on the grounds of delay alone it would not be possible to have made an order bringing the proceedings to an end. For that draconian order to be made requires a clear case and there was certainly no clear case here.

[17] It is also necessary to consider whether other action could be taken by the courts to protect the position of the defendant if he was faced with separate and parallel proceedings by the claimant. In my view in this case it is important that the position of the defendant is fully recognised. However, while fully recognising that position, it is my view that the court could take steps which would fairly protect the defendant. In particular the court may make an order staying the claimant's action until after the completion of the group action (or at least until after the completion of part of that action). In addition, if the court were to impose a stay, it may identify conditions upon which it would be prepared to remove the stay. Those conditions might include a requirement that the claimant should be bound by generic decisions in the group action so far as they affect the claimant's case.

[18] Finally, the court has very wide powers in regard to costs. It may make an order to protect a defendant (in the event that a costs order was made against the defendant) from having to pay any costs in addition to those which the defendant would have had to pay even if the claimant had been a party to the group action.

[19] Having regard to the steps which the court may take to protect the position of a defendant (only some of which steps have been specifically identified), I regard it as disproportionate to have dismissed the claimant's claim. I would therefore allow this appeal, restore the claimant's claim, and impose a stay in respect of that claim until an application is considered by Holland J, brought by the claimant for directions as to the future management of the claimant's claim. Holland J is the High Court judge in charge of the group action and he is in the ideal position to decide what orders need to be made. He should decide at what stage of the proceedings it would be appropriate for the claimant's claim to come before the court. He may, for example, decide that although District Judge Fairclough's decision was correct at the time that it was made, because of the delay that has taken place in the group action since that time it would be sensible for the claimant's case now to become part of the group action. I venture no opinion as to this. I leave the matter entirely to Holland J.

[20] There are no doubt alternative steps which may be taken by the judge, to which I have not referred. Counsel should, so far as it is practicable for them to do so prior to the hearing before the judge, indicate the directions

which they seek in order that a result can be achieved which meets the justice of this case. I would allow the appeal and order accordingly.

a

TUCKEY LJ.

[21] I agree.

WALL LJ.

[22] I also agree.

b

Appeal allowed.

Kate O'Hanlon Barrister.

Re The Designer Room Ltd

[2004] EWHC 720 (Ch)

CHANCERY DIVISION

RIMER J

11, 23 MARCH 2004

Company – Administration order – Administrator – Powers – Administrator's powers to pay dividend directly to preferential creditors – Insolvency Act 1986, s 14(1), Sch 1, para 13.

An administration order was made in relation to the company for certain of the purposes specified by the Insolvency Act 1986 for the making of such an order, namely the survival of the company, and the whole or any part of its undertaking as a going concern, the approval of a voluntary arrangement, and a more advantageous realisation of the company's assets than would be effected on a winding up. The outcome of the administration was that some £63,000 would be available for distribution to the preferential creditors whose claims in total exceeded £800,000. Section 14 of the 1986 Act provided, inter alia, that administrators 'may do all such things as may be necessary for the management of the affairs, business and property of the company' and para 13 of Sch 1 to the 1986 Act specified that an administrator had the power to make any payment which was necessary or incidental to the performance of his functions. The administrators wished to maximise the dividend available for the preferential creditors by paying it themselves, avoiding the expenses which would be incurred by either voluntary or compulsory liquidation or by a voluntary arrangement and applied to the court for directions under s 14 of the 1986 Act to allow them to do so, contending that it was a payment which they were properly entitled to make under para 13 of Sch 1.

Held – The administrators would only have power under the 1986 Act to distribute the remaining assets to the preferential creditors if such a power could properly be regarded as necessary or incidental to the performance by the administrators of their functions as administrators. The functions of the administrators were, so far as possible, to achieve the purposes of the administration order. Those purposes did not include the distribution to pre-administration creditors of the realised assets. The distribution was therefore not necessary or incidental; it had been proposed only because, from the view point of the preferential creditors, it would be the most beneficial way of distributing the assets. Accordingly, the application would be dismissed (see [13], [25]–[27], below).

Re John Slack Ltd [1995] BCC 1116 distinguished.

Re WBS Realisations 1992 Ltd [1995] 2 BCLC 576, *Re Powerstore (Trading) Ltd* [1998] 1 All ER 121 and *Re UCT (UK) Ltd (in admin)* [2001] 2 All ER 186 considered.

Re Mark One (Oxford Street) plc [1999] 1 All ER 608 not followed.

Notes

For the powers of administrators see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) para 2097.

Section 14 of the Insolvency Act 1986 was substituted, together with ss 8–13, 15–27, by new s 8, by the Enterprise Act 2002, ss 248(1), 249 with effect from 15 September 2003. Section 8, as substituted, brings into effect Sch B1, and under para 66 of Sch B1, the administrator of a company may make a payment otherwise than in accordance of para 13 of Sch 1 if he thinks it likely to assist achievement of the purpose of administration. a

For the Insolvency Act 1986, s 14, Sch 1, para 13, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 905, 1353. b

Cases referred to in judgment

John Slack Ltd, Re [1995] BCC 1116.

Mark One (Oxford Street) plc, Re [1999] 1 All ER 608, [1999] 1 WLR 1445. c

Mount Banking plc, Re (25 January 1993, unreported), Ch D.

Powerstore (Trading) Ltd, Re, Re Homepower Stores Ltd [1998] 1 All ER 121, [1997] 1 WLR 1280.

St Ives Windings Ltd, Re [1987] 3 BCC 634.

TXU UK Ltd (in admin), Re [2002] EWHC 2784 (Ch), [2003] 2 BCLC 341.

UCT (UK) Ltd (in admin), Re [2001] 2 All ER 186, [2001] 1 WLR 436. d

WBSL Realisations 1992 Ltd, Re, Re Ward Group Ltd [1995] 2 BCLC 576.

Wolsey Theatre Co Ltd, Re [2001] BCC 486.

Application for directions

Nicholas Roy Hood and Vivian Murray Bairstow, the joint administrators of The Designer Room Ltd (the company), applied for directions under s 14(3) of the Insolvency Act 1986 seeking an order that they be able to pay a dividend to the company's preferential creditors. The facts are set out in the judgment. e

Lexa Hilliard (instructed by *Addleshaw Goddard*) for the administrators.

Cur adv vult f

23 March 2004. The following judgment was delivered.

RIMER J.

[1] This is an application by Nicholas Roy Hood and Vivian Murray Bairstow, the joint administrators of The Designer Room Ltd (the company). It raises once again the question as to the power, if any, of administrators to make payments to pre-administration creditors. g

[2] The administration order was made on 12 June 2002, and so the administration is governed by the law in force prior to the changes introduced by the Enterprise Act 2002. The order was made for the purposes specified in s 8(3)(a), (b) and (d) of the Insolvency Act 1986, namely: (1) the survival of the company, and the whole or any part of its undertaking, as a going concern; (2) the approval of a voluntary arrangement under Part I of the 1986 Act; and (3) a more advantageous realisation of the company's assets than would be effected on a winding-up. The administrators were directed to make reports of progress to the court at various stages, and have done so. h

[3] The company has a number of preferential creditors within the meaning of s 386 of, and Sch 6 to, the 1986 Act, and the administrators have assumed the task of agreeing their respective claims. The preferential creditors are the Inland Revenue (£212,822.38), HM Customs and Excise (£544,793.30), the Department j

a of Trade and Industry (£74,399·83), and the company's employees (£3,798·17). Those sums total £835,813·68.

[4] The outcome of the administration is that approximately £63,000 will be available for distribution to the preferential creditors after payment of the outstanding expenses of the administration. On this basis the preferential creditors would, if paid this sum, receive a dividend of 7·5 pence in the pound.
b There will be nothing for any of the unsecured creditors.

[5] The application asks for an order that the administrators be at liberty to pay the preferential creditors such a dividend. In support of the application, Mr Bairstow explains in his witness statement that whilst he would normally achieve such a result by the route of a company voluntary arrangement, or by an exit from the administration resulting in the company entering into either
c voluntary or compulsory liquidation, the adoption of any of these alternatives in this case will be disadvantageous to the preferential creditors. If the company were to be put into compulsory liquidation, the £63,000 would suffer the costs of the Official Receiver as liquidator, perhaps also those of a private liquidator, and also the ad valorem fees on money paid into the insolvency services account. A
d voluntary winding-up would save the ad valorem fees, but the costs of it would still involve a material inroad into the money available for the preferential creditors. As there will be nothing for the unsecured creditors, the administrators also consider that it would be uneconomic to prepare a proposal for a voluntary arrangement, circulate it to all creditors, and then hold a meeting to seek approval for the sole purpose of making a distribution to the preferential
e creditors.

[6] In the circumstances, what the administrators therefore want to do is to pay the preferential creditors themselves and so maximise the dividend. Having paid them, the administrators would then propose to petition for the compulsory winding up of the company. Their proposal so to pay the preferential creditors
f is supported by HM Customs and Excise. The Department of Trade and Industry has similarly expressed its support. Notice of the present application was given to the Official Receiver, who indicated that no one from the Insolvency Service would be attending the hearing.

[7] Ms Lexa Hilliard appeared for the joint administrators. I needed no persuading by her that what the administrators wish to do is in the interests of the
g preferential creditors. However, the reason they have sought the court's direction that they may make the proposed distribution is because they recognise that there is nothing in Pt II of the 1986 Act, or in Sch 1 to it (which lists the powers of an administrator), which, either expressly or by clear implication, confers any power on them to do so.

h [8] The application is made under s 14(3) of the 1986 Act, but I should also refer to s 14(1). They respectively provide that:

j '(1) The administrator of a company—(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and (b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act; and in the application of that Schedule to the administrator of a company the words "he" and "him" refer to the administrator ...

(3) The administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.'

[9] Ms Hilliard referred me to several authorities dealing with the power of administrators to pay pre-administration creditors. The first in time is *Re St Ives Windings Ltd* [1987] 3 BCC 634. The administration order in that case had been made for the purposes specified in s 8(3)(a) and (d), being two of the purposes for which the order was made in this case. The application to the court was for a direction to permit the administrators to make distributions to creditors of a nature which had been approved at the creditors' meeting. Harman J was addressed by counsel for the administrators, who advanced an argument in support of the application, but he did not have the benefit of any argument the other way. In those circumstances, Harman J expressed what he called his provisional view that there was no power in the court to sanction the payments which the administrators wanted to make, and he declined to make the order sought. What he instead did was to vary the administration order by adding the approval of a voluntary arrangement as a further purpose, with a view to the distributions being made to creditors under such an arrangement.

[10] *Re John Slack Ltd*, 2nd July 1990, is a decision of Scott J. It is unreported^a, and I have not been shown a transcript of the judgment, but it is referred to in the next case to which I will come, a decision of Knox J. *Re John Slack Ltd* was a case in which the administration order was made for the same two purposes as the original purposes of the order in *Re St Ives*. The result of the administration was that there was a surplus sufficient to pay all creditors in full, and Scott J authorised the administrators to do just that. He noted the provisional view of Harman J in *Re St Ives*, that there was no power to make the payments, but said that whereas in that case what was proposed was merely a pro rata distribution, in the case before him what was proposed was a payment in full, so that there was no possibility of any dissentients. If, in making that distinction, Scott J was recognising that administrators have no power to pay a dividend to pre-administration creditors, I do not, with respect, understand on what basis he considered that they have a power to pay them in full. The merit of what the administrators wanted to do was, of course, obvious, and I can well understand why Scott J wanted to make the orders sought. But the brief reference to the case in Knox J's decision does not convince me that what Scott J was doing was other than to authorise what might perhaps strictly be viewed as being in the nature of a judicious excess of the administrators' statutory powers. If, however, the true basis of the decision in *Re John Slack Ltd* is that an ability by joint administrators to pay all pre-administration creditors in full carries with it a power actually to make such payment, that ability is not present in this case.

[11] *Re WBSL Realisations 1992 Ltd* [1995] 2 BCLC 576 is a decision of Knox J. The application was by the joint administrators of two companies, WBSL and Ward, the former being a subsidiary of the latter. The sole purpose of the administrations was the more advantageous realisation of assets. The administration of WBSL had been successful and enabled all creditors to be paid in full, and the judge was asked to sanction that. As regards Ward, it was insolvent but the administrators sought an authority enabling them to agree all the creditors' debts and pay them on a *pari passu* basis.

[12] It is not unambiguously clear from the report whether Knox J authorised the payment in full of the WBSL creditors, but I presume that he did, no doubt guided by Scott J's decision in *Re John Slack Ltd*. I have explained why I do not regard *Re John Slack Ltd* as providing authority for the purposes of the distribution

^a Editor's note: *Re John Slack Ltd* is reported at [1995] BCC 1116.

a sought to be made in this case. The bulk of Knox J's judgment was devoted to the question of whether he could sanction the pari passu payments to the Ward creditors. He held that he could, taking the view that para 13 of Sch 1 to the 1986 Act permitted the desired distribution in the special circumstances of the case. Paragraph 13 confers on an administrator a 'Power to make any payment which is necessary or incidental to the performance of his functions'.

b [13] In the course of his judgment, Knox J referred to *Re Mount Banking plc* (25 January 1993, unreported) in which Ferris J authorised administrators to make certain payments on account to pre-administration creditors, but in circumstances in which the payment was needed in order to preserve the goodwill of the company's business pending the attempt to achieve the survival of the company and its undertaking. On that basis, Ferris J held that the payment
c was empowered by para 13 of Sch 1 to the 1986 Act. I interpret Knox J's reasoning for making the order he did in the Ward application to have been similar, namely that on the particular facts the payment of the creditors on the proposed pari passu basis was necessary for the performance of the joint administrators' functions in achieving the purposes of the administration and
d was, therefore, also empowered by para 13. So interpreting Knox J's decision, I do not regard it as providing assistance for the purposes of the application now before me. I can see no basis on which it can be said that the proposed payment to the preferential creditors can be said to be necessary or incidental to the joint administrators' functions. Their functions were, so far as possible, to achieve the purposes of the administration order, and it appears that, to the extent possible,
e they have done that. Those purposes do not include the distribution to pre-administration creditors of the realised assets.

[14] The next case is *Re Powerstore (Trading) Ltd* [1998] 1 All ER 121, [1997] 1 WLR 1280. It concerned the familiar situation in which administrators wished to achieve an exit from the administration by the relatively cheap route of a
f voluntary liquidation rather than a compulsory liquidation, but in circumstances in which a voluntary liquidation would, without more, have a prejudicial effect on preferential creditors. This is because, in the case of a voluntary winding-up, such creditors are ascertained as at the date of the resolution to wind up, whereas in the case of a compulsory winding-up they are ascertained as at the date of the
g administration order. In such circumstances, the preferential creditors will or may only agree to an exit by way of a voluntary winding-up if one way or another they are put in the like position that they would have been in had the company been put into compulsory liquidation.

[15] The administrators sought directions from Lightman J enabling them to
h achieve this result. One of the points argued before Lightman J was whether he could give directions to the liquidators of the future voluntary winding-up that they should, in effect, treat those creditors who would have been preferential creditors on a compulsory winding-up as having a like preference in the voluntary winding-up. He held he could not give such a direction, and I do not
j understand his views in that respect to have been subsequently questioned.

[16] The other point argued before Lightman J was whether he could direct the joint administrators either to pay the preferential creditors on this more favourable basis themselves, or else to set up a fund for their payment. He held that he could not do that either. He referred to s 14(1) of the 1986 Act and to para 13 of Sch 1, but held that, following *Re WBSL Realisations*, the latter power was only exercisable to advance the purposes for which the administration orders

were made. He said ([1998] 1 All ER 121 at 126–127, [1997] 1 WLR 1280 at 1285–1286) that the problem in the case before him was that—

‘the purpose of the proposed payment is not the more advantageous realisation of the companies’ assets but a more advantageous method of distribution of assets. The power conferred by para 13 of Sch 1 to the 1986 Act is accordingly inapplicable. The power conferred by s 14(1) of the Act is likewise inapplicable because the proposed direction is not necessary for the management of the affairs, business or property of the companies.’

[17] Had Lightman J been satisfied that the proposed payments were so necessary, it is clear from his earlier remarks ([1998] 1 All ER 121 at 126–127, [1997] 1 WLR 1280 at 1285–1286) that he would have been prepared to sanction them, either by way of a direction under s 14(3) or else by way of a direction under s 18(3). Section 18(1) empowers an administrator to apply to the court for the discharge of the administration order, or for its variation so as to specify an additional purpose. Section 18(2) requires the administrator to make such an application in certain specified circumstances, including those in which it appears to him that the purpose or each of the purposes for which the order was made has been achieved or is incapable of achievement. Section 18(3) then provides:

‘On the hearing of an application under this section, the court may by order discharge or vary the administration order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order it thinks fit.’

However, for reasons given in the quoted passage, Lightman J saw no justification for the giving of a direction under s 14(3) or s 18(3).

[18] In *Re Mark One (Oxford Street) plc* [1999] 1 All ER 608 at 609, [1999] 1 WLR 1445 at 1446, Jacob J observed that Lightman J’s decision in *Re Powerstore (Trading) Ltd* ‘caused something of a stir in the world of insolvency’. He explained that prior to the decision the Companies Court had apparently been prepared to give directions to administrators faced with the type of situation before Lightman J in *Re Powerstore (Trading) Ltd*, ie directions enabling funds to be set aside by way of special provision for preferential creditors in advance of the discharge of the administration order and the entry of the company into voluntary liquidation. The application before Jacob J was for a similar type of order. Jacob J declined to follow *Re Powerstore (Trading) Ltd* and made the orders sought. He held, first, that the court’s inherent jurisdiction over administrators as officers of the court conferred the necessary jurisdiction. Secondly, he held that jurisdiction was also to be found in s 18(3) of the 1986 Act. He said that the key words in s 18(3) were the concluding ones, those empowering the court to make ‘any other order it thinks fit’, and that such power was not confined to making orders for the purpose of the administration itself. He said that the power—

‘arises specifically at the time, or may arise specifically at the time, when the purposes of the administration order have either been achieved or have become incapable of achievement. So the power is wider than the purposes of the administration itself. I see no reason to limit the very wide ambit of s 18(3) to the purposes of the administration only. So I therefore depart from

a what Lightman J said.’ (See [1999] 1 All ER 608 at 611, [1999] 1 WLR 1445 at 1448.)

b [19] The application before me is not one under s 18(1), although such an application is likely to be made by the administrators in fairly short order. Jacob J’s views as to the breadth of the inherent jurisdiction would, if correct, presumably enable the court to make the order sought on this application. His interpretation of s 18(3) would, if correct, suggest that were the joint administrators to seek the order they now seek at the same time as an order for the discharge of the administration order, the court could also make the order under s 18(3).

c [20] The next case is *Re Wolsey Theatre Co Ltd* [2001] BCC 486. That concerned an application by the joint administrators for a discharge of the administration order and an order making the usual special provision for preferential creditors. Jonathan Parker J referred to *Re Powerstore (Trading) Ltd* and *Re Mark One*, and, at least in part, followed the guidance given in the latter decision. He said (at 487):

d ‘I am satisfied that the court does have inherent jurisdiction to make the direction sought. I note that an argument based on inherent jurisdiction does not appear to have been addressed to Lightman J in the case of [*Re Powerstore (Trading) Ltd*]. In addition, it seems to me that s. 18(3) is, on its true construction, wide enough to cover the direction sought in this case. e Whether a provision is “consequential” for the purposes of the subsection must depend on the particular circumstances of the case. Where, as here, it is contemplated that the administration will be immediately replaced by a voluntary liquidation, it seems to me that a direction designed to protect the position of preferential creditors in the ensuing voluntary liquidation is a f direction which can properly be described as being consequential upon the discharge of the administration order.’

[21] It is to be noted, therefore, that Jonathan Parker J did not adopt the reliance that Jacob J placed upon the final words of s 18(3), but preferred the view that the direction sought was ‘consequential’ upon the discharge of the administration order.

g [22] The same point once again came before Arden J in *Re UCT (UK) Ltd (in admin)* [2001] 2 All ER 186, [2001] 1 WLR 436. That too was an application by joint administrators for the discharge of the administration order in advance of a voluntary winding-up, and for directions for the setting up of a trust account in h order to make special provision for the preferential creditors. Arden J referred to *Re WBSL Realisations*, *Re Powerstore (Trading) Ltd*, and *Re Mark One*. She referred ([2001] 2 All ER 186 at 190, [2001] 1 WLR 436 at 440) to Jacob J’s view that, as she summarised it, ‘the court had inherent power over administrators as officers of the court and that the Insolvency Act did not cut down that power’. She did not, j however, make any further reference to the court’s inherent jurisdiction, and although she made the order sought, it is plain that she did not make it on reliance on any such jurisdiction. Arden J disagreed with Jacob J’s view that the critical empowering words in s 18(3) were ‘or make ... any other order it thinks fit’. Her view, in line with Jonathan Parker J’s views in *Re Wolsey Theatre Co Ltd* (a case not apparently cited to her), was that the relevant provision in s 18(3) was the court’s power when making an order for discharge to ‘make such consequential

provision as it thinks fit'. I respectfully agree. She then said ([2001] 2 All ER 186 at 191–192, [2001] 1 WLR 436 at 441–442):

'Thus on this small point, I differ from the judgment of Jacob J. The question is then, what is the meaning of consequential provision for the purposes of s 18(3)? In my judgment it means any provision which results directly or indirectly from the discharge of the administration order. In this case there clearly has to be a discharge of the administration order. The purposes for which the administrators were appointed have now been achieved or become spent and the time has come when the moneys have to be distributed to creditors and the appropriate medium in this case is through a liquidation. The creditors wish to avoid the costs of a compulsory liquidation and the creditors would be better off if the course proposed by Ms Toubé [counsel for the joint administrators] is taken than if the company goes into compulsory liquidation. She submits, in my view, rightly, that if I am not able to make this direction then the company will have to go into compulsory liquidation in order to preserve the rights of preferential creditors. In my judgment, a provision is consequential even though it will have to take effect immediately before the discharge because it is a direction which is being made to the administrators and they of course will cease to hold office on the discharge of the administration order. As I see it, this particular direction is necessitated by the application for discharge since there will have to be a liquidation and voluntary liquidation is the preferred route. Accordingly, I am satisfied that the court has power to make the proposed direction, provided that the administrators have power to make the proposed payments to themselves on trust. In that connection I turn to s 14 of the Act and to Sch 1. Paragraph 13 empowers administrators to make the payments which are necessary or incidental to the performance of their functions. I agree with Ms Toubé that part of the function of the administrators is to bring the administration to a conclusion in the manner which seems to them to be in the best interests of the creditors. I note that under Sch 1 the administrators have the power to present a petition for the winding up of the company, in other words, their functions extend to bringing the administration to a conclusion and ensuring that the company is put into a position from which it can make distributions to creditors. As I see it, it is part of their function to put the company in that position in a manner which is most advantageous to creditors. In this particular case, that is achieved by first putting the company in a position whereby it can enter into voluntary liquidation. As I see it, the proposed payment to the administrators as trustees is a payment which will enable that process to be achieved and, therefore, comes within para 13 of Sch 1. The payment is "necessary or incidental" to the performance by them of their functions. It is accordingly within their statutory powers to make this payment, and it follows to carry out the terms of the proposed trust. Accordingly, I propose to make the following order.'

[23] Whilst, therefore, Arden J arrived at the like result as Jacob J had in *Re Mark One* and Jonathan Parker J had in *Re Wolsey Theatre Co Ltd*, I do not regard her reasoning as endorsing the approach of the other judges in either case. She placed no reliance on any inherent jurisdiction of the court to make the order sought. She instead regarded it as necessary to the court's sanction of what was

a proposed for the court to be satisfied that the relevant payments were empowered by para 13 of Sch 1. In this respect, her reasoning was in line with that favoured by Knox J in *Re WBSL Realisations* and Lightman J in *Re Powerstore (Trading) Ltd*. Whereas, however, Knox J was satisfied in *Re WBSL Realisations* that the payments to the Ward creditors were empowered by para 13, Lightman J was not so satisfied in *Re Powerstore (Trading) Ltd*. Whether, had Lightman J had the benefit of the argument put by Miss Toubé to Arden J, he would have come to a different conclusion on the facts of the application before him is an unanswerable question, but, if I may respectfully say so, I regard Arden J's reasoning in *Re UCT* for her conclusion that the proposed payments were empowered by para 13 of Sch 1 as wholly convincing.

c [24] The final decision to which Ms Hilliard referred me was *Re TXU UK Ltd (in admin)* [2002] EWHC 2784 (Ch), [2003] 2 BCLC 341, a decision of Peter Smith J. I do not propose to refer to the judgment in any detail. It was a case in which the judge sanctioned the making by the administrators of a payment in settlement of potential claims. I read the judgment as showing no more than that it was a case in which the judge was satisfied that the administrators were proposing to exercise powers under Sch 1 in circumstances in which it was for the benefit of the administration for them to do so.

e [25] Having summarised the authorities to which I was referred, I return to the present case. Ms Hilliard submitted that I should sanction the proposed payment in exercise of the inherent jurisdiction of the court, or on the basis that it was a payment that the administrators are properly entitled to make under para 13 of Sch 1 to the 1986 Act. For reasons which are obvious from my summary of the facts, if I felt able to direct the administrators to make the proposed payment to the preferential creditors I would readily do so. However, leaving aside for the moment the question of the court's inherent jurisdiction, I have not been persuaded that I have any jurisdiction to give such a direction. f I am persuaded by the reasoning in the *Re WBSL Realisations*, *Re Powerstore (Trading) Ltd* and *Re UCT* cases that the joint administrators would only have a power to make the proposed payment to the preferential creditors if, on the facts of the case, such a payment can properly be regarded as necessary or incidental to the performance by the administrators of their functions as such. I have not, however, been persuaded that the payment is so necessary or incidental. g This is not a case like *Re UCT*, in which special provision has to be made for the preferential creditors in order that, with the best interests of the creditors generally in mind, the administrators can achieve an exit from the administration by way of a voluntary winding-up rather than by way of the relatively more expensive route of a compulsory winding-up. It is a case where, as matters stand h at present, the administrators propose to petition for the compulsory winding-up of the company. The only reason that they wish to be able to make the proposed payments is because, from the viewpoint of the preferential creditors, it will be the most beneficial way of distributing the remaining assets they have realised. In short, the administrators' case is that they can achieve the distribution of these assets more cheaply than it would cost to distribute them via a voluntary j winding-up, a compulsory winding-up or a voluntary arrangement, and therefore they should be empowered to distribute them. I sympathise with their wish to make such a distribution, but the equally short answer to their case is that, in my view, there is nothing in the 1986 Act empowering them to make it.

[26] As regards the suggestion that the court has an inherent jurisdiction to direct the making of the distribution, Ms Hilliard did not develop any argument

in reliance on the inherent jurisdiction and did no more than refer me to the decisions to which I have referred, which themselves deal only briefly with the point. I do not question that the court has an inherent jurisdiction over administrators as officers of the court. However, having concluded that the 1986 Act confers no power on the administrators to make the proposed distribution, I have serious doubts as to whether the court's inherent jurisdiction can empower it to direct them to make it. If, however, the inherent jurisdiction does extend to directing administrators to do that which they have no power to do, I would require considerable persuasion that it would be proper so to exercise it in the present case. a

[27] I dismiss the administrators' application. b

Application dismissed.

Neneh Mune Barrister.

R v S

[2004] EWCA Crim 1320

COURT OF APPEAL, CRIMINAL DIVISION

THOMAS LJ, HOLLAND J AND JUDGE MICHAEL BAKER QC

17 MARCH, 25 MAY 2004

Criminal evidence – Complaints in sexual cases – Recent complaint – Degree of consistency required for evidence of recent complaint to be admissible – Direction to be given by judge where there was obvious inconsistency between complainant’s evidence and that of witness to whom recent complaint had been made.

The complainant alleged that she had been sexually abused by the defendant between the ages of 9 or 10 and 19, including penetrative assaults from the age of 10 or 11. The defendant was tried on an indictment containing specimen counts of indecent assault, buggery, rape and gross indecency. In the course of the trial, the prosecution applied to the judge to adduce evidence of a complaint made to a school friend by the complainant when she about 13 or 14 years old. Despite an objection by the defendant, the judge permitted the evidence to be given. The complainant then gave evidence that the complaint had related not merely to indecent assaults, but also to the much more serious penetrative assaults. In contrast, the friend gave evidence that the complaint related only to indecent assaults. In his summing up, the judge did not draw the jury’s attention to the inconsistency. The defendant was convicted both of the indecent assaults and the penetrative assaults. He appealed, contending, inter alia, that evidence of a previous complaint had to be consistent in so far as it related to the ingredients of the offence charged because such evidence was only admissible to establish the consistency of the evidence of the victim of the sexual assault; that the friend’s evidence in relation to the complaint was not consistent with the ingredients of the offences which then were allegedly being committed, ie the penetrative assaults; and that accordingly it should not have been admitted, particularly as it was highly prejudicial. Alternatively, the defendant contended that, if the evidence had been admissible, the judge’s direction to the jury had been insufficient in that it had not drawn attention to the inconsistencies between the friend’s evidence about the complaint and the complainant’s evidence of what the defendant had been doing to her at the time.

Held – (1) Evidence of a recent complaint was admissible where it was sufficiently consistent that it could, depending on the view of the evidence taken by the jury, support or enhance the credibility of the complainant. The decision in each case as to whether it was sufficiently consistent for it to be admissible had to depend on the facts. It was not necessary that the complaint disclosed the ingredients of the offence. It would, however, usually be necessary that the complaint disclosed evidence of material and relevant unlawful sexual conduct on the part of the defendant which could support the complainant’s credibility. Thus it would not usually be necessary that the complaint described the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided that it was capable of supporting the credibility of the complainant’s evidence given at the trial. Differences might be accounted for by a variety of matters, but it was for the jury to assess those. Although evidence of

a
b
c
a recent complaint might be prejudicial, it could be highly probative of the veracity of the complainant in putting before the jury what complaint was being made immediately after the occurrence of the conduct that was the subject of complaint. It was for the jury, after an appropriate direction from the judge, to weigh up the evidence and determine whether the circumstances in which the complaint was made and its terms supported the veracity of the complainant. In the instant case, the friend's evidence had been capable of supporting the credibility of the complainant's evidence given in the witness box in relation to the more serious sexual conduct of penetrative assaults. Accordingly, the evidence of the contemporaneous complaint about the less serious indecent assaults was admissible even if they had not continued and the complainant's evidence at trial related solely, at the time of the contemporaneous complaint, to the penetrative assaults (see [28]–[32], [35], below); *R v Lillyman* [1896] 2 QBD 167 applied.

d
e
f
(2) Where there was an obvious inconsistency, it was very important for the judge to make clear to the jury the extent and significance of the inconsistency. He should also draw to the jury's attention any reason given for the inconsistency, and tell them to take all those matters into account in deciding whether the complainant was telling the truth. In the instant case, the judge should have summarised the friend's evidence and contrasted it with that of the complainant. Given the real significance of the friend's evidence, the judge should clearly have drawn to the jury's attention the specific differences between the complainant's evidence and the friend's evidence, and made clear to the jury the limited consistency between the complainant's evidence as to what had happened and the friend's evidence as to the complaint made to her. The judge's direction was plainly so inadequate that it amounted to a material misdirection to the jury. It was impossible to conclude that the conviction was safe, and accordingly the appeal would be allowed (see [34], [36], [38], below).

Notes

For complaints in sexual cases, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1177.

Cases referred to in judgment

- g
h
j
Kilby v R [1973] 129 CLR 460, Aust HC.
R v Askew [1981] Crim LR 398, CA.
R v Braye-Jones [1966] Qd R 295, Aust CCA.
R v Camelleri [1922] 2 KB 122, CCA.
R v Islam (Abdul Khair) [1999] 1 Cr App R 22, CA.
R v Lillyman [1896] 2 QBD 167, [1895–9] All ER Rep 586, CCR.
R v Nazif [1987] 2 NZLR 122, NZ CA.
R v Osborne [1905] 1 KB 551, [1904–7] All ER Rep 54, CCR.
R v Wallwork (William Evans) (1958) 42 Cr App Rep 153, CA.
R v Wright (Albert Edward), R v Ormerod (Sidney George) (1990) 90 Cr App R 91, CA.
Sparks v R [1964] 1 All ER 727, [1964] AC 964, [1964] 2 WLR 566, PC.
White v R [1999] 1 AC 210, [1998] 3 WLR 992, PC.

Appeal against conviction

The appellant, S, appealed against his conviction in the Crown Court at Maidstone on 6 June 2002, following a trial before Judge Simpson and a jury, of twelve counts

a of indecent assault, one count of buggery, three counts of rape and one count of gross indecency. The facts are set out in the judgment of the court.

Mark Evans QC (assigned by the *Registrar of Criminal Appeals*) for the appellant.
John Hillen (instructed by the *Crown Prosecution Service*) for the Crown.

Cur adv vult

b

25 May 2004. The following judgment of the court was delivered.

THOMAS LJ.

c [1] On 6 June 2002 the appellant was convicted at the Crown Court at Maidstone before Judge Simpson and a jury of twelve counts of indecent assault, one count of buggery, three counts of rape and one count of gross indecency; these were specimen counts. He was sentenced to 12 years' imprisonment. He appeals against conviction by leave of the single judge.

d [2] The sole ground on which the safety of the conviction is challenged relates to the admission of evidence of recent complaint; it was contended that the evidence of the complaint was not consistent with the evidence of the complainant and should not therefore have been admitted. It is possible to summarise the evidence quite briefly.

THE EVIDENCE

e [3] The appellant was the stepfather of S, the complainant, who was born in June 1979. It was the prosecution case that the appellant began abusing her when she was nine or ten and this continued until she left home at the age of 19 in 1999. It was S's evidence that she had been abused on an almost daily basis in the early hours of the morning. The abuse began with the appellant touching her indecently by putting his hand up her nightdress and lying on top of her and f touching her. That form of abuse, S said, continued until she left home at the age of 19. From the age of ten or 11, she was also subjected, on her evidence, on a regular basis to much more serious sexual abuse, including digital penetration of her vagina, and vaginal and anal sexual intercourse. The differing counts in the indictment reflected the differing sexual activity of which complaint was made. The defence was a denial of the accusations.

g [4] In the course of S's evidence-in-chief, the Crown applied to the judge to adduce the evidence of her complaint to a school friend C, to whom S said she had complained when she was 13 or 14. Objection was taken by the appellant to the admissibility of that evidence on the ground that the evidence set out in the statements of S and of C was not consistent with the evidence of the sexual h conduct which S alleged the appellant had committed against her. The judge did not deal with the issue of consistency in his ruling; the reasoning in the ruling dealt with an objection (which it was agreed before us had not been made on behalf of the appellant) that the complaint was not recent in the sense of being contemporaneous; if any such objection had been made, it clearly would have j been bound to fail, as the complaint was said to have been made on the day or days following the abuse alleged. On the basis set out in his ruling, the judge permitted the evidence to be given.

[5] The evidence then given by S (which was largely in accordance with her statement) can be summarised. She said she had spoken to C at the age of about 13 or 14; she had little recollection, but thought she had only had one conversation. She had told C that the appellant had come in and had done things

to her; she had told C what was happening. When asked to say what she had said to C, she answered that she had talked of the matters that had been spoken of during the trial. That was a clear reference not merely to the indecent assaults, but to the much more serious penetrative assaults. a

[6] The evidence of C was that at some time around the age of 12 or 14 she recalled that on five or six different occasions S had spoken to her. S had told her that 'it happened last night'; when asked to explain what 'it' was, C's evidence was that S had said that the appellant had touched her, had lain on top of her and put his hand up her nightdress. b

[7] When the learned judge came to sum the case up to the jury, he directed them on the issue of recent complaint in the following terms:

'She did then tell her best friend at school, the witness [C], something (but not in much detail) about what she alleged the defendant was doing to her. She remembers one conversation, but cannot recall others. [C] has told you that there were several occasions when [S] told her that the defendant had done something to her the previous night. It is important to realise and remember that [C] did not witness any such conduct by the defendant. She therefore is not a witness as to what happened to [S], but only as to what [S] reported to her. The effect of that is, therefore, limited to what lawyers call "consistency" of the complaints made by [S] and goes no further, apart from serving to establish, if you accept that evidence, that [S] did complain in some measure of the defendant's alleged conduct when she was about 14. In other words, [S] did not wait until the time when the matter was reported to the police last year before speaking out. The prosecution say that it would also serve to rebut the defence suggestion put to [S] in cross-examination that she made up this whole series of allegations some time after she left home at the age of 19 in order to gain some advantage in obtaining council accommodation. That suggestion, say the prosecution, is wholly inconsistent with [S] having complained in whatever limited form to [C] when she was about 14. The reason why [C]'s evidence cannot provide support for any particular type of misconduct alleged by [S] against the defendant is of course because what [C] has told you comes itself from [S]. In other words, it is not independent support regarding any of these allegations because [C] was not there to see what if anything was happening.' c d e f g

[8] The judge later in the summing up summarised the evidence of S, but did not refer again to the evidence of C.

THE SUBMISSIONS

[9] In the course of the oral argument before us and in subsequent written submissions on the case law to which we will refer, the issues were refined to two: (i) what degree of consistency was required for evidence of recent complaint to be admissible? (ii) was the direction given by the judge sufficient in the circumstances? h

[10] It is important to point out that although the summing up refers to the evidence being used to rebut a suggestion of recent fabrication, no separate argument was addressed to us on that issue. This was because the evidence was admitted before the issue of fabrication was raised; it was the case for the appellant that if the evidence had not been admitted during examination-in-chief of the complainant, the allegation of fabrication made in cross-examination might not have been put. j

a [11] The submissions made to us can be shortly stated. (i) On behalf of the appellant: (a) evidence of recent complaint was only admissible to establish the consistency of the evidence of the victim of the sexual assault; the evidence therefore had to be consistent in so far as it related to the ingredients of the offence charged. (b) The principles had initially been developed at a time when attitudes towards women were very different and the older cases should be approached with considerable caution. (c) The cases in which the law had been developed all dealt with complaints in the context of events that had recently taken place; in cases such as the present, a different approach and special caution were needed. (d) The evidence given by C was of S complaining of touching; there was no complaint about the more serious penetrative offences. That evidence was not therefore consistent with the evidence that S had given of what the defendant was doing to her at that time; by the time S spoke to C, it had been S's evidence that the appellant had for some time been regularly abusing her by digital penetration and rape. (e) The evidence of C in relation to the complaint was not evidence consistent with the ingredients of the offences which by then were allegedly being committed. Evidence of touching added nothing and was inconsistent with the conduct alleged. It should not therefore have been admitted, particularly as it was highly prejudicial. (f) In the alternative, if the evidence was admissible, the judge's direction to the jury was, in any event, insufficient in that it did not draw attention to the inconsistencies between the evidence of C about the complaint—touching under her nightdress—and S's evidence about what the defendant was doing to her at the time—digital penetration and rape. (ii) For the prosecution, it was contended: (a) there was a sufficient degree of consistency if the evidence of the complaint was consistent with the circumstances in which an offence of a sexual nature had been committed. The test to be applied was whether the complaint referred to the same series of events as that given in the evidence given at trial by the complainant. (b) S's evidence was that the assaults which comprised touching her under her nightdress had continued throughout the period; the evidence of C was therefore consistent with those offences. (c) As to the more serious offences, it was not uncommon in such cases for a complainant only to be able to bring herself to refer to some of the conduct when making a contemporaneous complaint and not to its full extent; what was therefore important was that there had been a complaint of sexual abuse and that was consistent with the circumstances in which an offence of a sexual nature had been committed. (d) It was in accordance with the basic principle that such evidence should be admissible and the judge would then direct the jury how it was to be treated.

h THE RELEVANT AUTHORITIES

[12] The issue raised is one that turns on the general principles applicable to the admissibility of such evidence. It is therefore necessary first to examine the principles relevant to consistency laid down when the modern law was established.

j [13] Although the law relating to the admissibility of the evidence of recent complaint has a long history (clearly and helpfully summarised in *Cross and Tapper on Evidence* (9th edn, 1999) p 273), the foundation of the modern law relevant to the issue before us was established in *R v Lillyman* [1896] 2 QBD 167, [1895–9] All ER Rep 586. In that case, evidence of a contemporaneous complaint by the complainant to her employer was admitted against two objections—that such evidence ought not to be admitted and the evidence should be confined merely

to the fact of the complaint. The evidence given of the complaint corresponded with the account given to the jury by the complainant. In giving the judgment of the Court of Crown Cases Reserved presided over by Lord Russell of Killowen CJ, Hawkins J dealt first with the objection in principle to the admission of such evidence: a

‘It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestae*, can be admitted. It is clearly not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains. In every one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge ... It is too late, therefore now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.’ (See [1896] 2 QBD 167 at 170, 171, [1895–9] All ER Rep 586 at 588, 589.) b
c
d

[14] He then proceeded to consider whether it was only the fact of the complaint that should be admitted: e

‘We proceed to consider the second objection, which is, that the evidence of complaint should be limited to the fact that *a complaint* was made without giving any particulars of it. No authority binding upon us was cited during the argument, either in support of or against this objection. We must therefore determine the matter upon principle.’ (See [1896] 2 QBD 167 at 171, [1895–9] All ER Rep 586 at 589.) f

[15] After setting out the authorities, he concluded:

‘After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our so doing. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman’s conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness’s interpretation of her words as binding upon them g
h
j

a without having the whole statement before them, and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? ... In reality, affirmative answers to such stereotyped questions as these, "Did the prosecutrix make a complaint" (a very leading question, by the way) "of something done to herself?" "Did she mention a name?" amount to nothing to which any weight
b ought to be attached; they tend rather to embarrass than assist a thoughtful jury, for they are consistent either with there having been a complaint or no complaint of the prisoner's conduct. To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand and in the cognizance of the witness in the box. In our opinion, nothing ought
c unnecessarily to be left to speculation ...' (See [1896] 2 QBD 167 at 177, 178, [1895-9] All ER Rep 586 at 592.)

[16] The court went on to make it clear that a direction was to be given as to the purpose for which the evidence was admissible; in *R v Lillyman*, the decision was confined to the admissibility of such evidence where consent was in issue,
d but in *R v Osborne* [1905] 1 KB 551, [1904-7] All ER Rep 54 and *R v Camelleri* [1922] 2 KB 122, the court made it clear that the admissibility of such evidence was not confined to cases where consent was the issue. It may be helpful to refer to three short passages in the judgment of the Court of Crown Cases reserved in *R v Osborne* [1905] 1 KB 551 at 557, 558-559, [1904-7] All ER Rep 54 at 57, 58, 59 given
e by Ridley J:

'We think, however, if it were a question of the meaning of words, that the better construction of the judgment is that while the Court dealt with the charge in question as involving in fact, though not in law, the question of consent on the part of the prosecutrix, yet the reasons given for admitting the
f complaint were two—first, that it was consistent with her story in the witness-box; and, secondly, that it was inconsistent with consent ... it appears to us that, in accordance with principle, such complaints are admissible, not merely as negating consent, but because they are consistent with the story of the prosecutrix. In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence.
g Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is
h important for the jury ... It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such
j bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent.'

[17] It is, in our view, clear from these two authorities that the principle on which the evidence is admitted is to support and enhance the credibility of the

complainant; the jury can, in making their assessment of the truth of the evidence given by the complainant in the witness box, take into account evidence as to consistency between that evidence and evidence of her contemporaneous conduct and her contemporaneous complaint; it can be a powerful aid to the credit of the complainant. (See also the judgment of Sir Garfield Barwick CJ in *Kilby v R* (1973) 129 CLR 460 at 466–472 (paras 14–31) and the opinion of the Privy Council given by Lord Morris of Borth-y-Gest in *Sparks v R* [1964] 1 All ER 727 at 733–734, [1964] AC 964 at 979.) This underlying principle remains as relevant now as it was at the time *R v Lillyman* and *R v Osborne* were decided.

[18] It follows therefore that, if the evidence of the complaint is wholly inconsistent with the evidence given in the witness box by the complainant, the prosecution cannot adduce it under this principle; it would be immaterial and irrelevant to the purpose for which such evidence is admitted, as it would not support or enhance the credit of the complainant. That is evident from the decision of this court in *R v Wright (Albert Edward)* (1990) 90 Cr App R 91. The defendants in that case were charged with indecent assault on a child of five. The child gave evidence at the trial; she said during that evidence that the defendants had hurt her in the back and said naughty things to her. The judge also admitted evidence from the child's mother of the complaint the child had made to the mother. The essence of that evidence was to the effect that the defendants had lifted up her dress and pulled her knickers down and touched her nipples. In giving the judgment of the court, Ognall J said (at 96–97):

‘The first and primarily important point to note arising from the terms of that complaint is that none of that allegation formed any part of the child's evidence before the jury. We draw attention to this as the starting-point, because it cannot be doubted as a matter of long-established law that the whole and exclusive rationale for the introduction of a recent complaint in cases of alleged sexual crimes lies in its utility to the jury in determining whether or not the complainant has been consistent in the accounts she has given. For this purpose we refer to and agree with the passage set out in [*Archbold's Criminal Pleading, Evidence and Practice* (42nd edn, 1985)] at para. 4–308, p. 403, which reads: “The mere complaint is no evidence of the facts complained of, and its admissibility depends on proof of the facts by sworn or other legalised testimony.” (My emphasis.) It must, in our view, follow that if the terms of the complaint are not ostensibly consistent with the terms of the testimony, the introduction of the complaint has no legitimate purpose within the context of the trial. It is for this reason that the courts have treated the matter in the past as is summarised in para. 4–310 of *Archbold* (42nd ed.), which summary in that paragraph we respectfully agree with and adopt. It may be that if the learned judge had confined the admitted evidence to the fact of a complaint, without allowing in its detail, other considerations would have applied. But, of course, the consequences of so doing might have been to compel the defendants to adduce evidence of its terms in an effort to demonstrate inconsistency. The prejudice attendant thereon would no doubt be the subject of complaint to this Court, and we express no concluded view on it if only for the reason that it did not occur in this case. The fact is that not merely a complaint but the terms of the complaint were admitted in evidence.’

[19] The court does not appear to have been referred to *R v Lillyman*; we therefore treat the breadth of the observations of Ognall J with a degree of

a caution. This is particularly important in respect of his observations about the admissibility of the fact of a complaint, as the issue as to the admissibility of the fact of a complaint is an important part of the rationale for the principle as established by *R v Lillyman* and *R v Osborne*.

b [20] The question of the admissibility of the fact of the complaint had earlier been considered in *R v Wallwork* (*William Evans*) (1958) 42 Cr App Rep 153 in a judgment of this court given by Lord Goddard CJ. He suggested that there might be in the circumstances of that case have been no objection to the fact of the making of the complaint, as opposed to its terms, being admissible. In that case, the defendant was charged with the incest of his five-year-old daughter; she was called into the witness box, but was unable to give evidence. Her grandmother was called and gave evidence of the complaint made to her by the girl. The court held that the terms of the complaint ought not to have been admitted. Lord Goddard CJ however observed (at 162):

d 'There would have been no objection to the grandmother saying: "The little girl made a complaint to me" and she could have been asked: "In consequence of that complaint what did you do?"—and the answer would have been "I took her to the doctor and later to the police." One realises that, although the terms of the child's statement must not be given, any jury could see at once that as a consequence of the complaint the grandmother took the child to the doctor and the police and that the terms of the complaint would mention her father. So there is really a certain artificiality about this rule that, although the statement which a girl or woman makes in these circumstances is not evidence of the facts complained of, at any rate it shows the jury at the time whether the name of the prisoner is mentioned or is not mentioned, for what happens is that the police go to a particular man and that is because the girl or woman has mentioned the name. Nevertheless, the evidence ought not to have been given and the learned judge ought to have told the jury to disregard it.'

[21] In a trenchant note in 'Complaints of Sexual Offences' (1958) 74 LQR 352, Professor Sir Rupert Cross commented (p 354):

g 'Nevertheless, it is to be hoped that the passage from the judgment which has just been quoted will be relegated to the realm of doubtful dicta, for no reference was made to the observations of Hawkins J. in *R v. Lillyman* which seems to have been sound in principle and according to which the procedure contemplated by Lord Goddard C.J. would have been inadmissible.'

h [22] In *White v R* [1999] 1 AC 210, [1998] 3 WLR 992 (on an appeal from Jamaica), Lord Hoffmann, giving the judgment of the Board, after referring to *R v Lillyman*, observed:

j 'The apparent approval of this kind of device by Lord Goddard C.J. in [*R v Wallwork* (*William Evans*) (1958) 42 Cr App Rep 153 at 162] was convincingly criticised by Sir Rupert Cross: "Complaints of Sexual Offences" (1958) 74 L.Q.R. 352–355. While therefore their Lordships do not go so far as to say that the evidence of the fact that statements were made was inadmissible, they consider that the admission of that evidence made it necessary for the judge to give the jury a careful direction about the limited value which could be attached to it.' (See [1999] 1 AC 210 at 218, [1998] 3 WLR 992 at 998.)

[23] In the light of the powerful reasoning in *R v Lillyman* and the observations of Lord Hoffmann in *White v R*, it seems to us that the better view may be that evidence of the mere fact of complaint may only ever be admissible in very unusual circumstances and only then if a very careful direction is given. Although it is not necessary for us to decide the point, it is of importance to note that, although the fact of complaint would be relevant to support the credit of the complainant, the reasoning against admissibility has a powerful and rational basis. That is because admitting only evidence of the fact of the complaint would be to deny to a jury direct evidence as to the circumstances and nature of the contemporaneous complaint and to invite speculation by them on that very matter. As the purpose of the introduction of such evidence is to support the credit of the complainant, they would be denied the means of making a proper assessment of that supporting contemporaneous evidence and hence of the overall credit of the complainant and be subject to the real risk of speculation in a way which might well be very unfair to the defendant.

[24] In this jurisdiction, that is the limit of the relevant authority; there is no authority (to which our attention was drawn) on the question of the admissibility of evidence which is capable only of being consistent with part of the evidence given by the complainant or consistent only to a limited degree; we did not find the decision in *R v Askew* [1981] Crim LR 398 of any assistance on this point.

[25] However, the Queensland Court of Criminal Appeal considered in *R v Braye-Jones* [1966] Qd R 295 the admissibility of evidence of recent complaint where the evidence of the complainant and the evidence of the contemporaneous complaint differed. It was argued that evidence of the contemporaneous complaint should not have been given as it was inconsistent with the evidence of the complainant. This was rejected by Lucas J (at 297) (with whom the other judges agreed) in the following terms:

‘Clearly enough, evidence of statements made by the prosecutrix which did not bear any resemblance at all to her sworn evidence would not be admissible, for such evidence would be irrelevant. In my opinion, however, the matter is one of degree, and if the substance of the complaint can be identified as relating to the story told by the prosecutrix in evidence and if it is such that a jury can reasonably regard it as constituting a complaint of a matter of a sexual nature, then I think that inconsistency as to detail is a matter for the jury to consider in their assessment of the credibility of the prosecutrix.’

After referring to the passage in *R v Lillyman* to which we have referred at [15], above, Lucas J continued (at 298–300):

‘The minds of their Lordships were not, of course, directed to the question now under discussion, but it seems to me that the passage is useful in this context, for in it their Lordships seem to assume that it is the jury who will have the task of considering any inconsistency between the terms of the complaint and the evidence of the prosecutrix. Indeed, in summing up in this case, the learned judge read the whole of this passage to the jury, and this was made the subject of a somewhat faint complaint by counsel for the appellant. But it seems to me that the passage would have been helpful to the jury as emphasising that it was for them to consider the inconsistencies of the complaint and the girl’s evidence to which inconsistencies the learned judge directed their attention. In any event, from a practical point of view,

a it would, as seems to me, be unreal to expect unanimity of expression in
the recounting of incidents by two women who were evidently agitated
when the events of which they were speaking took place ... If the girl's
complaint was so different from her evidence that the two could not be
b identified as relating to the same occasion, evidence of it would be
inadmissible because irrelevant, but that does not seem to be the situation
here. Clearly enough, what she said here by way of complaint could be
related only to the experience which she had just undergone and of which
she gave evidence and in these circumstances it seems to me that the
inconsistencies were a matter for the jury to consider ... The object of
c admitting evidence of fresh complaint is not to demonstrate that what the
prosecutrix says she said by way of complaint is consistent with the evidence
of the terms of the complaint given by the person to whom it was made; it is
to test the consistency of the story told by the prosecutrix in the witness box;
all that is required, therefore, is for the prosecutrix to go into the witness box
and tell her story. If she does, evidence of a complaint made by her can be
d given although she cannot herself remember what she said; provided, of
course, as I have already said, that the terms of her complaint are not so
completely inconsistent with the story she tells in the witness box as to be
incapable of reference to the same series of events'

[26] We find the approach and reasoning of the Queensland court very
helpful. There is also a decision of the New Zealand Court of Appeal to similar
e effect—*R v Nazif* [1987] 2 NZLR 122. The complainant gave evidence of an
indecent assault, whereas the evidence given of the complaint was of an assault;
Somers J (at 126) dealt with the issue (which was one among several) very
shortly:

f 'The third question arises from the fact that the witness of the complaint,
Miss Reidy, gave no evidence that the prosecutrix had told her that she had
been indecently assaulted, merely that she had been assaulted. It was
submitted that evidence of a complaint was not admissible unless the
complaint made referred in some way to its indecent character. The
submission has little logic to support it. The purpose of the admission of
g evidence of complaint being to show consistency of the conduct of the
prosecutrix with the evidence she has given as to what occurred; a simple
complaint of assault made by her made proximately to the event must surely
be capable of evidencing consistency. Whether it does so in fact will be a
matter for the jury.'

h OUR CONCLUSION

[27] The case law to which we have referred was developed in relation to
cases where the issue at the trial related to event or events which had occurred
within a relatively short time before the trial. The issue before us has arisen in a
case where there were allegations of sexual abuse extending over many years; the
j principal evidence was that of the complainant and the appellant. A powerful
argument could be made that the development of the law may need
reconsideration in the light of the importance of the overall history of complaints
by a complainant (whether recent or not, or whether consistent or not) to the
determination of the truth of the allegations. However although that may be an
argument that has to be considered by others (possibly in relation to the scope of
the common law rules in relation to the provisions of s 120 of the Criminal Justice

Act 2003), it is not necessary for us to consider it in this case, because in our judgment, the evidence in this case was admissible, applying the established principles, for the two distinct reasons set out in [28]–[32] and [33], below. a

[28] First, and this is the basis on which we reach our decision, even if the less serious indecent assaults had not continued and the complainant's evidence at trial related solely, at the time of the contemporaneous complaint, to digital penetration and rape by the appellant, the evidence of the contemporaneous complaint about the less serious indecent assaults would have been admissible. b
The question of admissibility, in our view, depends, applying the established principles, on whether such evidence is sufficiently consistent that it could, depending on the view taken by the jury of the evidence, support or enhance the credibility of the complainant. In our judgment, on the facts of this case the evidence of C was capable of supporting the credibility of S's evidence given in the witness box in relation to the more serious sexual conduct of digital penetration and rape; in our view it was irrelevant that these were events that had occurred years before; the complaint was contemporaneous to the evidence of the complainant as to the time of the conduct alleged against the appellant. c

[29] If the evidence is admissible (as it was in this case), then it is for the jury, properly directed, to consider the whole of the circumstances relating to the contemporaneous complaint in determining whether the evidence of the complaint, on their view of the witness giving that evidence, supports the complainant's evidence and what weight they consider should be attached to it in their assessment of the credit of the complainant. d

[30] The decision in each case as to whether it is sufficiently consistent for it to be admissible must depend on the facts. It is not in our judgment necessary that the complaint discloses the ingredients of the offence; it will, however, usually be necessary that the complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the defendant which could support the credibility of the complainant. It will not, therefore, usually be necessary that the complaint describes the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided it is capable of supporting the credibility of the complainant's evidence given at the trial. e

[31] Differences may be accounted for by a variety of matters, but it is for the jury to assess these. For example, in cases of alleged abuse (such as this) by a stepfather or other family member, it would be for the jury to consider whether the difference arises because, as is known to happen on some occasions, the complainant cannot bring herself to disclose the full extent of the conduct alleged against the defendant at the time of the contemporaneous complaint. f

[32] For the reasons we have given at [19], above, there are obvious dangers in merely informing the jury of the fact of a complaint, supportive though that is of the credibility of the complainant; we have there expressed our doubts as to whether evidence of the fact of complaint can ever be admissible save in unusual circumstances, as not only will such limited evidence make it impossible to assess whether it supports the complainant's evidence, but it may well result in unfairness of the defendant. It is, however, a matter of common experience that the terms of the evidence of a complainant given at trial and the evidence of the complaint may differ, but it would be contrary to good sense to exclude the latter if it is capable of supporting the credibility of the complainant. Provided that the evidence as to the terms of the complaint is sufficiently consistent that it can, depending on the view the jury takes, support the credibility of the complainant, it is, in our view, both fair to the defendant and in accordance with the g
h
j

a long-established principles to permit such evidence to be given and to leave it to the jury to assess its weight. We accept that such evidence may be prejudicial, but, as we have said, it can be highly probative of the veracity of the complainant in putting before the jury what complaint was being made immediately after the occurrence of the conduct complained of. It is for the jury, after an appropriate direction from the judge, to weigh up the evidence and to determine whether the
b circumstances in which the complaint was made and its terms support the veracity of the complainant. Reason and good sense and principle are against us excluding what may be very important evidence from the jury, just as reason, good sense and principle laid the foundation in 1896 of the modern law relating to the admissibility of the terms of the complaint.

c [33] On the facts of this particular case, there was a second basis on which the evidence of complaint could have been admitted, though we do not base our decision on these grounds; the evidence of C was consistent with the complainant's evidence that the defendant had continued to commit the less serious indecent assaults upon her even after the more serious penetrative conduct had commenced.

d [34] It is, as we have observed in [32], above, important for the judge to direct the jury fully on the use the jury may make of the complaint; *R v Islam (Abdul Khair)* [1999] 1 Cr App R 22. The Judicial Studies Board have provided a specimen direction. In cases where there is an obvious inconsistency, it will be very important for the judge to make clear to the jury the extent and significance of the inconsistency, as the trial judge did in *R v Braye-Jones*. He should also draw to
e the jury's attention any reason given for the inconsistency and tell them that it is for them to take all these matters into account in deciding whether the complainant was telling the truth.

[35] For those reasons we therefore consider that the evidence was admissible and turn to consider the alternative argument made by the appellant that the
f direction given by the judge was inadequate in the light of the judge's duty to direct the jury in the terms we have outlined.

THE DIRECTION GIVEN BY THE JUDGE

[36] In considering the directions given by the judge, it must be borne in mind that he was not given the benefit of the detailed submissions made to us. This
g may explain why the judge's single observation in relation to the inconsistency was that the evidence of C served to establish that S did complain 'in some measure'. Moreover, the judge should, in any event, have summarised the evidence of C and contrasted it with that of S. He did not do so and pointed to none of the inconsistencies. In the circumstances of this case where the evidence
h of C was of real significance, the judge clearly should have drawn to the jury the specific differences between the evidence of S and that of C and made clear to them the limited consistency between the evidence of S as to what had happened and C's evidence as to the complaint made to her. The direction given by the judge was plainly so inadequate that it amounted to a material misdirection to the
j jury.

[37] In the light of our conclusions on the direction given by the judge, we have to consider the overall safety of the conviction. It was submitted on behalf of the appellant that in the light of an overall assessment of the evidence, the evidence of contemporaneous complaint by C must have played an important part in the jury's assessment of the respective credibility of S and the defendant. In our view, on the evidence, in this case, that must be so. It must be

remembered, for example, that it was S's evidence that the conduct complained of took place very frequently for much of the period in a room which she shared with her brother; she was said to be unwilling to sleep with the lights out and her evidence was that she cried every time she was assaulted.

[38] Taking into account the very limited direction given by the judge and the importance of drawing to the jury's attention the inconsistencies, on the facts of this case, between the account given by S and the evidence by C of the complaint made by her, we cannot conclude that the conviction was safe. We therefore allow the appellant's appeal against conviction. We will consider the Crown's application for a re-trial when the judgment is handed down.

Appeal allowed.

Stephen Leake Barrister.

Oxley v Hiscock

[2004] EWCA Civ 546

COURT OF APPEAL, CIVIL DIVISION

CHADWICK, MANCE AND SCOTT BAKER LJJ

13 FEBRUARY, 6 MAY 2004

Trust and trustee – Constructive trust – Unmarried couple – House acquired by joint efforts for joint benefit – Principles applicable in determining beneficial interests in property – House acquired in sole name of one – Both contributing unequally to purchase price – Common intention that each should have a share in the property – Couple sharing outgoings referable to ownership approximately equally – Sale of property – Share of proceeds of sale to which each entitled.

The claimant and defendant, who were unmarried, purchased a house in the sole name of the defendant at a price of £127,000. The claimant's direct contribution to the purchase price was some £36,300, and the defendant's was some £60,700. On the sale of the house ten years later the proceeds of sale were divided between the claimant and the defendant, with the claimant receiving less than 20%. The claimant brought proceedings for a declaration that the sale proceeds were held by the defendant on trust for himself and the claimant in equal shares or in such shares as the court should determine. The judge found that both had intended, and had expressed the intention to each other, that each should have a beneficial share in the property and that at the time the property had been purchased each had believed it was their joint home and that in keeping with that belief each had contributed toward the total outgoings, with a 'classic pooling of resources'. The judge concluded that their intention had been to share the property jointly and equally and made a declaration that the claimant was entitled to a half share of the proceeds of sale. The defendant appealed, contending that the property had been held in beneficial shares proportionate to the contribution of each party to the acquisition cost, being approximately, 22% for the claimant and 78% for the defendant. The Court of Appeal considered the question of how the proceeds of property in which an unmarried couple had been living as man and wife should be shared between them when the relationship came to an end.

Held – In cases in which the common features were (i) that a property was bought as a home for a couple who, although not married, intended to live together as man and wife; (ii) that each of them made some financial contribution to the purchase; (iii) that the property was purchased in the sole name of one of them; (iv) that there was no express declaration of trust but there was evidence, as in the instant case, from which to infer a common intention, communicated by each to the other, that each should have a beneficial share in the property, and there was no evidence, as in the instant case, of any discussion between them as to the amount of the share which each was to have, the answer to the question of what was the extent of the parties' respective beneficial interests was that each was entitled to that share which the court considered fair having regard to the whole course of dealing between them in relation to that property. That included the arrangements which they made from time to time in order to meet the outgoings, for example, mortgage

contributions, council tax and utilities, repairs, insurance and housekeeping, which had to be met if they were to live in the property as their home. In the instant case, on the basis of the judge's findings that there had been a pooling of resources and conduct consistent with an intention to share the outgoings referable to ownership and cohabitation it was fair to treat them as having made approximately equal contributions to the balance of the purchase price. Taking that into account with their direct contributions to the purchase price, where the defendant's contribution had been substantially greater than the claimant's, a fair division of the proceeds of sale was 60% to the defendant and 40% to the claimant. Accordingly, the appeal would be allowed to that extent (see [68], [69], [73]–[77], below).

Springette v Defoe [1992] 2 FCR 561, *Gissing v Gissing* [1970] 2 All ER 780, *Stokes v Anderson* [1991] FCR 539, *Lloyds Bank plc v Rossett* [1990] 1 All ER 1111, *Midland Bank plc v Cooke* [1995] 4 All ER 562, *Grant v Edwards* [1986] 2 All ER 426, considered.

Notes

For beneficial interests in the matrimonial home or quasi-matrimonial home, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 617.

Cases referred to in judgments

Austin v Keele (1987) 72 ALR 579, PC.

Burns v Burns [1984] 1 All ER 244, [1984] Ch 317, [1984] 2 WLR 582, CA.

Crabb v Arun DC [1975] 3 All ER 865, [1976] Ch 179, [1975] 3 WLR 847, CA.

Drake v Whipp [1996] 2 FCR 296, CA.

Dyer v Dyer (1788) 2 Cox Eq Cas 92, 30 ER 42, [1775–1802] All ER Rep 205, Exch.

Evans v Hayward [1995] 2 FCR 313, CA.

Eves v Eves [1975] 3 All ER 768, [1975] 1 WLR 1338, CA.

Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255, HL.

Goodman v Carlton [2002] EWCA Civ 545, [2002] 2 FLR 259.

Grant v Edwards [1986] 2 All ER 426, [1986] Ch 638, [1986] 3 WLR 114, CA.

Huntingford v Hobbs [1993] 1 FCR 45, CA.

Lloyds Bank plc v Rossett [1990] 1 All ER 1111, [1991] 1 AC 107, [1990] 2 WLR 867, HL; *rvsg* [1988] 3 All ER 915, [1989] Ch 350, CA.

McFarlane v McFarlane [1972] NI 59, NI CA.

McHardy & Sons (a firm) v Warren [1994] 2 FCR 1247, CA.

Marsh v von Sternberg [1986] 1 FLR 526.

Midland Bank plc v Cooke [1995] 4 All ER 562, CA.

Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777, [1969] 2 WLR 966, HL.

Rimmer v Rimmer [1952] 2 All ER 863, [1953] 1 QB 63, CA.

Savill v Goodall [1994] 1 FCR 325, CA.

Springette v Defoe [1992] 2 FCR 561, CA.

Stokes v Anderson [1991] FCR 539, CA.

Turton v Turton [1987] 2 All ER 641, [1988] Ch 542, [1987] 3 WLR 622, CA.

Walker v Hall [1984] FLR 126, CA.

Yaxley v Gotts [2000] 1 All ER 711, [2000] Ch 162, [1999] 3 WLR 1217, CA.

Appeal

Allan Hiscock appealed with permission of Jonathan Parker LJ given on 5 December 2003 from the order of Judge Hallon in the Bromley County Court on 20 May 2003 in proceedings brought by Elayne Oxley under s 14 of the Trusts

- a of Land and Appointment of Trustees Act 1996 declaring that the proceeds of sale of a property known as 35 Dickens Close, Hartley, Kent were held on trust by Mr Hiscock for himself and Mrs Oxley in equal shares.

Nicholas Francis QC and Christopher Wagstaffe (instructed by the *Parry Sharratt Partnership*, Whitstable) for Mr Hiscock.

- b *David Walden-Smith* (instructed by *Clarkson Wright & Jakes*, Orpington) for Mrs Oxley.

Cur adv vult

6 May 2004. The following judgments were delivered.

- c **CHADWICK LJ.**

- [1] This is an appeal from an order made on 20 May 2003 by Judge Hallon, sitting in the Bromley County Court, in proceedings brought under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 in relation to the proceeds of sale of property known as 35 Dickens Close, Hartley, Kent. The appeal requires the court to revisit, once again, the familiar question how the proceeds of property in which an unmarried couple have been living as man and wife should be shared between them when the relationship comes to an end.

- e THE UNDERLYING FACTS

- [2] The property at 35 Dickens Close was purchased in April 1991 in the name of the appellant, Mr Allan Hiscock. At that date Mr Hiscock and the respondent, Mrs Elayne Oxley, had known each other for some five or six years. For much of that time his employment had required Mr Hiscock to reside in Kuwait; but, when he was in England on leave, they had lived together at 39 Page Close, Bean, near Dartford. That was a house which Mrs Oxley had formerly occupied as a secure tenant but which she had acquired in September 1987 by the exercise of her rights under Pt V of the Housing Act 1985.

- [3] In August 1990 Kuwait was invaded by Iraqi troops. In October 1990, Mr Hiscock was captured, taken to Baghdad and held as hostage. He was released in December 1990. The judge found that 35 Dickens Close was purchased as a home for Mr Hiscock, Mrs Oxley and her children by a former marriage, following Mr Hiscock's return to England at the end of 1990.

- [4] The purchase price for 35 Dickens Close was £127,000. The purchase was funded (i) by a building society advance of £30,000, (ii) by the net proceeds of sale of 39 Page Close (some £61,500) and (iii), as to the balance, £35,500 or thereabouts, by Mr Hiscock from his own savings.

- [5] Given that part of the moneys for the purchase of 35 Dickens Close were provided from the net proceeds of sale of 39 Page Close, it is necessary to have in mind the circumstances in which that property had been acquired by Mrs Oxley. For some years before she met Mr Hiscock she had been a secure tenant in local authority housing in Chatham. In May 1986, at the suggestion of Mr Hiscock, she exchanged her tenancy in Chatham for a tenancy of 39 Page Close, at Bean. In November 1986, again at the suggestion of Mr Hiscock, she exercised her right to buy under Pt V of the 1985 Act. The open market value of 39 Page Close was assessed at £45,200. Under the 'right to buy' legislation she was entitled to a discount of £20,000; so her acquisition price, when she completed in September 1987, was £25,200. The whole of that sum was

provided by Mr Hiscock, out of the proceeds of sale of the house in which he had been living, 49 Hurst Hill, Walderslade, Chatham. It is clear from the documents that he put that house on the market in November 1986, within seven days of Mrs Oxley exercising her right to buy. It is not, I think, in dispute that the two matters were linked; in that Mr Hiscock sold his own house in order to provide moneys which would enable Mrs Oxley to take advantage of the favourable terms on which 39 Page Close could be acquired by the exercise of her 'right to buy'.

[6] On 31 July 1987 solicitors, Messrs Bassets, acting in the purchase of 39 Page Close, wrote to Mrs Oxley and Mr Hiscock in these terms:

'... I note that the property [39 Page Close] is being purchased with the assistance of funds raised by Mr Hiscock and that the property will be purchased in the sole name of Mrs Oxley. It is therefore important to safeguard Mr Hiscock's interests in the property by either evidencing the monies paid by Mr Hiscock for the purchase of the property by means of a mortgage from Mr Hiscock to Mrs Oxley or by some contract between the two parties creating an indemnity or option to Mr Hiscock in respect of an interest in the property. I am of opinion that a simple mortgage by Mr Hiscock to Mrs Oxley would suffice. Mr Hiscock's capital is then protected and after the three year period, the property can be transferred into joint names and the mortgage declared redeemed.'

The reference, there, to 'the three year period' is, I think, to the period within which a tenant who had acquired property by the exercise of a 'right to buy' could be required, on a subsequent disposal, to repay part of the discount allowed on purchase: see s 155 of the 1985 Act as amended by s 2(3) of the Housing and Planning Act 1986.

[7] For whatever reason—perhaps because the relevant period had not expired—the property at 39 Page Close was never transferred into joint names. It remained in Mrs Oxley's name, but subject to a charge to secure the moneys provided by Mr Hiscock (£25,200) with interest at 5% p.a payable half-yearly. We have been shown a copy of that charge, which was registered at HM Land Registry. There is no evidence that any interest was, or was not, paid. The probability is that the parties never thought about it.

[8] When 39 Page Close was sold, in April 1991, the solicitors acting in the sale, Messrs Wright & Moxham, wrote to Mr Hiscock:

'You have a legal charge registered against 39 Page Close. Please let me know the amount which you will require from us on behalf of Mrs Oxley in order to release your charge from the property [sic].'

Mr Hiscock replied, on 18 April 1991: 'Regarding the legal charge on 39 Page Close, please note I require no monies from Mrs Oxley ...' The effect, ignoring any liability of Mrs Oxley to interest under the charge, was that out of the proceeds of sale of 39 Page Close, Bean—some £61,500, as I have said—Mr Hiscock contributed £25,200 to the purchase of 35 Dickens Close and Mrs Oxley contributed the balance, £36,300. So the balance of the moneys needed to purchase 35 Dickens Close after borrowing £30,000 from the building society (£127,000 – £30,000 = £97,000) were provided as to £36,300 by Mrs Oxley and as to £60,700 (being £25,200 + £35,500) by Mr Hiscock. The figures are not, of course, precise: they ignore interest (if any) due under the charge, the sale costs of 39 Page Close and the purchase costs of 35 Dickens Close. But they are

a indicative of the substantial contributions made by both Mr Hiscock and Mrs Oxley to the purchase.

[9] The solicitors acting in the sale of 39 Page Close were also acting in the purchase of 35 Dickens Close. They were concerned—and properly concerned—as to the basis upon which Mrs Oxley was contributing to the purchase moneys. In March 1991 they had inquired whether the purchase was to be in joint names. Mrs Oxley had replied, on 2 April 1991, that she would not be a joint purchaser of 35 Dickens Close. On 18 April 1991 the solicitor dealing with the sale and purchase wrote to her in these terms:

c 'Please let me know if you are making any funds available to Mr Hiscock on his purchase of 35 Dickens Close. If so you should let me know if you wish to secure those funds by way of a second mortgage on the property or if you require a Trust Deed to provide for the property to be held on trust, partly for yourself so as to reflect your investment.'

Mrs Oxley's reply, on 21 April 1991 was that: 'As we discussed previously, the funds from the sale of 39 Page Close will go towards purchasing 35 Dickens Close, with Mr Hiscock providing the remainder.' The solicitor tried again. On 22 April 1991, in a letter which bears the date 22 October 1991, he wrote:

e 'It is essential for me to have your written instructions as to how you wish me to deal with the proceeds of sale [of 39 Page Close]. I think you wish me to apply the whole of this sum towards the purchase of 35 Dickens Close by Mr Hiscock. If that is correct then I must have your very clear instructions in writing. You must also give very serious consideration as to whether you do wish to invest all of your net sale proceeds in the purchase of 35 Dickens Close which will be in the sole name of Mr Hiscock. If any dispute should then arise between yourself and Mr Hiscock in the future then you will have difficulty in establishing any claim in respect of 35 Dickens Close or any claim for a refund of the investment which you have made in that property. My advice must be that you should be a joint purchaser of 35 Dickens Close or that you should at least require Mr Hiscock to enter into a Trust deed to confirm that the property will be held by him on trust for both of you and such deed should also set out the respective shares to which you will each be entitled. Alternatively you could require a second mortgage to be entered in your favour against 35 Dickens Close.'

Mrs Oxley replied in a letter dated 23 April 1991:

h 'I ... confirm that I wish all the proceeds from the sale of 39 Page Close, Bean to be put towards the purchase of 35 Dickens Close by Mr A Hiscock. Your comments on any claim I might have to 35 Dickens Close have been noted, and I appreciate your concern. However, I am quite satisfied with the present arrangements, and feel I know Mr Hiscock well enough not to need written legal protection in this matter.'

j [10] The parties lived at 35 Dickens Close between April 1991 and the beginning of 2001. By the end of that period (if not before) the mortgage debt had been repaid. Mr Hiscock had taken early retirement in October 1999; and it seems clear that, for him at least, the relationship between them had run its course. It was decided to put 35 Dickens Close on the market; and to purchase two other properties. 35 Dickens Close was sold in March 2001 at a price of

£232,000. A property in Chatham, 34 Beacon Hill, was purchased by Mrs Oxley at a price of £73,000, of which £40,000 was funded by a mortgage advance. The balance of the purchase moneys were provided by Mr Hiscock in part satisfaction of Mrs Oxley's interest in 35 Dickens Close. Mr Hiscock purchased for himself a property in Whitstable, 39 Grassmere Road, at a price of £122,000. He has paid a further £5,000 to Mrs Oxley, and (it is said) has paid an amount of £3,200 in respect of renovations to 34 Beacon Hill; but he has retained the balance of the proceeds of sale of 35 Dickens Close. In these proceedings he has accepted that there is a small part of that balance—amounting to £1,000 or thereabouts—which remains due to her.

THESE PROCEEDINGS

[11] These proceedings were commenced by the issue of a claim form in November 2002. The relief sought, under s 14 of the 1996 Act, was a declaration that the proceeds of sale of 35 Dickens Road were held by Mr Hiscock upon trust for himself and Mrs Oxley, in equal shares; alternatively, in such shares as the court should determine. In the present context, the critical allegations in the particulars of claim are these:

'4. In February 1988 the Defendant asked the Claimant to marry him. The Defendant thereafter learnt that there would be fiscal disadvantages to marriage and persuaded the Claimant that they should remain unmarried. As a consequence the parties remained unmarried: their intention was to live together, subject to the Claimant's work commitments, and to pool their financial and other resources as would a married couple. *It was their joint intention that the beneficial interest in any property, real or otherwise, would be shared by them jointly* ...

8. [In April 1991] [t]he second property [35 Dickens Close] was conveyed into the sole name of the Defendant. The registration into the Defendant's sole name [was] at his insistence and was stated by him to be in order to defeat any claim that the Claimant's former husband might have against the second property. *It was expressly the joint intention of the Claimant and the Defendant at the time of the purchase of the second property that they should share the beneficial ownership of that property equally.*' (My emphases.)

[12] By his defence Mr Hiscock denied the joint or common intention alleged in paras 4 and 8 of the particulars of claim. Paragraph 8 of the defence is unequivocal:

'The defendant specifically denies that there were discussions between the parties relating to the possibility of claims by the claimant's first husband. It is specifically denied that it was ever agreed, arranged or understood between the claimant and defendant that they would share the property equally beneficially.'

[13] The action came before Judge Hallon in May 2003. She heard evidence from both Mr Hiscock and Mrs Oxley; and she made it clear that, where their evidence differed, she preferred the evidence of Mrs Oxley. In particular, the judge preferred her evidence as to the reason why 35 Dickens Road was registered in the sole name of Mr Hiscock. The judge said (para 23):

'I find that in relation to the purchase of the Hartley property and the conveyance of it into the defendant's sole name, despite the advice of the

a solicitors to the claimant, that that happened because of the discussion which had taken place between the defendant and the claimant in which the defendant raised the possibility of the claimant's former husband making a claim in the event of her death against her share of the Hartley property if it was in part in her name, and that therefore the conveyance into his name, with the claimant's agreement, was on the basis that she trusted the defendant that, despite what was shown on the face of the conveyance, that in no way actually altered the reality of the situation and their sharing of the property.'

[14] A transfer of the property into the sole name of Mr Hiscock: (i) would not, of itself, alter the beneficial interests in the property to which (in the absence of agreement, arrangement or common intention) the parties were entitled by reason of their respective contributions to the purchase price; (ii) would not affect Mrs Oxley's right to a beneficial joint share (or a beneficial equal share) in the proceeds of sale, if that is what the parties had agreed or intended that she should have; and (iii) would not defeat any claim by Mrs Oxley's former husband in the event of her death to whatever interest in the property she did have unless (which was not alleged) the purpose of transferring the property into the sole name of Mr Hiscock was to enable him (falsely) to deny the existence of that interest. The relevance of the judge's finding, as it seems to me, is not that, in the context of a possible claim by Mrs Oxley's former husband, the property was transferred into the sole name of Mr Hiscock so that it would not appear on the face of the register that Mrs Oxley was likely to have some beneficial interest in it; nor that the fact that the property was transferred into the sole name of Mr Hiscock 'in no way actually altered the reality of the situation'. Neither party had suggested that it did. The true relevance is that her finding that there was a discussion between the parties as to whose name should appear on the registered title in the context of a possible claim by Mrs Oxley's former husband is only explicable on the basis that they both intended—and expressed that intention to the other—that each should have a beneficial share in the property. It is that feature which, to my mind, provides the foundation for Mrs Oxley's claim in constructive trust or proprietary estoppel; and which distinguishes that claim from one founded on resulting trust alone.

[15] Nevertheless, it is significant that the judge did not go on to find that, as alleged in para 8 of the particulars of claim:

'It was *expressly* the joint intention of the Claimant and the Defendant at the time of the purchase of the second property that they should share the beneficial ownership of that property *equally*.' (My emphasis.)

The reason, perhaps, why the judge made no finding that there was some expression of agreement in April 1991 as to the shares in which 35 Dickens Close should be held was that there was no evidence to support such a finding. None has been shown to this court. The effect of the judge's findings, as it seems to me, is that Mr Hiscock and Mrs Oxley were in agreement, before the acquisition of 35 Dickens Close, that the property would be shared; but that there was no express agreement as to what their respective shares should be.

[16] The view which the judge took as to the applicable principle of law made it unnecessary for her to make a finding that there had been any expression of agreement as to the extent of the respective shares. After

referring to the decision of this court in *Springette v Defoe* [1992] 2 FCR 561, the judge held that, notwithstanding that decision, she should follow observations of Waite LJ in *Midland Bank plc v Cooke* [1995] 4 All ER 562. Waite LJ had said this (at 575):

'I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one.'

In the light of that passage, the judge directed herself (at para 17 of her judgment) that:

'It could not be clearer therefore that the proper approach of a court to a dispute of this nature is that when there is no express agreement between the parties the court must look to the whole course of dealings to infer what the agreement between those parties was.'

[17] The judge gave effect to her understanding of the correct approach in para 26 of her judgment, where she said:

'I find that the transfer of the tenancy from Chatham to Bean was the beginning of putting into effect a long-term plan. That is not simply to live together, but to acquire a property through purchase with the advantageous discount available to a council tenant, with a view subsequently to moving on to better accommodation. Each made substantial contributions to the purchase of the Bean property, and it is clear that the long-term plan had been for selling and upgrading, because the sale of Bean and the purchase of Hartley happened very, very soon after the defendant's return from Kuwait; in other words, at a time when the family would in the future be living on a permanent basis all together. Thus, Hartley was as much a joint property as Bean had been, although, perhaps quirkily in this case, the first property had been conveyed into the claimant's sole name, and the second property conveyed into the defendant's sole name. There were reasons for each of those: the first, because the property could only be conveyed to the claimant; the second, because of the discussions that had taken place between the defendant and the claimant, and the concern about the claimant's former husband. But it does not alter the position that, in relation to both of those properties, they were regarded as these two people's home, and indeed each was asked in the course of oral evidence if they had been questioned back at the time what would they have said, for instance, regarding the property, and each gave evidence, "Well, I would have said it was our home."

[18] I have no doubt that the judge was right to take the view that each of the parties regarded, first, 39 Page Close, and, latterly, 35 Dickens Close, as their home. It was to 39 Page Close that Mr Hiscock returned when on leave from Iraq; and 35 Dickens Close was the house in which they lived as a family, with Mrs Oxley's children. But I think she was plainly wrong if she thought that 39 Page Close, Bean, was joint property. The true position in relation to that property was that it belonged beneficially to Mrs Oxley, subject to a charge to secure the moneys advanced by Mr Hiscock at the time of the purchase. That is what the parties had agreed.

a [19] Nevertheless, whether or not the judge was right as to the beneficial ownership of 39 Page Close, she was in no doubt as to the position as 35 Dickens Close. She said (at para 27 of her judgment):

b 'In continuing with the long-term plan, and in keeping with the belief that each clearly had at the time that Hartley was purchased, that it was their joint home, the claimant worked almost continuously; the defendant also worked. The defendant made improvements to the property; the claimant helped him. The claimant also decorated substantial parts of the property, and she did the gardening. Each contributed towards the total outgoings. The description given by the claimant, whose evidence I accept, shows that this was a classic pooling of resources, even though c there was no joint bank account ... All of the evidence which I have heard clearly shows that both were evincing an intention to share the benefit and the burden of this property [35 Dickens Close] jointly and equally.'

She expressed her conclusion (at para 31 of her judgment):

d '... from the analysis of the law and the facts in this case, it is clear that the order which the claimant sought in her notice of application is the only one that can properly be made, namely to declare that the claimant is equally entitled, with the defendant, to a half-share in the proceeds of sale of the Hartley property ...'

e The effect was that a further sum was payable to her out of the proceeds of sale of 35 Dickens Close—representing the difference between the amount which Mr Hiscock had paid towards the purchase of her new property, 34 Beacon Hill, Chatham, and the one-half share of 35 Dickens Close to which she was held to be entitled. That sum was quantified, in the order of 20 May 2003, at £72,056.

f [20] The judge refused permission to appeal from her order. Mr Hiscock obtained permission to appeal from this court (Jonathan Parker LJ) on 5 December 2003.

THIS APPEAL

g [21] The principal ground of appeal is that the judge misdirected herself in law in refusing to follow the decision of this court in *Springette v Defoe* [1992] 2 FLR 388. The basis of that decision is accurately summarised in the headnote to the report:

h 'If two or more persons purchased property in their joint names and there was no declaration of trusts on which they were to hold the property, they held the property on a resulting trust for the persons who provided the purchase money in the proportions in which they provided it, unless there was sufficient specific evidence of their common intention that they should be entitled in other proportions, that common intention being a shared intention communicated between them and made manifest at the time of the transaction itself.'

j

It was said that, in the present case as in *Springette's* case, it was clear, notwithstanding any subjective intention each might have had, that there had been no discussion between the parties as to the extent of their respective beneficial interests at the time of the purchase of 35 Dickens Close. So it must follow that the presumption of resulting trust was not displaced and the property

was held for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to their contributions. a

[22] That, it was said, led to the conclusion that Mrs Oxley's share of the proceeds of sale of 35 Dickens Close was 22% or thereabouts—the proportion which her contribution to the purchase of that property (put by the appellant at £31,699, after deducting the costs of sale and interest on the £25,200 advanced from the proceeds of sale of 39 Page Close) bore to the whole of the acquisition cost (put by the appellant at £141,260, after adding the costs of purchase and improvements). b

[23] There is obvious scope for debate about the figures. The appellant's approach treats Mr Hiscock as having contributed the whole of the moneys (£30,000) advanced by the building society—no doubt on the basis that, as the person in whose sole name the property was registered, he was solely responsible for the mortgage debt. But there was no evidence as to how, in fact, the mortgage debt was discharged; and it is (at the least) arguable that, on the judge's findings, the parties should be treated as having contributed equally to the payment-off of that debt. But, making all assumptions in Mrs Oxley's favour, the amount of her share (based on financial contributions) could not exceed 40%—($£36,300 + \frac{1}{2} £30,000$)/£127,000. c

[24] The first question on this appeal, therefore, is whether the judge was required, by the decision of this court in *Springette's* case, to find that, in the absence of some 'shared intention [as to the proportions in which they should be entitled] communicated between them and made manifest at the time of the transaction itself', the property was held upon a resulting trust for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to the respective financial contributions which they had made to the acquisition cost. Or was the judge entitled and required—as she plainly thought—to follow the approach adopted by this court in *Cooke's* case. d

THE LAW AS UNDERSTOOD BEFORE *MIDLAND BANK PLC v COOKE*

[25] It is important to have in mind the underlying requirement, imposed by s 53(1) of the Law of Property Act 1925, (a) that no interest in land can be created orally and (b) that no declaration of trust respecting land can have effect if made orally. But s 53(2) excludes from that requirement 'the creation or operation of resulting, implied or constructive trusts'. It is the requirement in s 53(1) of the 1925 Act—and the saving provision in s 53(2)—which has led to the need, in a case where one former cohabitee asserts against the other (in whose sole name the property is registered) a beneficial interest arising out of some informal arrangement or understanding (not evidenced in writing) or from subsequent conduct, to establish the existence of a constructive trust; or else to rely on a resulting trust arising from contributions. e

[26] The judge described *Springette's* case as an 'unusual case' which 'quite clearly does not fit happily into the reported authorities which have developed this area of the law quite considerably from the early days'. By 'the early days' in that context, she meant, I think, the late 1960s—shortly before the change in the law relating to matrimonial property introduced by the Matrimonial Proceedings and Property Act 1970. When referring to 'the reported authorities which have developed this area of the law' she must have had in mind the decisions of this court and in the House of Lords between, say, 1985 and 1995—when *Cooke's* case was decided. f

a [27] Leaving aside, for the moment, the two decisions of the House of Lords in the late 1960s, *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 and *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886, the approach of this court during that period is exemplified by the judgments in *Walker v Hall* [1984] FLR 126. In that case Lawton LJ set out his understanding of the position in these terms (at 135–136):

b 'During the past two decades the courts have had to consider on a number of occasions the division of property between men and women living together without being married. Ever since the Matrimonial Proceedings and Property Act 1970, which has been replaced by the Matrimonial Causes Act 1973, the courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. No such jurisdiction exists when the cohabiters are unmarried. When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property: see *Pettitt v Pettitt* ([1969] 2 All ER 385, [1970] AC 777) and *Gissing v Gissing* ([1970] 2 All ER 780, [1971] AC 886). There is no special law relating to property shared by cohabiters any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In circumstances such as arose in this case the appropriate law is that of resulting trusts. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property. An interest in property which is the consequence of a legal process must be identifiable. It must be more than expectations which at some later date require to be valued by a court.'

Dillon LJ, also, rejected the suggestion that, in the absence of evidence as to contrary intention, the court could depart from the shares in which the parties had contributed to the purchase price. He said (at 134):

h 'Accordingly, it is not open to this court, in my judgment, in the absence of specific evidence of the parties' intention, to hold that 33 Foxberry Road belongs beneficially to Mr Hall and Mrs Walker in equal shares, notwithstanding their unequal contributions to the purchase price, simply because it was bought to be their family home and they intended that their relationship should last for life. Equally it is not open to this court to "top up" Mrs Walker's share, beyond what it would be on the mere basis of her financial contribution, on some broad notion of what would be fair simply because the house was bought as the family home; the court could no doubt do this in an appropriate case in proceedings under s.24 of the 1973 Act but the discretion under that section is not available in the present case.'

Kerr LJ agreed with both judgments.

[28] Some four years later, in *Turton v Turton* [1987] 2 All ER 641, [1988] Ch 542, this court reaffirmed the principle that the beneficial interests had to be

ascertained from consideration of the intentions of the parties at the time of the purchase; they were not to be left for determination in the light of subsequent events. Nourse LJ, after referring to the passages in the judgments in *Walker's* case which I have just set out, said this ([1987] 2 All ER 641 at 648, [1988] Ch 542 at 552):

'It is thus made clear that Dillon and Lawton LJ were of the opinion that a beneficial interest acquired under an application of the principles stated in *Gissing v Gissing* can only be an absolute and indefeasible interest. It cannot be one which is liable to determine or to be defeated or diminished, either automatically or by the exercise of some discretion, on the happening of some future event, for example the separation of an unmarried couple who were living together at the time of its acquisition. The validity of that proposition is in my judgment beyond doubt. It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the conduct of the parties, that the claimant is to have a beneficial interest in the house. In the common case where the intention can be inferred only from the respective contributions, either initial or under a mortgage, to the cost of its acquisition it is held that the house belongs to the parties beneficially in proportions corresponding to those contributions.'

Kerr LJ agreed (see [1987] 2 All ER 641 at 650, [1988] Ch 542 at 554):

'... once the court had found the existence of a constructive or implied trust whereby the beneficial rights to the property belonged to the parties in whatever shares the court determined, then the necessary consequence was the recognition by the court of rights which are proprietary in their nature and which lie wholly outside the exercise of any discretionary powers. That was made clear, inter alia, in *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886.'

Nevertheless, there is in those judgments some recognition of the possibility that a common intention at the time of purchase, sufficient to give rise to a constructive trust, might be inferred from conduct other than the making of financial contributions. But, in that case, the need to find a common intention from conduct did not arise: the conveyance contained an express declaration that the property was held for the parties as beneficial joint tenants.

[29] *Turton's* case was heard in January 1987; judgments were delivered in March 1987. Some 12 months earlier this court (*Browne-Wilkinson V-C*, Mustill and Nourse LJ) had decided *Grant v Edwards* [1986] 2 All ER 426, [1986] Ch 638. *Grant v Edwards*—which, for reasons which I shall explain, may be seen as a turning point in this area of the law—was not cited in *Turton's* case; and it would not be surprising (given that the conveyance in *Turton* contained an express declaration of trust) if Nourse LJ (who was a member of both constitutions) took the view that there was nothing in the earlier case which bore upon the point for decision in the later. Be that as it may, some three-and-a-half years later, in a passage to which I will need to refer from his judgment in *Stokes v Anderson* [1991] FCR 539, Nourse LJ addressed the potential impact of *Grant v Edwards* on what may be described as the then accepted view of the law in this area. But, first, I should turn to the judgments in *Grant v Edwards*.

a [30] *Grant v Edwards* [1986] 2 All ER 426, [1986] Ch 638 was a case in which the plaintiff had made no contribution to the purchase price of the house in which she lived with the defendant as husband and wife. The house was purchased in the names of the defendant and his brother. There was, therefore, no room for the application of principles based on resulting trust—as exemplified in *Walker's* case. Nevertheless, she was able to succeed in
b establishing a beneficial interest equal to a one-half share on the basis of constructive trust or (per Browne-Wilkinson V-C) proprietary estoppel.

[31] The analysis by way of constructive trust can be seen clearly in the judgment of Nourse LJ ([1986] 2 All ER 426 at 431–432, [1986] Ch 638 at 646–647):

c 'In order to decide whether the plaintiff has a beneficial interest in 96 Hewitt Road we must climb again the familiar ground which slopes down from the twin peaks of *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 and *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886. In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as
d to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it. In most of these cases the fundamental, and invariably
e the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: see *Burns v Burns* [1984] 1 All ER 244 at 252–253, [1984] Ch 317 at 328–329 per Fox LJ. If it is found
f to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it. There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for
g conduct from which the intention can be inferred, but only for conduct which amounts to an acting on it by the claimant. And, although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so.'

Nourse LJ was satisfied that the facts in that case were such as—

h 'to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house ...' (see [1986] 2 All ER 426 at 433, [1986] Ch 638 at 649):

j and was satisfied, also, that she—

'did act to her detriment on the faith of the common intention between her and the defendant that she was to have some sort of proprietary interest in the house' (see [1986] 2 All ER 426 at 434, [1986] Ch 638 at 650).

Mustill LJ agreed with that analysis ([1986] 2 All ER 426 at 437, [1986] Ch 638 at 654).

[32] Browne-Wilkinson V-C, took the opportunity to restate the principles which had been laid down in the speech of Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886. He said ([1986] 2 All ER 426 at 437, [1986] Ch 638 at 654–655):

‘In my judgment, there has been a tendency over the years to distort the principles as laid down in the speech of Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886 by concentrating on only part of his reasoning. For present purposes, his speech can be treated as falling into three sections: the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.

1. *The nature of the substantive right* (see [1970] 2 All ER 780 at 790, [1971] AC 886 at 905)

If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention.

2. *The proof of the common intention*

(a) Direct evidence (see [1970] 2 All ER 780 at 790, [1971] AC 886 at 905). It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention (see [1970] 2 All ER 780 at 791–792, [1971] AC 886 at 907–908).

(b) Inferred common intention (see [1970] 2 All ER 780 at 790–792, [1971] AC 886 at 906–908). Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention, viz contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention; he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. *The quantification of the right* (see [1970] 2 All ER 780 at 792–793, [1971] AC 886 at 908–909)

Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant has acted to his detriment, the question may still remain: what is the extent of the claimant’s beneficial interest? This last section of Lord Diplock’s speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important.’ (Browne-Wilkinson V-C’s emphasis.)

[33] Browne-Wilkinson V-C pointed out ([1986] 2 All ER 426 at 437, [1986] Ch 638 at 655) that, if his analysis were correct, it led to the conclusion that contributions made by a claimant who was not named on the title might be relevant both as evidence from which an intention that the claimant was to have some beneficial interest in the property could be inferred and 'to quantify the extent of the beneficial interest'. It is in that latter context that what he described as '[t]his last section of Lord Diplock's speech' is of particular relevance. It is convenient, therefore to set out the passage which Browne-Wilkinson V-C had in mind. Lord Diplock had said this (see [1970] 2 All ER 780 at 792-793, [1971] AC 886 at 908-909):

'Where in any of the circumstances described above contributions, direct or indirect, have been made to the mortgage instalments by the spouse into whose name the matrimonial home has not been conveyed, and the court can infer from their conduct a common intention that the contributing spouse should be entitled to *some* [Lord Diplock's emphasis] beneficial interest in the matrimonial home, what effect is to be given to that intention if there is no evidence that they in fact reached any express agreement as to what the respective share of each spouse should be? ... In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse on which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently ... If the contribution of the wife in the early part of the period of repayment [of a building society mortgage] is substantial but is not an identifiable and uniform proportion of each instalment, because her contributions are indirect or, if direct, are made irregularly, it may well be a reasonable inference that their common intention at the time of acquisition of the matrimonial home was that the beneficial interest should be held by them in equal shares and that each should contribute to the cost of its acquisition whatever amounts each could afford in the varying exigencies of family life to be expected during the period of repayment. In the social conditions of today this would be a natural enough common intention of a young couple who were both earning when the house was acquired but who contemplated having children whose birth and rearing in their infancy would necessarily affect the future earning capacity of the wife. The relative size of their respective contributions to the instalments in the early part of the period of repayment, or later if a subsequent reduction in the wife's contributions is not to be accounted for by a reduction in her earnings due to motherhood or some other cause from which the husband benefits as well, may make it a more probable inference that the wife's share in the beneficial interest was intended to be in some proportion other than one-half. And there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately on the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date. *Where this was the most likely*

inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share. (My emphasis.)

[34] In *Grant v Edwards* [1986] 2 All ER 426 at 438, [1986] Ch 638 at 655, 656 Browne-Wilkinson V-C held that there was ample evidence to establish a common intention that the claimant was to have a beneficial interest in the house; and that, by making payments which, directly or indirectly, had been used to discharge the mortgage instalments—

‘the plaintiff has acted to her detriment in reliance on the common intention that she had a beneficial interest in the house and accordingly that she has established such beneficial interest.’

In a passage which is of importance in the present context, he went on to consider the extent of that interest ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 657–658):

‘What then is the extent of the plaintiff’s interest? It is clear from *Gissing v Gissing* that, once the common intention and the actions to the claimant’s detriment have been proved from direct or other evidence, in fixing the quantum of the claimant’s beneficial interest the court can take into account indirect contributions by the plaintiff such as the plaintiff’s contributions to joint household accounts: see *Gissing v Gissing* [1970] 2 All ER 780 at 793, [1971] AC 886 at 909. In my judgment, the passage in Lord Diplock’s speech ([1970] 2 All ER 780 at 793, [1971] AC 886 at 909–910) is dealing with a case where there is no evidence of the common intention other than contributions to joint expenditure; in such a case there is insufficient evidence to prove any beneficial interest and the question of the extent of that interest cannot arise. Where, as in this case, the existence of some beneficial interest in the claimant has been shown, prima facie the interest of the claimant will be that which the parties intended: see *Gissing v Gissing* [1970] 2 All ER 780 at 792, [1971] AC 886 at 908. In *Eves v Eves* [1975] 3 All ER 768 at 775, [1975] 1 WLR 1338 at 1345 Brightman J plainly felt that a common intention that there should be a joint interest pointed to the beneficial interests being equal. However, he felt able to find a lesser beneficial interest in that case without explaining the legal basis on which he did so. With diffidence, I suggest that the law of proprietary estoppel may again provide useful guidance. If proprietary estoppel is established, the court gives effect to it by giving effect to the common intention so far as may fairly be done between the parties. For that purpose, equity is displayed at its most flexible: see *Crabb v Arun DC* [1975] 3 All ER 865, [1976] Ch 179. Identifiable contributions to the purchase of the house will of course be an important factor in many cases. But in other cases, contributions by way of the labour or other unquantifiable actions of the claimant will also be relevant. Taking into account the fact that the house was intended to be the joint property, the contributions to the common expenditure and the payment of the fire insurance moneys into the joint account, I agree that the plaintiff is entitled to a half interest in the house.’

[35] The suggestion, in that passage of Browne-Wilkinson V-C’s judgment, that ‘proprietary estoppel may again provide useful guidance’ (my emphasis) is a

a reference back to an earlier passage ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 656) in which he had said this:

b 'I suggest that, in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing*. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions.'

d Nevertheless, he made it clear that the possible analogy with proprietary estoppel had not been fully argued; and that he decided the case on the narrower ground of common intention coupled with acts of detriment in reliance on such intention.

e [36] As I have said, *Grant v Edwards* was decided in March 1986. Some four years later it was referred to by Lord Bridge of Harwich, with obvious approval, in *Lloyds Bank plc v Rosset* [1990] 1 All ER 1111, [1991] 1 AC 107. In a passage on which the appellant relies strongly Lord Bridge drew attention ([1990] 1 All ER 1111 at 1118–1119, [1991] 1 AC 107 at 132–133)—

'to one critical distinction which any judge required to resolve a dispute between former partners as to the beneficial interest in the home which they formerly shared should always have in the forefront of his mind.'

f The distinction is between (i) those cases in which, prior to the acquisition, there has been some agreement, arrangement or understanding reached between the parties that each is to have a beneficial share in the property and (ii) those cases in which there has been no such agreement, arrangement or understanding prior to the acquisition. Lord Bridge described *Grant v Edwards* as an example of a case within the first of those categories. He said this ([1990] 1 All ER 1111 at 1119, [1991] 1 AC 107 at 133):

h 'The leading cases in your Lordships' House are *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 and *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886. Both demonstrate situations in the second category to which I have referred and their Lordships discuss at great length the difficulties to which these situations give rise. The effect of these two decisions is very helpfully analysed in the judgment of Lord MacDermott LCJ in *McFarlane v McFarlane* [1972] NI 59. Outstanding examples on the other hand of cases giving rise to situations in the first category are *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338 and *Grant v Edwards* [1986] 2 All ER 426, [1986] Ch 638. In both those cases, where parties who had cohabited were unmarried, the female partner had been clearly led by the male partner to believe, when they set up home together, that the property would belong to them jointly. In *Eves v Eves* the male partner had told the female partner that the only reason why the property was to be acquired in his name alone was because she was under 21 and that, but for her age, he would have had

the house put in their joint names. He admitted in evidence that this was simply an "excuse". Similarly in *Grant v Edwards* the female partner was told by the male partner that the only reason for not acquiring the property in joint names was because she was involved in divorce proceedings and that, if the property were acquired jointly, this might operate to her prejudice in those proceedings. As Nourse LJ put it ([1886] 2 All ER 426 at 433, [1986] Ch 638 at 649): "Just as in *Eves v Eves*, these facts appear to me to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house otherwise no excuse for not putting her name onto the title would have been needed." The subsequent conduct of the female partner in each of these cases, which the court rightly held sufficient to give rise to a constructive trust or proprietary estoppel supporting her claim to an interest in the property, fell far short of such conduct as would by itself have supported the claim in the absence of an express representation by the male partner that she was to have such an interest. It is significant to note that the share to which the female partners in *Eves v Eves* and *Grant v Edwards* were held entitled were one-quarter and one-half respectively. In no sense could these shares have been regarded as proportionate to what the judge in the instant case described as a "qualifying contribution" in terms of the indirect contributions to the acquisition or enhancement of the value of the houses made by the female partners.'

[37] In the first paragraph of the passage which I have just set out Lord Bridge described *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 and *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886 as cases within the second of his two categories; that is to say, as cases in which there had been no agreement, arrangement or understanding, prior to the acquisition, that the parties would share the property beneficially. It is important to keep in mind that the relevant distinction in Lord Bridge's categorisation is between cases in which there has been some prior agreement, arrangement or understanding that each of the parties would have some beneficial share in the property and cases in which there had been no such prior agreement, arrangement or understanding. For a case to fall within the first of Lord Bridge's two categories it is not necessary that the prior agreement extends to defining the extent of the respective shares—as his inclusion in that category of *Eves v Eves* and *Grant v Edwards* makes clear.

[38] Lord Bridge, in *Rosset's* case, refers with approval to the analysis of *Pettitt v Pettitt* and *Gissing v Gissing* which is found in the judgment of Lord MacDermott, Lord Chief Justice of Northern Ireland, in *McFarlane v McFarlane* [1972] NI 59. It is unnecessary, therefore, to attempt any further analysis of those decisions in this judgment. I can adopt, with gratitude, the analysis which has been approved, subsequently, in the House of Lords in *Rosset's* case. In *McFarlane*, after observing that the facts in *Pettitt* and *Gissing* 'were not such as to facilitate or encourage a comprehensive statement of this vexed branch of the law'—and that 'much remains unsettled'—Lord MacDermott CJ had said this (at 66–67):

'But two points were put beyond question. The "family assets" doctrine was definitely rejected. See *Pettitt*, per Lord Reid at p. 797, per Lord Hodson at p. 810 and per Lord Upjohn at p. 817. And, secondly, section 17 of the Act of 1882 was held to be only a procedural provision which did not empower

- a the court to alter the existing rights of the parties. See per Lord Reid at p. 793, per Lord Morris of Borth-y-Gest at pp. 798–799, per Lord Hodson at p. 808, per Lord Upjohn at p. 813 and per Lord Diplock at p. 820. These decisions, as I understand them, have also established or affirmed two rather less negative propositions of law to which I must now refer. The first is that,
- b in the absence of proof to the contrary, a spouse who acquired the legal title to property purchased with the aid of a substantial monetary contribution from the other spouse will hold the property subject to a beneficial interest therein belonging to the other spouse: see *Pettitt*, per Lord Reid at p. 749B, per Lord Hodson at p. 810G, per Lord Upjohn at p. 815 G-H; and *Gissing* per Lord Pearson at p. 264G–265B. This may be the result of some binding agreement between the spouses; but more usually it will flow from a
- c resulting trust in favour of the contributing spouse who has not the legal title. The extent of the beneficial interests will depend on the circumstances. They will not necessarily be equal, but may be held so where that conclusion accords with the broad merits of the respective claims or with what is fair and reasonable when there is some difficulty or uncertainty in assessing the contributions: see *Rimmer v. Rimmer* ([1952] 2 All ER 863, [1953] 1 QB 63).
- d The second proposition which I take to be now accepted in *Pettitt* and *Gissing* must be stated in a qualified form. It is that in certain circumstances the first proposition can also apply in favour of the spouse without the legal title where that spouse has contributed to the purchase, not directly by finding a part of the price, but indirectly and in a manner which has added to the
- e resources out of which the property has been acquired as, for example, by work done or services rendered or by relieving the other spouse of some, at any rate, of his or her financial obligations.’

- It can be seen that Lord MacDermott recognised that where property purchased in the name of one party with the aid of a substantial monetary contribution from the other party was held upon trust—so as to give effect to the beneficial interest of that other party—the extent of the respective beneficial interests would not necessarily either (i) be proportionate to the respective contributions or (ii) be equal. The extent of the beneficial interests will depend on the circumstances. But they may be held to be equal where that accords with the broad merits of the
- g respective claims.

[39] With that analysis of the effect of *Pettitt v Pettitt* and *Gissing v Gissing*, and Lord Bridge’s own observations as to the reasoning in *Grant v Edwards*, in mind, I return to the passage in *Lloyd’s Bank plc v Rosset* [1990] 1 All ER 1111 at 1118–1119, [1991] 1 AC 107 at 132–133, on which the appellant relies:

- h ‘The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding
- j reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her

detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel. In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.'

[40] The appellant seeks support in that passage for two propositions: (i) that cases in the first class are confined to those in which there is evidence of discussions between the parties directed not only to the question whether each should have some beneficial interest in the property but also, expressly, to the extent of their respective interests and (ii) that, in cases which do not fall within that first class, direct contributions to the purchase price by the party who is not the legal owner will both justify the inference of a common intention to share the property beneficially and, necessarily, define the extent of the respective beneficial interests. In my view that passage in *Rosset's* case supports neither of those propositions. As I have said, a case will not fall within the first class unless there is evidence of some agreement, arrangement or understanding, usually prior to acquisition, that the each party should have some beneficial interest in the property; but it is not necessary that that agreement, arrangement or understanding extends to defining the extent of the respective shares. If a case does not fall within the first class it may, nevertheless, fall within the second class if common intention can be inferred from conduct; and direct contributions to the purchase price will be conduct from which such common intention can readily be inferred. But the relevant common intention is that each party should have some beneficial interest. Direct contributions to the purchase price may lead to an inference that each party should have some beneficial interest without, necessarily leading to the further inference that their respective shares should be proportionate to the amount of the direct contributions. When the passage in *Rosset's* case on which the appellant relies is read in the light of Lord Bridge's indorsement of the analysis in *McFarlane v McFarlane* and the reasoning in *Grant v Edwards* it will not bear the construction which the appellant seeks to put upon it.

[41] Shortly after the decision of the House of Lords in *Rosset's* case that decision, and the decision in *Grant v Edwards*, were considered by this court (Lloyd, Nourse and Ralph Gibson LJ) in *Stokes v Anderson* [1991] FCR 539. The factual basis of the claim was, in material respects, similar to that in the present case. The claimant had made two payments, amounting together to £12,000, towards the acquisition of the one-half share of the defendant's ex-wife in the net equity (valued at £90,000) in a house in which the claimant and the respondent lived as husband and wife. As Nourse LJ explained at the outset of his judgment ([1991] 1 FLR 391 at 392):

a 'This is a dispute between an unmarried couple as to the beneficial ownership of a house in which they formerly lived together; compare *Gissing v Gissing* ([1970] 2 All ER 780, [1971] AC 886) and *Grant v Edwards* ([1986] 2 All ER 426, [1986] Ch 638). [The judge] decided that the woman was entitled to half the beneficial interest in the house. The man has now
b appealed to this court, contending that the woman has no beneficial interest, alternatively that it does not exceed 15% at the most.'

After setting out the facts, and upholding the judge's finding that the payments made by the claimant were made pursuant to a common intention that she should have a beneficial interest in the property, Nourse LJ turned to the question: what was to be the extent of that interest. It is pertinent to note the
c evidential similarity with the present case (see [1991] FCR 539 at 541):

'... the defendant's evidence was that the plaintiff said that she was to have a beneficial interest in the property; he did not say what the extent of that interest was to be; she assumed that it would be 50%. There was no other evidence to suggest that the extent of the defendant's beneficial interest was
d ever discussed between herself and the plaintiff.'

[42] Nourse LJ (with whose judgment the other members of the court agreed) pointed out (at 541) that, although it was open to the judge, if justified by the evidence as a whole, to find a common intention that the property should be shared 50/50,—

e 'it is important to emphasize that he could only have done so by inference. Although the parties had orally made plain their common intention that the defendant should have a beneficial interest in the property, the extent of it had never been discussed.' (Nourse LJ's emphasis.)

f In a passage which is directly apposite to the present case, he went on to say (at 541–543):

'... I take this to be a clear example of what in *Grant v Edwards* ([1986] 2 All ER 426 at 431, [1986] Ch 638 at 646), I thought, perhaps wrongly, was the rarer class of case under *Gissing v Gissing* ([1970] 2 All ER 780, [1971] AC 886), where the parties have orally declared themselves in such a way as to make plain their common intention that the claimant should have a beneficial interest in the property. Moreover, here it is unnecessary to look beyond the two payments of £5,000 and £7,000 in order to find conduct which amounted to an acting upon the common intention by the defendant. And so the only real question for decision, a difficult one, is
g what is the extent of her beneficial interest ... Before *Grant v Edwards* the distinction between the category of case exemplified by that decision and *Eves v Eves* ([1975] 3 All ER 768, [1975] 1 WLR 1338) on the one hand, and that exemplified in *Gissing v Gissing* and *Burns v Burns* ([1984] 1 All ER 244, [1984] Ch 317) on the other had not been clearly perceived. The distinction
h has now been authoritatively recognized in the speech of Lord Bridge of Harwich in *Lloyds Bank Plc v Rosset* ([1990] 1 All ER 1111 at 1118–1119, [1991] 1 AC 107 at 132–133), a passage which is also notable for two references to conduct giving rise to "a constructive trust or a proprietary estoppel". Since it is necessary, in order to decide the extent of the defendant's beneficial interest in Stone Cottage, to ascertain the principle on which such a decision ought to be made, a brief diversion into the
j

burgeoning question of the relationship between the *Gissing v Gissing* species of constructive trust and proprietary estoppel is here desirable. In *Grant v Edwards* ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 656 and 657), the Vice-Chancellor suggested that in cases under *Gissing v Gissing* the principles underlying the law of proprietary estoppel might provide useful guidance both in regard to the conduct necessary to constitute an acting upon the common intention by the claimant and in regard to the quantification of his or her beneficial interest in the property. In *Austin v Keele* ((1987) 61 ALJR 605 at 609, 72 ALR 579 at 587), Lord Oliver of Aylmerton, in delivering the judgment of the Privy Council, said that in essence the doctrine of *Gissing v Gissing* was an anticipation of proprietary estoppel. The Vice-Chancellor's suggestion was echoed by Nicholls, LJ in *Lloyds Bank Plc v Rosset* ([1988] 3 All ER 915 at 933, [1989] Ch 350 at 387), and it has now been adopted and enlarged upon by Professor Hayton; see *The Conveyancer and Property Lawyer* (1990) 370. However, it must be emphasized that this question was only touched on in the arguments in this court in *Grant v Edwards* and *Lloyds Bank Plc v Rosset* and both the Vice-Chancellor and Nicholls, LJ were careful to base their decisions on conventional *Gissing v Gissing* principles. It is possible that the House of Lords will one day decide to solve the problems presented by these cases either by assimilating the principles of *Gissing v Gissing* and those of proprietary estoppel or even by following the recent trend in other Commonwealth jurisdictions towards more generalized principles of unconscionability and unjust enrichment. The Vice-Chancellor has identified two areas where the application of *Gissing v Gissing* might be enlarged through the influence of proprietary estoppel and there is no real reason for thinking that their assimilation would be unduly hindered by their separate development out of basically different factual situations. But they have not yet been assimilated and we in this court must continue to regard cases such as the present as being governed by the principles of *Gissing v Gissing*, at any rate until we come to one where we cannot be confident that their application will produce a just result. I do not lack that confidence in the present case, especially since it has given us the opportunity of putting the quantification of the claimant's beneficial interest on a more satisfactory footing, a footing which incidentally brings it nearer to proprietary estoppel. In regard to the quantification of the defendant's beneficial interest we were referred by counsel to *Eves v Eves* and *Grant v Edwards*, in each of which the same question arose. But the starting point must be Lord Diplock's speech in *Gissing v Gissing*, from which it is clear that this question, like the anterior one, depends on the common intention of the parties, either expressed or more usually to be inferred from all the circumstances. That does not mean that in the latter case you have to infer a common intention that the extent of the claimant's beneficial interest is to be ascertained once and for all at the date of its acquisition.'

Nourse LJ then referred to Lord Diplock's observations in *Gissing v Gissing* ([1970] 2 All ER 780 at 793, [1971] AC 886 at 909), which I have already set out, that—

'there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to

a be quantified immediately on the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of and that—

b '[w]here this was the most likely inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share'

and continued ([1991] FCR 539 at 543):

c 'I agree with the Vice-Chancellor in *Grant v Edwards* ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 657), that those observations, although made only in reference to contributions to mortgage repayments, support a more general proposition that all payments made and acts done by the claimant are to be treated as illuminating the common intention as to the extent of the beneficial interest. Once you get to that stage, as Lord Diplock recognized, there is no practicable alternative to the determination of a fair share. The court must supply the common intention by reference to that which all the material circumstances have shown to be fair.'

[43] It is important to have in mind that, in that passage, Nourse LJ was addressing the question of quantification. He had already held that the case was one in which there was a common, expressed, intention that the claimant should have a beneficial interest in the property and that she had acted in reliance on that common intention. Four propositions can be identified: (i) that the answer to the question 'what is the extent of the claimant's beneficial interest' was to be found by the application of 'conventional *Gissing v Gissing* principles', not—or, at least, not yet or not in that case—by direct recourse to the principles underlying proprietary estoppel; (ii) that the answer was to be found in the common intention of the parties at the time of the acquisition which, if not expressed was 'to be inferred from all the circumstances'; (iii) that it was open to the court to infer that it was the common intention of the parties at the time of acquisition that the extent of the respective beneficial interests should 'be left to be determined when ... the property [was] disposed of, on the basis of what was fair having regard to the total contributions, direct or indirect, which each ... had made'; and (iv) that, '[o]nce you get to that stage' there is no practicable alternative to the determination of a fair share—'The court must supply the common intention by reference to that which all the material circumstances have shown to be fair.' For my part, I find it difficult to reconcile the third and fourth of those propositions with the observations of this court in *Turton v Turton*—see, in particular, [1987] 2 All ER 641 at 648, 650, [1988] Ch 542 at 552, 555—but, as Peter Gibson LJ was to say in *Drake v Whipp* [1996] 2 FCR 296 at 298, 'as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law'.

j [44] The result, in *Stokes's* case was that the claimant's share was reduced from the 50% which she had been awarded by the judge (on the basis, it seems, that that was what she assumed would be her share at the time of the acquisition: see [1991] FCR 539 at 541) to 25%. The reason for that reduction was that, at the time when the claimant made her payments, Mr Stokes was already entitled to a one-half share; the payments were made in order to acquire the other one-half share from his ex-wife. As Nourse LJ put it (at 544):

‘... to hold that the defendant was entitled to half the beneficial interest in Stone Cottage ... would be markedly unfair to the plaintiff. On a broad approach, the only approach which can be made, I think that the fair view of all the circumstances is that the defendant is entitled to a beneficial interest equivalent to one half of the plaintiffs [sic] wife’s half share, or one quarter of the whole, subject to the mortgage.’

[45] *Springette v Defoe* [1992] 2 FCR 561 followed some 15 months later. In that case the property was purchased in the joint names of the parties. They had been living there for a short time as joint tenants of the local authority; but they were able to purchase at a substantial discount from the estimated market value because Miss Springette had, herself, been a tenant of the local authority (in another property) for 11 years or more. The property was purchased with the assistance of a building society mortgage—for the repayment of which they were both liable as covenantors. Treating the mortgage moneys as provided in equal shares—and giving Miss Springette credit for the whole of the tenant’s discount—her contribution to the purchase was 75% or thereabouts. It was common ground that, at the time of acquisition, they were each intended to have some beneficial interest in the property; and it was found as a fact by the trial judge that they never had any discussion at all, at or before the time of the purchase, about what their respective interests were to be. The judge held that the property was owned in equal shares; not on the basis of his finding that, although uncommunicated to each other, that was, in fact, the intention of each at the time, but because, as he put it (at 565):

‘It is my judgment that there is sufficient evidence on the facts of inference of common intention or arrangement between the parties that the property should be owned in equal shares.’

[46] In the light of the judge’s findings of fact, it might have been thought that the case fell squarely within the first of the two categories of case identified by Lord Bridge in *Rosset’s* case [1990] 1 All ER 1111 at 1119, [1991] 1 AC 107 at 132–133. There was a common intention that each should have some beneficial interest in the property; there was no evidence of express agreement as to what the extent of those interests should be; the court had to ask whether there was sufficient evidence from which a common intention on that latter point could be inferred: see *Grant v Edwards* [1986] 2 All ER 426 at 434, 437, 439, [1986] Ch 638 at 651, 654, 657 and *Stokes v Anderson* [1991] FCR 539 at 543. That is the question which the judge asked in *Springette’s* case; and to which he gave the answer which he did. But the Court of Appeal reached a different conclusion.

[47] It is, I think, important to an understanding of the reasoning in the judgments in *Springette’s* case that each member of this court seems to have thought that when Lord Bridge referred, in *Rosset’s* case [1990] 1 All ER 1111 at 1118, [1991] 1 AC 107 at 132, to the need to base a ‘finding of an agreement or arrangement to share in this sense’ on ‘evidence of express discussions between the partners’ he was addressing the secondary, or consequential, question ‘what was the common intention of the parties as to extent of their respective beneficial interests?’ rather than the primary, or threshold, question ‘was there a common intention that each should have a beneficial interest in the property?’. That that was the basis of the reasoning in *Springette’s* case appears clearly from the judgments of Dillon LJ ([1992] 2 FCR 561 at 567) and Steyn LJ (at 568). The third member of the court, Sir Christopher Slade, agreed with that reasoning (at 571).

a [48] For the reasons which I have sought to explain, I think that the better view is that, in the passage in *Rosset's* case [1990] 1 All ER 1111 at 1118, [1991] 1 AC 107 at 135, to which both Dillon and Steyn LJ referred in *Springette's* case, Lord Bridge was addressing only the primary question—‘was there a common intention that each should have a beneficial interest in the property?’: he was not addressing the secondary question—‘what was the common intention of the parties as to extent of their respective beneficial interests?’. As this court had pointed out in *Grant v Edwards* and *Stokes v Anderson*, the court may well have to supply the answer to that secondary question by inference from their subsequent conduct—see, in particular, the reference in the judgment of Browne-Wilkinson V-C in *Grant v Edwards* ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 657) to the passages in the speech of Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780 at 793, [1971] AC 886 at 909. And it may be, as Nourse LJ observed in *Stokes's* case [1991] FCR 539 at 543, that—

b

c

‘once you get to that stage ... there is no practicable alternative to the determination of a fair share. The court must supply the common intention by reference to that which all the material circumstances have shown to be fair.’

d

[49] There are, of course, passages in the judgments of this court in *Springette v Defoe* [1992] 2 FCR 561 which, at first sight, provide support for the appellant’s contentions in the present appeal. In particular, there are the passages in the judgment of Dillon LJ (at 565–566, 567):

e

‘In *Walker v Hall*, I expressed the view at p 134C that it was not open to this court, in the absence of specific evidence of the parties’ intentions, to hold that the property there in question belonged beneficially to the two parties in equal shares, notwithstanding their unequal contributions to the purchase price, simply because it was bought to be their family home and they intended – (or possibly one should say “hoped”) – that their relationship should last for life. The effect is that, in the absence of an express declaration of the beneficial interests, the court will hold that the joint purchasers hold the property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price, unless there is sufficient specific evidence of their common intention that they should be entitled in other proportions – eg in equal shares notwithstanding unequal contributions – to rebut the presumption of a resulting trust ... The common intention must be founded on evidence such as would support a finding that there is an implied or constructive trust for the parties in proportions to the purchase price. The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair ... Since, therefore, it is clear in the present case that there never was any discussion between the parties about what their respective beneficial interests were to be, they cannot, in my judgment, have had in any relevant sense any common intention [as] to the beneficial ownership of [the property] ... The presumption of resulting trust is not displaced.’

f

g

h

j

And there is further support in the judgment of Steyn LJ who—after referring to the finding of the trial judge that ‘looking at the facts surrounding the parties at the time of the acquisition and the plaintiff’s evidence that after the purchase the mortgage was paid in equal shares’ there was sufficient evidence, on those facts

to infer 'common intention or arrangement between the parties that the property should be owned in equal shares'—said ([1991] FCR 539 at 569):

'But these factors could not support such an inference because the assistant recorder had already found as a matter of fact that no such common intention was communicated between the parties. The simple answer to the man's case is that there was no communicated common intention. Given that no actual common intention to share the property in equal beneficial shares was established, one is driven back to the equitable principle that the shares are presumed to be in proportion to the contributions.'

But, for the reasons which I have sought to explain, it is (at the least) open to serious doubt whether those passages did reflect the state of the law as it had developed in this area by the time that *Springette's* case was decided in March 1992.

[50] On the same day as judgments were handed down in *Springette's* case, the same court (Dillon, Steyn LJ and Sir Christopher Slade) handed down their judgments in *Huntingford v Hobbs* (reported, a year later, at [1993] 1 FCR 45). Unsurprisingly, the decision in *Huntingford's* case is consistent with the approach in *Springette's* case; to which Dillon LJ refers (at 62) in explaining why a point not taken in the court below was not open on the appeal. But, save for an observation of Steyn LJ (at 59) which suggests that he was less of an enthusiast for that approach than might have been thought from his judgment in *Springette's* case—the decision in *Huntingford's* case is of no real assistance in the present context: the appeal turned on a different point.

[51] *Springette v Defoe* and *Huntingford v Hobbs* case were considered by this court (Dillon and Staughton LJ) a few months later in *Evans v Hayward* (judgments delivered in June 1992, but reported at [1995] 2 FCR 313). That, like *Springette's* case, was a case in which the property had been bought in joint names at a discounted price under a 'right to buy' conferred by the 1985 Act; but where the discount was substantially attributable to the plaintiff's former occupation as local authority tenant. Dillon LJ referred to the decision in *Springette's* case in the following passage (at 315):

'In *Springette v Defoe* the primary issue which arose for decision was whether, as the Judge at first instance had held, it was permissible to reach the conclusion that the two parties were to share the beneficial interest in the property equally without regard to their contributions on the ground that, though neither of them ever said anything about it to the other, each of them had in fact in his or her own mind an uncommunicated belief or intention that they were to share the property equally beneficially. But that view was rejected by this court ...'

For my part, I think that the identification of the issue in those terms does less than justice to the trial judge in *Springette's* case, who had made it clear, in a passage to which I have already referred (cited by Dillon LJ himself at [1992] 2 FCR 561 at 565) that, although he did find that that was the actual (but uncommunicated) intention of each at the time, he had not based his conclusion on that finding. He had gone on to find that there was 'sufficient evidence on the facts of inference of common intention or arrangement between the parties that the property should be owned in equal shares'. But, be that as it may, Staughton LJ, following the approach taken by Bush J in *Marsh v von Sternberg* [1986] 1 FLR 526, treated the point as turning on

a intention rather than contribution—or, to put the point another way, as turning on constructive rather than resulting trust. He said ([1995] 2 FCR 313 at 319):

b 'For my part I find it difficult to say that a discount is, strictly speaking, purchase money provided by either party. It is money which is not provided by anybody. But I do consider that the facts as to the existence of a discount and the source from which it is derived must be taken into account, and are capable of leading to the inference that the parties have made an agreement as to how the purchase price is provided.'

c [52] Later in the same year (1992) the judgments in *Springette's* case were cited to this court (Nourse and Evans LJ) in *Savill v Goodall* [1994] 1 FCR 325. Nourse LJ observed (at 330):

d '[Counsel] referred us to a recent decision of this court in *Springette v Defoe* [1992] 2 FCR 561, which recognizes that the common intention must be communicated between the parties. I think that all the authorities on first category cases will be found to be consistent with that proposition.'

e In that context, the reference to 'first category cases' is to cases within the first of Lord Bridge's two categories in *Rosset's* case—as appears from a passage earlier in the judgment ([1994] 1 FCR 325 at 329). But, as I have sought to explain, in making that categorisation, Lord Bridge was addressing the primary question—'was there a common intention that each should have a beneficial interest in the property?': he was not addressing the secondary question—'what was the common intention of the parties as to extent of their respective beneficial interests?' And Nourse LJ, to whose judgments in both *Grant v Edwards* and *Stokes v Anderson* I have already referred, may be taken to have had that well in mind. The difference in approach to the primary and secondary questions—illustrated by the decisions in *Grant's* case and *Stokes's* case—was not material to the decision in *Savill's* case. In that case this court was satisfied, on the evidence, that the parties had discussed and agreed joint ownership.

THE DECISION IN *MIDLAND BANK PLC v COOKE*

g [53] I have set out, at some length, the law in this area as it appears to have been understood in this court before the decision in *Midland Bank plc v Cooke* [1995] 4 All ER 562 because that decision must be examined in that context. The issue in that case—as to the extent of the wife's beneficial interest in the former matrimonial home—arose in proceedings brought by the bank to enforce a charge given by the husband to secure a business loan. The property had been purchased with the assistance of a mortgage advance (£6,450); the balance being found out of a wedding gift from the husband's parents (£1,100) and the husband's own moneys (£1,000 or thereabouts). The property was conveyed into the husband's sole name. There had been no discussion or agreement between husband and wife at the time of the acquisition as to the basis upon which the property was held by the husband, or as to the extent of their respective beneficial interests. Treating the wedding gift as made to husband and wife equally, it had been held in the county court that the wife was entitled to a beneficial interest on the basis of her contribution to the purchase price. But, following the approach in *Springette's* case, the judge had held that the extent of that beneficial interest was limited to the proportion (6.47%) which her contribution (equal to one-half of the wedding gift) bore to the whole. This court (Stuart-Smith, Waite and

Schiemann LJ) took a different view, holding that the wife was entitled to half-share in the property. a

[54] The leading judgment (with which the other two members of the court agreed) was given by Waite LJ. He indorsed the view of the county court judge that, in the absence of any discussion or agreement at the time of the purchase, the wife's claim to have a beneficial interest in the property depended on her being held to have made a monetary contribution (see [1995] 4 All ER 562 at 569). b But if she had made a contribution equal to one-half of the wedding gift—as the judge had been entitled to hold on the evidence—then this was a case within the second of the categories identified by Lord Bridge in *Rosset's* case. Waite LJ then addressed the question (at 570):

'(B) Is the proportion of Mrs Cooke's beneficial interest to be fixed solely c by reference to the percentage of the purchase price which she contributed directly, so as to make all other conduct irrelevant?'

He accepted the submission on behalf of the bank that—

'in determining (in the absence of evidence of express agreement) d whether a party unnamed in the deeds has any beneficial interest in the property at all the test is the stringent one stated by Lord Bridge of Harwich in *Lloyds Bank plc v Rosset* [1990] 1 All ER 1111 at 1119, [1991] 1 AC 107 at 133';

that is to say that (for a case to fall within the second of Lord Bridge's categories) e it was, at the least, extremely doubtful whether anything less than direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will 'justify the inference necessary to the creation of a constructive trust'. He summarised the further submission advanced on behalf of the bank in these terms ([1995] 4 All ER f 562 at 571):

'By parity of reasoning, in cases where a direct contribution has been duly proved by the partner who is not the legal owner (thus establishing a resulting trust in his or her favour of *some* part of the beneficial interest) the proportion of that share will be fixed at the proportion it bears to the overall price of the property. Although the proportion may be enlarged by g subsequent contribution to the purchase price, such contributions must be direct—ie further cash payments or contribution to the capital element in instalment repayments of any mortgage under which the unpaid proportion of the purchase remains secured. Nothing less will do.' (Waite LJ's emphasis.) h

As he pointed out, that submission was based on the decision of this court in *Springette's* case.

[55] After referring to the observations of Dillon LJ in *Springette v Defoe* [1992] 2 FCR 561 at 567 which I have already set out earlier in this judgment, and having compared the approach of the same judge in *McHardy & Sons (a firm) v Warren* j [1994] 2 FCR 1247—in which Dillon LJ had said this (at 1250):

'To my mind it is the irresistible conclusion that where a parent pays the deposit, either directly to the solicitors or to the bride and groom, it matters not which, on the purchase of their first matrimonial home, it is the intention of all three of them that the bride and groom should have equal interests in

a the matrimonial home, not interests measured by reference to the percentage half the deposit [bears] to the full price.'

—Waite LJ went on to observe ([1995] 4 All ER 562 at 572):

b 'I confess that I find the differences of approach in these two cases mystifying. In the one a strict resulting trust geared to mathematical calculation of the proportion of the purchase price provided by cash contribution is treated as virtually immutable in the absence of express agreement: in the other a displacement of the cash-related trust by inferred agreement is not only permitted but treated as obligatory.'

c He found the guidance out of that dilemma which he sought in the passage in the speech of Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780 at 792–793, [1971] AC 886 at 908–909, which I have set out earlier in this judgment. As he said, it is in that section of Lord Diplock's speech that the approach to be adopted by the court when evaluating the proportionate shares of the parties—once it has been duly established, through the direct contributions of the party without legal title, d that some beneficial interest was intended for both—is to be found. That, of course, had been the view of Browne-Wilkinson V-C, in *Grant v Edwards* [1986] 2 All ER 426 at 437–438, [1986] Ch 638 at 655.

[56] It was to the decision in *Grant v Edwards* that Waite LJ then turned. He said ([1995] 4 All ER 562 at 573):

e 'The decision of this court in *Grant v Edwards* [1986] 2 All ER 426, [1986] Ch 638 also affords helpful guidance. The context was different, in that the court was there dealing with a legal owner who had made representations to the occupier on which the latter had relied to her detriment so as to introduce equities in the nature of estoppel. Once a beneficial interest had been f established by that route, however, the court then proceeded—as I read the judgments—to fix the proportions of the beneficial interests on general grounds which were regarded as applying in all cases. That appears from the judgments of Nourse LJ ([1986] 2 All ER 426 at 434, [1986] Ch 638 at 650) and of Browne-Wilkinson V-C ... [1986] 2 All ER 426 at 439–440, [1986] Ch 638 g at 657–658 ...'

[57] Waite LJ then cited the passage from the judgment of Browne-Wilkinson V-C which I have already set out, and continued (at 574):

h 'The general principle to be derived from *Gissing v Gissing* and *Grant v Edwards* can in my judgment be summarised in this way. When the court is proceeding, in cases like the present where the partner without legal title has successfully asserted an equitable interest through direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their j beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that

search proves inconclusive does the court fall back on the maxim that "equality is equity".

[58] On the basis of that analysis he concluded that the question posed under 'B' should be answered in the negative. The court is not bound to deal with the matter on the strict basis of the trust resulting from the cash contribution to the purchase price, and is free to attribute to the parties an intention to share the beneficial interest in some different proportions. He then addressed a further submission advanced on behalf of the bank in that case, which he put as question (C): '(C) Can an agreement be attributed by inference of law to parties who have expressly stated that they reached no agreement?' After referring, again, to the passage from the judgment of Dillon LJ in *Springette v Defoe* [1992] 2 FCR 561 at 567 which I have set out earlier in this judgment and to the passage in the judgment of Steyn LJ (at 569)—also set out earlier in this judgment—Waite LJ concluded that that question, also, should be answered in the negative (see [1995] 4 All ER 562 at 575):

'I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one.'

As I have said, it was on that passage that Judge Hallon relied in the present case.

[59] In reaching that conclusion Waite LJ had rejected the submission that, if the parties themselves had testified on oath that they made no agreement, there was no scope for equity to make one for them. He had said this (at 575):

'That is a submission which, if it fell to be considered without assistance from authority, I would reject instinctively on the ground that it runs counter to the very system of law—equity—on which it seeks to rely. Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.'

[60] I return, therefore, to the first question on this appeal—whether the judge was required by the decision of this court in *Springette v Defoe* [1992]

a 2 FCR 561 to find that, in the absence of some shared intention as to the proportions in which they should be entitled to the property communicated between them at the time of the purchase, the property was held upon a resulting trust for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to the respective financial contributions which they had made to the acquisition cost. In my view the judge was not so required. For my part, I doubt whether
b the observations in *Springette's* case upon which the appellant relies did, in truth, reflect the state of the law at the time when that appeal was decided. Be that as it may, they have not done so since the decision of this court in *Midland Bank plc v Cooke*. I reject the submission, in so far as it was pursued in argument, that *Cooke's* case was wrongly decided. But I think that the law has moved on since that decision.

c DEVELOPMENTS SINCE THE DECISION IN *MIDLAND BANK PLC v COOKE*

[61] The judgments of this court in *Cooke's* case were handed down in July 1995. Within a few months the familiar question 'what is the interest of one unmarried cohabitee in the house purchased in the name of the other as a home
d in which they intend to live as man and wife' was before this court, again, in *Drake v Whipp* [1996] 2 FCR 296. Peter Gibson LJ identified the point in the opening paragraph of his judgment (at 297–298):

'Yet again this court is asked to rule on a dispute between a man and a woman, who cohabited but were not married to each other, as to their
e respective beneficial interests in a property which they purchased to be their home but which was put into the man's name only. The usual lengthy litany of authorities as well as more recent additions have been recited to us and, as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law. A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of
f the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates on a presumed intention of the contributing party in the absence of rebutting evidence of actual intention.'

[62] In that case—as in *Cooke's* case and the present case—each party had
g made a financial contribution to the acquisition of the property. Mrs Drake had provided £25,000 towards the purchase price of £61,254. The property (which had been a barn) was conveyed into the sole name of Mr Whipp. There was no declaration of trust. The property required substantial work to convert it to a dwelling. That work cost £129,536; of which Mrs Drake contributed £13,000.
h The remainder of the cost of conversion was provided by Mr Whipp from his own resources. After they had lived together in the property as man and wife for a few years the relationship came to an end; Mrs Drake moved out of the property; and commenced proceedings in the county court for a declaration that she and Mr Whipp were entitled to the property in equal shares or in such
j shares as the court might think fit. On the basis of their respective financial contributions, the county court judge held that Mrs Drake was entitled to share to the extent of 19.4%—that being the proportion which her aggregate contributions (£38,000) bore to the whole cost of acquisition and conversion (£195,790). On appeal Mrs Drake contended for a share of 40.1%—that being the proportion which her contribution to the purchase price (£25,000) bore to the cost of acquisition (£61,250). The Court of Appeal held that a 'fair share'

would be one-third; and varied the county court order accordingly. It is material, in the context of the present appeal, to analyse the reasoning which led the court to that conclusion.

[63] The leading judgment (with which the other members of the court, Hirst LJ and Forbes J, agreed) was delivered by Peter Gibson LJ. After setting out the facts, he cited the familiar passage in *Lloyds Bank plc v Rosset* [1990] 1 All ER 1111 at 1118–1119, [1991] 1 AC 107 at 132–133, in which Lord Bridge had explained the distinction between those cases in which, at the time of the acquisition, there has been some agreement, arrangement or understanding between the parties that the property was to be shared beneficially (albeit, not an agreement or understanding as to the extent of their respective beneficial shares) and those cases in which there had been no such agreement or arrangement to share. He went on to say this, ([1996] 2 FCR 296 at 299–300):

‘This passage was read twice to the Judge. But nevertheless it was the submission of [counsel] for Mrs Drake that Mr Whipp held [the property] not on a constructive trust but as trustee on a resulting trust, both parties having made contributions to the purchase price, on the application of the principle of *Dyer v Dyer* (1788) 2 Cox Eq Cas 92. However that principle could not apply if (1) there was a common intention to share the property beneficially found to exist on the application of the guidance given by Lord Bridge, whether by dint of a finding of an agreement, arrangement or understanding on evidence of express discussions between the partners or by ready inference from direct contributions to the purchase price by the partner who is not the legal owner, and (2) that partner has acted to his or her detriment in reliance on the common intention. In the present case it seems to me that the Judge made findings and there was undisputed evidence which amounted to there being a common understanding between the parties that they were to share beneficially.’

Peter Gibson LJ observed that he found it ‘all the more remarkable’ that, given that evidence of common understanding, the debate in the court below had been based solely on the existence of a resulting trust; and had turned on whether it was permissible, in that context, to take account of the respective contributions to the costs of conversion as well as the contributions to the cost of acquisition. The county court judge had found that it was. Peter Gibson LJ said (at 300–301):

‘Mrs Drake now appeals to this court. [Counsel] submits that the Judge wrongly conflated the separate doctrines of constructive trust and resulting trust, whereas he was only concerned with a resulting trust. That, he submitted, required attention to be paid only to the cost of acquisition of the property, the cost of its subsequent enhancement being irrelevant. When it was put to him that this was a case of a constructive trust by reason of a common understanding or intention acted on by his client to her detriment, he submitted that there had to be a common understanding or intention as to the respective shares to be taken by the beneficial owners. That is an impossible argument in the light of the authorities (see, for example, the speech of Lord Diplock in *Gissing v Gissing* ([1970] 2 All ER 780 at 791–793, [1971] AC 886 at 907–909)). All that is required for the creation of a constructive trust is that there should be a common intention that the party who is not the legal owner should have

a a beneficial interest and that that party should act to his or her detriment in reliance thereon.'

[64] As I have indicated, this court, in *Drake's* case, was in no doubt that it had been the common understanding and intention of the parties, at the time that the property was acquired, that each should have some beneficial interest. In those circumstances—notwithstanding a concession by counsel for Mr Drake that there had been no common intention—the court held that—

'it would ... be artificial in the extreme to proceed to decide this appeal on the false footing that the parties' shares are to be determined in accordance with the law on resulting [trusts]' (see [1996] 2 FCR 296 at 301).

c The case was plainly one of a constructive trust. So it was to be approached on the basis explained by this court in *Grant v Edwards*—the judgments which Peter Gibson LJ described as 'particularly helpful and illuminating'. After setting out the passage in the judgment of Browne-Wilkinson V-C ([1986] 2 All ER 426 at 439, [1986] Ch 638 at 657–658), which I have cited earlier in this judgment, and having referred again to the speech of Lord Bridge in *Rosset's* case—in particular, to the passage at [1990] 1 All ER 1111 at 1119, [1991] 1 AC 107 at 133, where Lord Bridge observed that the shares to which the female partners in *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338 and *Grant v Edwards* were held entitled were in no sense proportionate to their actual contributions to the acquisition or enhancement costs—Peter Gibson LJ went on to say this ([1996] 2 FCR 296 at 302):

f 'In the present case the Judge has found what was the common intention of the parties as to their beneficial shares, but the only direct evidence in support of that finding was Mr Whipp's evidence as to his own intention. The Judge appears to have imputed the like intention to Mrs Drake although there is nothing in her evidence to support it. Further the Judge refused to take into account the contributions of the parties by way of their labour, being unquantified in monetary terms, and similarly Mrs Drake's other contributions to the household were ignored. No doubt this was because he was not invited to consider the matter on the basis of a constructive trust. In my judgment the Judge's finding on common intention cannot stand in the absence of any evidence that Mrs Drake intended her share to be limited to her direct contributions to the acquisition and conversion costs. I would approach the matter more broadly, looking at the parties' entire course of conduct together. I would take into account not only those direct contributions but also the fact that Mr Whipp and Mrs Drake together purchased the property with the intention that it should be their home, that they both contributed their labour in 70 per cent / 30 per cent proportions, that they had a joint account out of which the costs of conversion were met, but that that account was largely fed by his earnings, and that she paid for the food and some other household expenses and took care of the housekeeping for them both. I note that whilst it was open to Mrs Drake to argue at the trial for a constructive trust and for a 50 per cent share, she opted to rely solely on a resulting trust and a 40.1 per cent share. In all the circumstances I would hold that her fair share should be one-third.'

[65] It is very difficult, if not impossible, to find anything in the facts in *Drake's* case to suggest that either of the parties ever gave thought to an arrangement under

which the property should be shared in the proportions two-thirds and one-third; let alone that that was ever their common intention. Nor do I think that Peter Gibson LJ approached the matter on that basis. As he said (at 301), 'in constructive trust cases, the court can adopt a broad brush approach to determining the parties' respective shares'. And that is what he did, as he acknowledged in the passage which I have just set out (at 302)—'I would approach the matter more broadly, looking at the parties' entire course of conduct together.' That approach, as it seems to me, had received the approval of the House of Lords some 35 years earlier, in *Gissing v Gissing* [1970] 2 All ER 780 at 792, [1971] AC 886 at 909 per Lord Diplock; had been indorsed (at least by Browne-Wilkinson V-C) in *Grant v Edwards* [1986] 2 All ER 426 at 439, [1986] Ch 638 at 657; and had been acknowledged and accepted by Nourse LJ in *Stokes v Anderson* [1991] FCR 539 at 543. If these problems are to be solved by an analysis based on constructive trust, which requires the imputation of some common intention at the time of acquisition, then, as Nourse LJ observed in *Stokes's* case (at 543): 'The court must supply the common intention by reference to that which all the material circumstances have shown to be fair.' That is, I think, what Waite LJ had in mind when he referred, in *Midland Bank plc v Cooke* [1995] 4 All ER 562 at 575, to 'equity's assistance in formulating a fair presumed basis for the sharing of beneficial title [in a case where the parties] had been honest enough to admit they never gave ownership a thought ...'.

[66] Once it is recognised that what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair, it seems to me very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result; and that it may be more satisfactory to accept that there is no difference, in cases of this nature, between constructive trust and proprietary estoppel. It is clear that Browne-Wilkinson V-C, in *Grant v Edwards* thought that there was much to be said for that view. In *Stokes's* case, Nourse LJ seems to have thought the same. More recently, in *Yaxley v Gotts* [2000] 1 All ER 711 at 721, [2000] Ch 162 at 176, Robert Walker LJ observed that—

'in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts [estoppel and constructive trust] coincide';

and ([2000] 1 All ER 711 at 724, [2000] Ch 162 at 180) that 'the species of constructive trust based on "common intention" ... is closely akin to, if not indistinguishable from, proprietary estoppel'. He found support for those observations in the three cases to which much reference has been made in this judgment—*Gissing v Gissing*, *Grant v Edwards* and *Lloyds Bank plc v Rosset*.

[67] For completeness, I should mention that we were referred to the recent decision of this court in *Goodman v Carlton* [2002] EWCA Civ 545, [2002] 2 FLR 259. The question, in that case, was described by Mummery LJ (at [2]) as—

'an interesting point on resulting trusts in a case where the purchase of property acquired for the sole use and occupation of one party is partly financed by a joint mortgage on the property.'

It is important to have in mind that the appellant had paid nothing towards the purchase price; that it was never intended that she should do so; and that there was nothing in the circumstances to lead to the inference that it was the common

a intention that she should have any beneficial interest in the house (see [22](vii) and (ix). On its facts *Goodman v Carlton* was the inverse of the present case; and it provides little, if any, direct assistance on the principles to be applied in cases of the nature with which we are now concerned. But it is of interest to note the observation of Ward LJ (at [32]), that:

b ‘*Midland Bank v Cooke* itself can only be properly understood when it is appreciated that the court was satisfied that by the making of a direct contribution a resulting trust had been established in the wife’s favour of some part of the beneficial interest and the real question for the court in that case was to determine what proportions the parties must have been assumed to have intended for their beneficial ownership.’

c Save that I would omit from that statement the word ‘resulting’, I respectfully agree.

SUMMARY

d [68] I have referred, in the immediately preceding paragraphs, to ‘cases of this nature’. By that, I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust. In those circumstances the first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In many such cases—of which the present is an example—there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge’s categories in *Rosset*’s case. In other cases—where the evidence is that the matter was not discussed at all—an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge’s second category. And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention.

g [69] In those circumstances, the second question to be answered in cases of this nature is ‘what is the extent of the parties’ respective beneficial interests in the property?’ Again, in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, ‘the whole course of dealing between them in relation to the property’ includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.

[70] As the cases show, the courts have not found it easy to reconcile that final step with a traditional, property-based, approach. It was rejected, in unequivocal terms, by Dillon LJ in *Springette v Defoe* [1992] 2 FCR 561 at 567 when he said that: 'The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair.' Three strands of reasoning can be identified. (1) That suggested by Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780 at 793, [1971] AC 886 at 909 and adopted by Nourse LJ in *Stokes v Anderson* [1991] FCR 539 at 543. The parties are taken to have agreed at the time of the acquisition of the property that their respective shares are not to be quantified then, but are left to be determined when their relationship comes to an end or the property is sold on the basis of what is then fair having regard to the whole course of dealing between them. The court steps in to determine what is fair because, when the time came for that determination, the parties were unable to agree. (2) That suggested by Waite LJ in *Midland Bank plc v Cooke* [1995] 4 All ER 562 at 574. The court undertakes a survey of the whole course of dealing between the parties 'relevant to their ownership and occupation of the property and their sharing of its burdens and advantages' in order to determine 'what proportions the parties must be assumed to have intended [from the outset] for their beneficial ownership'. On that basis the court treats what has taken place while the parties have been living together in the property as evidence of what they intended at the time of the acquisition. (3) That suggested by Browne-Wilkinson V-C, in *Grant v Edwards* [1986] 2 All ER 426 at 439, [1986] Ch 638 at 656, 657 and approved by Robert Walker LJ in *Yaxley v Gotts* [2000] 1 All ER 711 at 722, [2000] Ch 162 at 177. The court makes such order as the circumstances require in order to give effect to the beneficial interest in the property of the one party, the existence of which the other party (having the legal title) is estopped from denying. That, I think, is the analysis which underlies the decision of this court in *Drake v Whipp* (see [1996] 2 FCR 296 at 302).

[71] For my part, I find the reasoning adopted by this court in *Cooke's* case to be the least satisfactory of the three strands. It seems to me artificial—and an unnecessary fiction—to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter. The same point can be made—although with less force—in relation to the reasoning that, at the time of the acquisition, their common intention was that the amount of the respective shares should be left for later determination. But it can be said that, if it were their common intention that each should have some beneficial interest in the property—which is the hypothesis upon which it becomes necessary to answer the second question—then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair. But, as I have said, I think that the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel.

DETERMINATION OF THE PRESENT APPEAL

- a [72] Judge Hallon directed herself that, in the light of *Cooke's* case, her task was to 'look to the whole course of dealings to infer what the agreement between these parties was'. She found that 'all the evidence ... clearly shows that both were evincing an intention to share the benefit and the burden of this property [35 Dickens Close] jointly and equally'. But, in reaching that conclusion, she had held that that was the continuation of a 'long-term plan' which had begun before
- b 39 Page Close, Bean, had been purchased. In my view, although the judge may have been right to identify a long-term plan, in general terms, that the parties would acquire a property 'through purchase with the advantageous discount available to a council tenant, with a view subsequently to moving on to better accommodation'; she was plainly wrong to take the view that it was a necessary incident of that plan that each property would be owned jointly or 'jointly and
- c equally'. The grant of a charge over 39 Page Close to secure Mr Hiscock's advance towards the purchase price of that property is inconsistent with an intention that that property should be owned jointly or in equal shares. And it is difficult to avoid the conclusion that the judge placed undue weight on the fact that (as she found) the parties regarded both 39 Page Close and 35 Dickens Close
- d 'as their [joint] home'. It does not follow from the fact that parties live together in a house that they both regard as their home that they share the ownership of that house equally.

[73] If the judge had found, as was alleged by Mrs Oxley in para 8 of her particulars of claim, that—

- e 'it was expressly the joint intention of the claimant and the defendant at the time of [35 Dickens Close] that they should share the beneficial ownership of that property equally ...'

- f I would taken the view that it would be wrong for this court to go behind that finding of fact. But, as I have said, she did not make that finding of fact; and we have seen no evidence upon which she could have done so. This must, I think, be seen as a case where there is no evidence of any discussion between the parties as to the amount of the share which each was to have. And, on that basis, the judge asked herself the wrong question. She should not have sought, by reference to the conduct of the parties while they were living together at
- g 35 Dickens Close, to determine what intention both were then 'evinced'—unless, by that, she was able to find a common intention, communicated to each other, to determine, definitively, the shares which had been left undetermined at the time of acquisition. She might have asked herself whether their subsequent conduct, while living together at 35 Dickens Close,
- h was consistent only with a common intention, at the time of the acquisition, that their shares should be equal; but she did not. The right question, in the circumstances of this case, was 'what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?'

- j [74] I think that that is a question to which this court can, and should, give an answer. I do not think it necessary to remit the matter to the county court. In my view to declare that the parties were entitled in equal shares would be unfair to Mr Hiscock. It would give insufficient weight to the fact that his direct contribution to the purchase price (£60,700) was substantially greater than that of Mrs Oxley (£36,300). On the basis of the judge's finding that there was in this case 'a classic pooling of resources' and conduct consistent with an intention to

share the burden of the property (by which she must, I think, have meant the outgoings referable to ownership and cohabitation), it would be fair to treat them as having made approximately equal contributions to the balance of the purchase price (£30,000). Taking that into account with their direct contributions at the time of the purchase, I would hold that a fair division of the proceeds of sale of the property would be 60% to Mr Hiscock and 40% to Mrs Oxley. a

[75] I would set aside the order of 20 May 2003; declare that Mrs Oxley is entitled to 40% of the proceeds of sale of 35 Dickens Close; and adjust the sum payable to her by Mr Hiscock accordingly. b

MANCE LJ.

[76] I agree. c

SCOTT BAKER LJ.

[77] I also agree.

Appeal allowed to extent indicated. d

Ian Denham Barrister.

**Lloyd-Wolper v Moore and another
(National Insurance Guarantee Corp plc,
Part 20 claimant, Moore and another, Part
20 defendants)**

[2004] EWCA Civ 766

COURT OF APPEAL, CIVIL DIVISION

PILL, RIX LJ AND SIR WILLIAM ALDOUS

25 MAY, 18 JUNE 2004

Motor insurance – Insurer liable to pay amount in respect of liability of a person not insured by a policy – Causing or permitting use of vehicle giving rise to liability – Road Traffic Act 1988, s 151(8)(b).

In 1996 M completed a proposal for motor insurance. He included his son, the first defendant, as a driver, stating that he was aged 17 and held a full driving licence. Those were M's honest beliefs but the first defendant was in fact 16 years old and while he held what purported to be a driving licence, it was not valid, being based on a driving test taken before the minimum age. Section 151^a of the Road Traffic Act 1988 imposed a duty on insurers to satisfy judgments against persons insured against third party risks. Under s 151(8)(b) of the 1988 Act, where an insurer became liable to pay an amount in respect of a person who was not insured by a policy he was entitled to recover the amount from any person who, inter alia, 'caused or permitted the use of the vehicle which gave rise to the liability'. Driving a car owned by his father, the first defendant was involved in a collision with a vehicle driven by the claimant and the claimant brought a claim for damages for personal injuries against the first defendant and M's insurers, who had declined cover under M's policy. The insurers brought Pt 20 proceedings against M and the first defendant. The claimant obtained judgment by consent against the first defendant and the insurers, and in the Pt 20 proceedings, the district judge gave summary judgment in favour of the insurers. M appealed and the judge dismissed his appeal. M appealed to the Court of Appeal contending: (i) that he had not permitted the first defendant to drive the vehicle within the meaning of s 151(8)(b) in that he had honestly and genuinely believed that the first defendant had been aged 17 and held a full driving licence, that had he known the truth he would not have given him permission, so that the permission was founded on and conditional upon a belief, induced by misrepresentation by first defendant, that he had passed his driving test, had obtained a valid licence and was entitled to drive; and (ii) that the meaning of permission under s 151(8)(b), which gave rise to a civil liability, was not the same as the meaning of permission under s 143(1)(b)^b of the 1988 Act, where causing or permitting any other person to use a motor vehicle without a policy of insurance in force was a criminal offence.

^a Section 151, so far as material, is set out at [6], below

^b Section 143, so far as material, is set out at [13], below

Held – The word ‘permitted’ in s 151(8)(b) of the 1988 Act should be construed in the same way as ‘permits’ in s 143(1)(b). A permission which would arise only subject to and upon the fulfilment of a condition was not a permission until that condition was fulfilled. However, a permission was given for the purposes of the section when there was an honest, although mistaken belief as to the circumstances of the person to whom permission was given. A permission did not cease to be a permission for the purposes of the statute because, in good faith, the person giving it believed that the person to whom it was given was covered by the policy when in fact that person was not. There was no basis for distinguishing between a mistaken belief induced by a misrepresentation and such a belief formed for any other reason. In the instant case the permission had been given based on a mistaken belief; it had not been subject to the fulfilment of a condition. The appeal would, accordingly, be dismissed (see [21], [25], [26], [28], [32], [33], [44], below).

Newbury v Davis [1974] RTR 367, *Baugh v Crago* [1975] RTR 453, *Ferrymasters Ltd v Adams* [1980] RTR 139, *DPP v Fisher* [1992] RTR 93 considered.

Notes

For the Road Traffic Act 1988, s 151, see 38 *Halsbury's Statutes* (4th edn) (2001 reissue) 964.

For the duty of insurers to satisfy judgment against persons insured, see 40(1) *Halsbury's Laws* (4th edn reissue) para 662.

Cases referred to in judgments

Baugh v Crago [1975] RTR 453, DC.

DPP v Fisher [1992] RTR 93, DC.

Ferrymasters Ltd v Adams [1980] RTR 139, DC.

Lyons v May [1948] 2 All ER 1062.

Monk v Warbey [1935] 1 KB 75, CA.

Newbury v Davis [1974] RTR 367, DC.

Appeal

Charles Moore (the appellant), the defendant in Pt 20 proceedings brought against him by the National Insurance Guarantee Corporation plc (the respondents) arising out of a claim for damages for personal injuries brought by Philip Owen Lloyd-Wolper against Robert Moore and the respondents, appealed from the decision of Judge Charles Harris QC, sitting as a deputy High Court judge, at Oxford County Court on 19 September 2003, dismissing his appeal from the decision of District Judge Matthews on 30 April 2003 giving summary judgment in the Pt 20 proceedings in favour of the respondents. The facts are set out in the judgment of Pill LJ.

Martin Strutt (instructed by *Brooke North*, Leeds) for the appellant.

Jason Evans-Tovey (instructed by *Edwards Duthie*, Ilford) for the respondents.

a 18 June 2004. The following judgments were delivered.

PILL LJ.

b [1] This is an appeal from a decision of Judge Charles Harris QC, sitting at Oxford County Court as a deputy High Court judge, whereby on 19 September 2003 he dismissed an appeal by Mr Charles Moore ('the appellant') against a judgment of District Judge Matthews. On 30 April 2003, the district judge gave summary judgment in favour of National Insurance Guarantee Corporation plc ('the respondents') against the appellant for £189,295 and costs.

c [2] The respondents' claim arose out of a claim brought by Mr Lloyd-Wolper against the appellant's son, Robert, for personal injuries caused in a road traffic collision on 26 March 1997. A Toyota Carina motor car owned by the appellant and driven by his son Robert Moore was involved in a collision with a vehicle driven by Mr Lloyd-Wolper. The vehicle was insured with the respondents under a motor trader's policy, the appellant being a dealer in secondhand cars.

d [3] The policy did not cover Robert Moore for two reasons, first, he did not possess a valid driving licence and, secondly, there was a 1600cc restriction upon the type of car Robert Moore could drive under the policy when driving for social, domestic or pleasure purposes. The vehicle's capacity was 1760cc and it was being used for purposes of pleasure at the material time.

e [4] Mr Lloyd-Wolper had brought proceedings against Robert Moore and, by virtue of the provisions of the Road Traffic Act 1988, against the respondents who had declined cover under the appellant's policy. CPR Pt 20 proceedings were brought by the respondents against both the appellant and Robert Moore. On 14 November 2002, Mr Lloyd-Wolper obtained judgment by consent against the respondents and Robert Moore in the sum of £180,000. A further sum of £9,295 was paid by the respondents to a passenger in the vehicle. In the Pt 20
f proceedings, the respondents obtained judgment against Charles Moore and Robert Moore plays no part in the proceedings.

g [5] While it does not affect the outcome of the present appeal, it should be added that, in separate proceedings, the appellant sought damages from his insurance broker on the ground that the broker had represented to the appellant that Robert Moore was insured to drive a car such as the 1760cc Toyota Carina 1760. The claim was settled in the sum of £100,000.

h [6] In seeking relief against the appellant, the respondents relied on the provisions of s 151(8) of the 1988 Act. Section 151 imposes a duty on insurers to satisfy judgments against persons insured against third party risks. It is common ground that the section applies to the judgment obtained by
i Mr Lloyd-Wolper and that the sums were payable by the respondents to third parties 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy' (s 151(5)). Subsection (8) provides:

j 'Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy or whose liability is not covered by a security, he is entitled to recover the amount from that person or from any person who—(a) is insured by the policy, or whose liability is covered by the security, by the terms of which the liability would be covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and (b) caused or permitted the use of the vehicle which gave rise to the liability.'

It is not disputed that the requirements of sub-para (a) are satisfied. The main issue below and in this appeal is whether the appellant 'caused or permitted the use of the vehicle' within the meaning of the section. That he knew that Robert Moore was driving the vehicle and that he allowed such use is not in issue. A second issue raised at the hearing was as to the effect of Robert Moore not having been insured under the policy because of the engine capacity of the vehicle driven.

[7] In his proposal form dated 11 December 1996 the appellant, giving details of persons who would drive vehicles, stated that Robert Moore was 17 years of age, had a full licence and that pleasure use was required for him restricted to vehicles of 1600cc. That restriction was reflected in the cover note issued. In fact he was not 17 until 18 January 1997. Moreover, while he held what purported to be a driving licence, it was not a valid licence because it was based on a driving test taken when he was 16 years of age, the minimum age for a test being 17 years. Robert Moore was not insured by the policy, first, because he did not have a valid driving licence and, secondly, because the vehicle being driven for pleasure purposes exceeded 1600cc in capacity.

[8] The appellant's defence was that, while in ordinary language he had given his son Robert Moore permission to drive the vehicle, there was no permission within the meaning of the word 'permitted' in s 151(8)(b) of the 1988 Act. In answer to the claim that the appellant represented that Robert Moore was aged 17 and held a full driving licence, the appellant pleaded in his defence that, when he completed the proposal form, 'he honestly and genuinely believed that the said Robert Moore was aged 17' and that he 'honestly and reasonably believed that Robert Moore held a full driving licence'. That amounts, it is submitted, against the background of a driving test taken at age 16, to a claim that Robert Moore misrepresented the position to his father. It was also pleaded that—

'at all material times [the appellant] was dyslexic and had difficulty in reading and writing; he had four children and did not and cannot remember any of their dates of birth so that at no time did it occur to him that Robert Moore was only 16 and not 17. [When reporting the accident to the respondents he put his son's age at 18 years when in fact he was 17.] It was only recently that [the appellant] was made aware of the fact that Robert Moore applied for, sat and passed the driving test when only 16 years old.'

It is submitted that the appellant did not have the requisite knowledge to have caused or permitted the use of the vehicle by Robert Moore.

[9] On the application for summary judgment, the district judge referred to the pleaded case and stated:

'The contention is that had [the appellant] known the truth and realised the reality of his son's age and driving licence, he would not have granted permission although it is acknowledged that he did give his permission.'

It was argued on his behalf that the appellant should have the opportunity to provide oral evidence and have the issues tried. Oral evidence was required to test his contentions. However, provided the decision was taken, as it was, on the assumption that the appellant's pleaded case was true, no mischief arises. It was for the respondents to establish that, on the pleaded case, there

a was no realistic prospect of defeating their claim. Judge Harris, on appeal, refused an application to admit further evidence and there is no appeal against that ruling.

[10] Having referred to authority, Judge Harris found that the appellant—
b 'on his own evidence had taken no step to check how or whether his son could have had a licence, nor told him not to drive without a valid licence.'

The judge continued:

c 'It is clear on the basis of the authority discussed, the terminology of the section itself and the state of affairs disclosed in Mr Moore's statement that the insurers are indeed entitled to the judgment which the district judge gave.'

The judge also held that, irrespective of the issue about the licence, the appellant was liable because he permitted Robert Moore to drive for pleasure purposes a
d vehicle with a capacity in excess of 1600cc.

[11] For the appellant, Mr Strutt submits that the judge was in error in holding that the appellant could not bring himself within the doctrine of 'conditional permission'. The effect of the judge's construction of s 151(8)(b) of the 1988 Act was to impose liability on the appellant irrespective of his true culpability. It
e should not be construed on the basis of strict liability.

[12] The strict liability contemplated in s 143 of the 1988 Act is not appropriate to the civil liability contemplated in s 151(8), it is submitted. Mr Strutt submits that the permission given was founded upon and conditional upon a belief, induced by Robert Moore, that Robert Moore had passed his driving test, had obtained a valid licence and was entitled to drive. Since the underlying
f assumption upon which the permission was given was not fulfilled, there was no permission within the meaning of s 151(8)(b). It was also argued at the hearing of the appeal that the appellant was also not liable on the basis of permitting an over-capacity vehicle to be driven, because that consent would not have arisen but for the misrepresentation as to the licence.

[13] Reference was made to cases decided under s 143 of the 1988 Act which
g provides, in sub-s (2), that a person acting in contravention of sub-s 1(1) is guilty of an offence. Section 143(1) provides:

h 'Subject to the provisions of this Part of this Act ... (b) a person must not cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that other person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.'

j [14] In *Newbury v Davis* [1974] RTR 367, an appeal was allowed against a conviction under the equivalent section to s 143 of the 1988 Act in the Road Traffic Act 1972, also s 143. The owner of a vehicle agreed to lend it to someone else on condition that that person insured against third party risks. In the owner's absence, that person drove the car on a road without insurance. Giving the leading judgment of a Divisional Court presided over by Lord Widgery CJ, MacKenna J stated (at 370):

'In my judgment the defendant did not permit Mr Jarvis to use the car. The defendant gave no permission to use it unless Mr Jarvis had a policy of insurance to cover its use, and he had none. Having no policy of insurance, he took the vehicle without the defendant's permission. In other words, permission given subject to a condition which is unfulfilled is no permission at all. It may be that the difference is a small one between a case where the owner gives unconditional permission in the mistaken belief that the use is covered by insurance, or in the disappointed hope that it will be covered, and the case where the permission is given subject to a condition and that condition is not fulfilled. But to my mind there is a difference and it is one of legal substance. On this view of the case the defendant committed no offence.'

[15] In *Baugh v Crago* [1975] RTR 453, the prosecutor's appeal against an acquittal of a vehicle owner of an offence under s 143 of the 1972 Act was allowed in the Divisional Court. The defendant believed that a driver was the holder of a driving licence and permitted him to use the vehicle, when the driver was not a holder. Lord Widgery CJ stated (at 455):

'It is not necessary to go into the detail of *Newbury v Davis* save to say that MacKenna J, giving the leading judgment, had to consider the different situation which can arise where the owner of the car granted permission to another to drive believing that the other is covered by insurance when in fact he is not and the case where a person allows another to drive making it a condition that he shall not drive unless and until he is covered by insurance. A case falling within the second group is a case in which permission has not been granted unless and until the appropriate insurance is effected. A case in the former group is one where permission has been granted, albeit in a mistaken belief that insurance cover did exist. Of those two situations the one which prevailed in the present case, so far as the defendant is concerned, was one in which he had given permission for the use of the vehicle honestly believing, as the justices find, that there would be insurance cover but at a time when the absence of a driving licence prevented the insurance cover from being effective. Into which category does he fall? Does he fall into the category in which guilt is established because permission to drive was given, or could it be said that his granting of permission was conditional? On the justices' finding I feel driven to conclude that they did not find that he imposed a condition on the use of the van. They find that he permitted the van to be used in the honest and mistaken belief that all would be well. That is not enough on authority to excuse him, and the justices were wrong here in deciding that they could acquit.'

[16] In *Ferrymasters Ltd v Adams* [1980] RTR 139, a Divisional Court dismissed an appeal against a conviction under s 84(2) of the 1972 Act, as amended, where employers were alleged to have caused or permitted an employee to drive a vehicle on the road while not holding a driving licence authorising him to do so. When the employee had entered the employment, the employers had ensured that he held a valid driving licence but it was not their practice to check thereafter that employees renewed their driving licences. Having cited *Newbury v Davis* and *Baugh v Crago*, Waller LJ, with whom Park J agreed, stated (at 144) that the

a employers 'had failed to adopt any system with a view to ensuring that reasonable checks were made' and held that the case was indistinguishable from *Baugh v Crago*.

[17] The point was again considered by the Divisional Court in *DPP v Fisher* [1992] RTR 93, Watkins LJ presiding. Justices had dismissed an information under s 143(2) of the 1988 Act. The court considered *Newbury v Davis*, which was b the only case cited to it.

[18] Having considered the facts in *Newbury v Davis*, Watkins LJ, with whom Owen J agreed, stated (at 97-98):

c 'Newbury v Davis [1974] RTR 367, if it is to be regarded as capable of application on different facts from those in that case, has in my view to be regarded with extreme caution. In my judgment the ratio of it is capable of application only in exceptional circumstances, otherwise the danger is that the strictness of the absolute liability created by section 143(1) will be seriously undermined. It cannot be right in law that a person who lends his car to another can avoid liability merely by saying something to the other d to the effect, "Please see to it that you are insured before using the car". That is especially so if he knows little or nothing about the other's licence, if any, to drive and nothing about whether or not a reason exists that would disable that person from obtaining insurance cover.'

In *DPP v Fisher*, the defendant was asked by L to lend him a car for a journey. e The defendant, who knew that L was disqualified from driving, agreed to lend his car provided that L could find a driver who was insured for the journey and held a full valid driving licence. The defendant did not know who L would ask or that he in fact asked R to drive; R was employed as delivery driver and the defendant neither knew or met him. L did not ask R if he was insured to drive f the defendant's car, both L and R assuming without discussion that R would be insured by virtue of his employment as a delivery driver. R drove the defendant's car, was uninsured to drive it and was involved in a road traffic accident with another car as a result of which a passenger in the other car lost a leg.

[19] Dealing with the facts, Watkins LJ stated (at 98):

g 'In any event in the present case the decision in *Newbury v Davis* is in my view clearly inapplicable. There was no communication of any kind between the owner and driver. The defendant was unaware who [L] was going to ask to drive the vehicle and the defendant simply could not and did h not know whether his so-called conditional permission would be passed on to that person. Thus it may be that [R] was wholly unaware of the qualified permission. Moreover he personally had not been made subject to it by the defendant. So far as the defendant knew, [R] could have been disqualified from driving and was uninsurable. It is quite ludicrous, I think, therefore to suppose that a so-called conditional permission was granted to him. To j begin to establish such an unusual permission, a conditional one that is, the owner would have at least to have been found to have given it directly to the would-be driver of his vehicle, regardless as to whether he has also given it to some other person, a would-be passenger in the vehicle, for instance. For those reasons I would allow this appeal and send the case back to the justices with a direction to convict.'

[20] In relation to the authorities, Mr Strutt submits: (a) The approach adopted in a criminal context, where the harshness of a conviction can be mitigated when imposing sentence, is not appropriate to civil liability. (b) None of the cases deals with a misrepresentation by the driver such as occurred in this case. (c) The decision in *Ferrymasters v Adams* was based on the absence of a system under which reasonable checks were made as to whether drivers held licences. That suggests that the correct test is to consider the reasonableness of the owner's conduct. a
b

[21] For the respondents, Mr Evans-Tovey submits that the word 'permit' in s 151 appears in the same Part of the 1988 Act and deals with the same subject matter as the same word in s 143(1)(b). Part VI is headed 'Third-Party Liabilities' and 'Compulsory Insurance or Security Against Third-Party Risks'. The word in s 151(8)(b) should be construed in the same way as it has been construed by the Divisional Court in s 143(1)(b). Authorities of longstanding in that context should be followed. c

[22] Taking a strict view of a vehicle owner's potential liability to injured third parties is not a new feature of the law. In *Monk v Warbey*, [1935] 1 KB 75, the Court of Appeal construed s 35 of the Road Traffic Act 1930, which provided in sub-s 1(1): d

'Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case maybe, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.' e

By virtue of s 35(2) of the Act a person contravening the section was liable to a fine and imprisonment. f

[23] Greer LJ stated (at 79–80):

'The Road Traffic Act, 1930, under which the question arises, was passed in these circumstances: it had become apparent that people who were injured by the negligent driving of motor cars were in a parlous situation if the negligent person was unable to pay damages. Accordingly two statutes were passed, one for the purpose of enabling persons who were thus injured to recover, in the case of the bankruptcy of an insured defendant the money which would be payable to him by the insurance company. Parliament enacted that in such circumstances the insurance money should go not to the general creditors of the bankrupt defendant but to the injured person; in other words the injured person, although not a party to the insurance could make the insurance company liable. That Act – the Third Parties (Rights against Insurers) Act, 1930, did not meet the whole difficulty that had arisen because motor car owners sometimes lent their cars to uninsured persons, and if a person who borrowed a car and in driving it caused injury to a third person the remedy provided by that Act did not avail the injured person. Consequently the Road Traffic Act, 1930, was passed for the very purpose of making provision for third parties who suffered injury by the negligent driving of motor vehicles by uninsured persons to whom the insured owner had lent such vehicles. How could Parliament make provision for their protection from such risks if it did not g
h
j

a enable an injured third person to recover for a breach of s. 35? That section which is in Part II of the Act headed "Provision against third-party risks arising out of the use of motor vehicles", would indeed be no protection to a person injured by the negligence of an uninsured person to whom a car had been lent by the insured owner, if no civil remedy were available for a breach of the section.'

b It was held that a person who suffered injury by reason of a breach of s 35 could maintain an action in damages for that breach.

[24] In *Lyons v May* [1948] 2 All ER 1062, a prosecution under s 35(1) of the Road Traffic Act 1930, it was held that a person who is ignorant of the fact that there is no policy of insurance covering a vehicle may be guilty of an offence if he permits the use of the vehicles while uninsured.

c [25] In my judgment, the issue turns upon the meaning of the word 'permits' (and 'permitted') in Part VI of the 1988 Act. Notwithstanding the use, for example by Watkins LJ in *DPP v Fisher*, of the expression 'absolute liability' the cases under s 143(1) are based on a construction of the word 'permits'. A permission which would arise only subject to and upon the fulfilment of a condition is not a permission until that condition is fulfilled. However, a permission is given for the purposes of the section when there is an honest, although mistaken, belief as to the circumstances of the person to whom permission is given. A permission does not cease to be a permission for the purposes of the statute because, in good faith, the person giving it believes that the person to whom it is given is covered by the policy when in fact that person is not.

[26] I can see no justification for adopting a different approach to the word 'permitted' in s 151(8) from that taken in relation to 'permits' in s 143(1)(b). I accept the submissions of Mr Evans-Tovey on that point. *Ferrymasters v Adams* f could be and was decided on the basis of the absence of system but does not in my judgment detract from the principles established in *Newbury v Davis* and *Baugh v Crago* which were cited without disapproval. Moreover, in this context I see no basis for distinguishing between a mistaken belief induced by a misrepresentation and such a belief formed for any other reason. Remedies in contract may be available to a person induced by a misrepresentation to enter g into a contract but the principles there relevant should not in my judgment be imported into a statute which regulates and apportions responsibility for third-party liabilities arising from the use of motor vehicles.

[27] The financial effect upon an insured person of an application of s 151(8) may be extremely severe. It will not arise if the driver to whom permission is h given is covered by the policy. Moreover, as recognised in *Newbury v Davis*, the insured may protect himself by making the permission subject to the performance or fulfilment of a condition. Whether a particular permission is subject to the fulfilment of a condition will depend on the evidence. Circumstances will differ widely and I do not see advantage in acceding to Mr Evans-Tovey's invitation to catalogue circumstances in which the permission is subject to a condition. That j will be a matter of evidence. The prudent insured will ensure that the person he or she permits to drive does come within the terms of the policy. Failing that, the insured will need to make it very plain that the permission is subject to fulfilment of the condition that the driver meets the requirements of the particular policy. I would not exclude the possibility that the existence of such a condition may be inferred from the circumstances in which permission is given but the permission

of the insured evidentially is likely to be improved if the condition is expressed. In their own interests, as well as in the public interest, drivers should be conscious of the requirements in this respect. a

[28] In the present case, the permission was given and in my judgment the appellant does not begin to establish that it was subject to the fulfilment of a condition. His mistaken belief that Robert Moore held a valid driving licence does not make the permission any less a permission. Even if he reasonably believed that Robert Moore held a valid driving licence, and even if that belief resulted from a misrepresentation by Robert Moore, a permission was given for the purposes of s 151(8)(b). A permission is none the less a permission because it is induced by a misrepresentation by the proposed driver. As to a conditional permission, the pleaded case does not allege the existence of such a condition; at most, and even this is disputed, it alleges a misrepresentation by Robert Moore. (I am prepared to assume that there was a misrepresentation in order that the legal point raised by the appeal can be considered.) Neither the misrepresentation, nor the mistaken assumption or belief of the appellant, can negative the permission. Assuming the facts entirely favourably to the appellant, he had no arguable case and the district judge correctly gave summary judgment. b
c
d

[29] Robert Moore was also uninsured because the insurance policy did not cover him while driving a vehicle with an engine capacity in excess of 1600cc. It follows from my earlier conclusion that the appellant's mistaken belief that his son was covered to drive the 1760cc vehicle is no defence to the claim under s 151(8). The point is, however, taken that but for Robert Moore's misrepresentations, permission to drive would not have been given, Robert Moore would not have driven and the accident which gave rise to his liability would not have occurred. e

[30] Even if a misrepresentation had provided a defence to the claim based on the absence of a valid licence, the appellant would in my judgment have been liable for permitting the use of an over-capacity vehicle. This separate and distinct permission would not be deprived of causative effect either because the permission to drive was based upon a misrepresentation as to the licence or because a situation might have existed, but did not exist, in which permission would have been refused on licence grounds. The judge reached the correct conclusion on the capacity ground. f
g

[31] Having had the opportunity to consider the judgment of Rix LJ in draft, I add that the scenario he postulates at [41] is in my view different from that in the present case. In the present case, the permission consisted of a general permission to drive (following an assumed misrepresentation as to a valid licence) and a permission to drive an over-capacity vehicle. As to the over-capacity vehicle, no question of misrepresentation or condition arose in relation to the permission. The use of the vehicle was uninsured. If, contrary to the view Rix LJ and I have expressed, and with which Sir William Aldous agrees, a part of the permission is taken not to be a permission within the meaning of the statute because it was induced by a misrepresentation, the permission to drive the over-capacity vehicle nevertheless remains a permission within the meaning of the statute and the use of the uninsured vehicle was within s 151(8). That part of the permission not defeated by the misrepresentation survives as a permission and the appellant would not be better off in relation to what is plainly a permission by reason of a misrepresentation unconnected with it. h
j

[32] I would dismiss this appeal.

RIX LJ.

- a** [33] I agree that the appeal should be dismissed, and, subject to one diffident reservation, with the reasons given in the judgment of Pill LJ. The reservation only concerns the subsidiary point dealt with at the very end of his judgment, which he has called the capacity ground.
- b** [34] The capacity ground point only arises on the hypothesis that, contrary of course to the principal holding of Judge Charles Harris QC and of this court, a misrepresentation is to be regarded as though it were like an unfulfilled condition, so that it prevents a permission otherwise granted from ever taking effect.
- c** [35] On that hypothesis, we are asked to assume that the father (here, the appellant) must be regarded as not having permitted his son to drive the car since his consent was obtained by misrepresentation.
- d** [36] No misrepresentation was in fact even pleaded by the father in his defence, for nothing there goes beyond the mere allegation that he honestly and reasonably believed that at the time of completing the proposal form on 11 December 1996 his son was 17 and held a full driving licence. Judged therefore by his defence, the father's reliance on misrepresentation does not even get off the ground. It is only in the father's first witness statement (dated 18 July 2002) that he says that his misapprehension was induced by his son. The case made there was that there had been a rift between father and son in late 1996/early 1997 and that it was not until early 1997 that they began talking again: the son then told the father that he had passed his driving test. The statement goes on that because of his dyslexia the father could not remember his children's ages and 'It therefore did not occur to me that at the time Robert was speaking to me he in fact was only 16 and not 17.' Even on the basis that the father's resistance to the insurers' application for summary judgment should be judged in the light of that witness statement as well as the pleaded defence, there was still no case of misrepresentation: for the conversation with the son was placed in a time-scale after the making of the proposal form, and in any event it was not said to be untrue that the son had passed a driving test (nor was it untrue). It was not until the father's supplementary witness statement (dated 9 June 2003) that he revised his evidence and said that it had been in or around November 1996 that the son had produced a document indicating that he had passed his test. He then said that he believed that his son had validly passed a driving test and had no idea that he had improperly obtained a provisional licence and taken a driving test at 16, when he was under age. Even that can hardly be said to amount to any case of misrepresentation on the part of the son, but in any event the judge below did not admit that supplementary statement into the argument on the application for summary judgment.
- e**
- f**
- g**
- h**
- j** [37] In truth therefore there never was a case in misrepresentation. Nevertheless, the matter has been argued as though there was. But on that basis, what is the assumed misrepresentation? It is, I think, that the son was 17 and/or that he had a valid driving licence. It is not, however, suggested that there is any separate misrepresentation covering the additional fact that (apart from not having a valid driving licence) the son was on the occasion of the accident driving a car with a capacity of more than 1600cc. The insurers therefore rely on that fact as an entirely separate ground for saying that the father permitted the son to drive the car on the occasion in question (the capacity ground).

[38] In my judgment, this is all a rather far-fetched scenario, and that perhaps has helped to make the point rather obscure. Nevertheless, I would wish to suggest that the response to it made by Mr Strutt on behalf of the father, namely that if the misrepresentation ground is a good one for present purposes, then the son would never have been driving the car in the first place, is a good one. a

[39] The forensic place of the capacity ground as relied on by the insurers is that it is an attempt to side-step completely the misrepresentation ground. It is said: here is another ground on which the son was uninsured and yet permitted by the father to drive the car while uninsured; this ground avoids a defence based on misrepresentation and can therefore be made good whatever the authorities discussed in Pill LJ's judgment amount to. The judge below agreed, and thus decided the case against the father on the capacity ground as an independent point. b
c

[40] In my judgment, however, the capacity ground is not an independent point. It may be an entirely separate reason for the son being uninsured, but in terms of the father's liability for permitting the use of the vehicle which gave rise to the insurers' liability, it is at this stage still caught up by the misrepresentation ground (were that to be a good one). For, if once the far-fetched nature of the father's misrepresentation defence is swallowed for summary judgment purposes, as appears to have been common ground if once the misrepresentation defence were to be made good in law, then the point can be well made, at any rate for present purposes, that but for the misrepresentation the father would never have allowed the son to drive at all. And if but for misrepresentation the father would never have allowed the son to drive at all, then, on the present hypothesis that the misrepresentation point is a good point, analogous to the unfulfilled condition defence, the capacity ground has no independent force: for the son would never have been permitted to drive. It may be perfectly true that, if the misrepresentation point fails, then the fact that the father permits the son to drive a car of too great capacity is an additional reason why the son was uninsured, but that does not mean that it operates as an independent basis of permission to use if the misrepresentation ground has to be regarded as a good one. d
e
f

[41] There are so many other reasons for holding this appeal to fail that it hardly seems important to make this point in this case. But the point is perhaps important, and its underlying merit can perhaps be better understood, if one transposes the facts of this case into a scenario where an insured car owner stipulates a condition for permission to drive his car, namely that the third party has a valid driving licence, but forgets or overlooks to introduce a second condition, namely that the third party's use must be only for personal and not business purposes (where his insurance contains a condition against business use). Suppose now that the third party has no valid licence, but, ignoring the condition imposed on him, nevertheless takes the car and uses it for a business trip. His use of the car was not permitted by the insured owner at all, irrespective of the fact that, if it had been permitted because the third party did have a valid driving licence, the car would have been uninsured for the different reason based on business use. I may permit something to be done subject to two separate conditions. If one or other of them is not fulfilled, the thing is not permitted. If I forget to stipulate the second condition, but the first condition is not met, I have still not permitted the thing to be done. g
h
j

- a* [42] Were a misrepresentation to be analogous to a condition so that it could be relied on as voiding what would otherwise be the insured owner's permission, by parity of reasoning, where the misrepresentation bites so as to allow the insured owner to say that he would not have permitted the car's use if he had not been misled, the terms of the statute would not be fulfilled, and that would still be the case even though, had the misrepresentation point failed, either in law or
- b* in fact, there would be an additional reason why the permitted use was an uninsured one.

[43] In any event, however, I agree that this appeal should be dismissed.

SIR WILLIAM ALDOUS.

[44] I agree with the judgment of Pill LJ.

c

Appeal dismissed.

Kate O'Hanlon Barrister.

a

Re Gray (deceased)
Allardyce v Roebuck and others
[2004] EWHC 1538 (Ch)

CHANCERY DIVISION

RIMER J

24 MAY, 2 JULY 2004

Will – Option – Option to purchase realty – Will providing for testator's house to be offered for purchase to claimant – Will specifying periods for acceptance and completion – Claimant accepting offer within prescribed acceptance period but not completing within prescribed completion period – Whether principle requiring option to be accepted in strict compliance with terms also requiring strict compliance with conditions for completion.

b

By cl 9 of his will, the testator granted the claimant a right, in the nature of an option or a right of pre-emption, to purchase his house for a price representing a substantial discount on its value (the option). The terms of the option provided for the house to be offered for sale at that price to the claimant who then had one month from the testator's death in which to accept the offer (the acceptance period), failing which the testator's trustees were to sell the house. In the event of the claimant accepting the offer, cl 9 went on to provide that he had three months from the day of acceptance to complete the purchase (the completion period). The house would fall into residue if the claimant lost the right to exercise the option. The claimant accepted the offer within the acceptance period, but the purchase was not completed within the completion period. In subsequent proceedings, the residuary beneficiaries contended that time for completion of the purchase had been of the essence, and that accordingly the claimant had lost the benefit of the option. In resolving that issue, the court considered whether the principle that an option had to be accepted strictly in accordance with its terms also required strict compliance with the conditions for completion.

c
d
e
f
g

Held – The principle that the irrevocable offer made by an option had to be accepted strictly in accordance with its terms did not necessarily compel the conclusion that there also had to be like timely compliance with any conditions in the option as to the manner in which the accepted offer was thereafter to be carried to completion. The conditions could, of course, make it plain that timely compliance with them was essential. In the instant case, however, cl 9 did not do so, at any rate expressly, with regard to the time for completion of the accepted offer. Its fixing of time for completion was analogous to the provision in an ordinary sale and purchase contract as to the time of completion. Ordinarily, the time for such contractual completion would not be of the essence. It would only be of the essence if the contract expressly so provided, or if the nature of the subject matter of the contract or the surrounding circumstances showed that time should be considered of the essence. Clause 9 did not provide expressly that time for completion was to be of the essence. Nor was there anything in the nature of the obligation created

h
j

- a by the acceptance of the offer, or in the surrounding circumstances, pointing to an inference that the testator had intended time to be of the essence. If, alternatively, the term as to completion was better regarded as in the nature of a condition which had to be satisfied in order that the claimant could enjoy the bounty conferred on him by the accepted offer, there was still no good reason why strict timely compliance was implicitly required. It followed that the claimant was entitled to enforce his option (see [29]–[31], [33], [55], below).
- b *Brooke v Garrod* (1857) 2 De G & J 62 distinguished.
Re Bowles (decd), *Hayward v Jackson* [2003] 2 All ER 387 considered.

Notes

- c For time limits for the exercise of options and for options to purchase in wills, see respectively 9(1) *Halsbury's Laws* (4th edn reissue) para 933 and 50 *Halsbury's Laws* (4th edn reissue) para 364.

Cases referred to in judgment

- Avard, Re, Hook v Parker* [1947] 2 All ER 548, [1948] Ch 43.
- d *Allgood (decd), Re, Chatfield v Allen* (18 December 1980, unreported), CA.
Bowles (decd), Re, Hayward v Jackson [2003] EWHC 253 (Ch), [2003] 2 All ER 387, [2003] Ch 422, [2003] 2 WLR 1274.
Brooke v Garrod (1857) 2 De G & J 62, 44 ER 911; *affg* (1857) 3 K & J 608, 69 ER 1252.
Dawson v Dawson (1837) 8 Sim 346, 59 ER 137.
- e *Di Luca v Juraise (Springs) Ltd* (2000) 79 P & CR 193, CA.
Goldsmith's Will Trusts, Re, Brett v Bingham [1947] 1 All ER 451, [1947] Ch 339.
Goodwin, Re, Ainslie v Goodwin [1924] 2 Ch 26, [1924] All ER Rep 180.
Mackay v Wilson (1947) 47 SR (NSW) 315.
Taylor v Popham (1782) 1 Bro CC 168, 28 ER 1059, LC.
United Scientific Holdings Ltd v Burnley BC, Cheapside Land Development Co Ltd v Messels Service Co [1977] 2 All ER 62, [1978] AC 904, [1977] 2 WLR 806, HL.
- f

Claim

- By claim form issued under CPR Pt 8 on 8 October 2003, the claimant, Keith Allardyce, brought proceedings against the first defendant, Philip Roebuck, the executor of the estate of the late Lawrence Charles Gray (the testator), and the second to fourth defendants, Bernard Edmund Gray, Reginald Dennis Gray and Vera Elvin Dale, the testator's siblings and residuary beneficiaries, seeking to enforce a right granted to Mr Allardyce by the will. The facts are set out in the judgment.
- g
- h *Michael O'Sullivan* (instructed by *Marsons*, Bromley) for Mr Allardyce.
Penelope Reed (instructed by *Parrott & Coales*, Aylesbury) for the testator's siblings.
 Mr Roebuck did not appear.

Cur adv vult

- j 2 July 2004. The following judgment was delivered.

RIMER J.

[1] This action was started on 8 October 2003 by a Pt 8 claim form. The claimant, Keith Allardyce, seeks to enforce a right in the nature of an option or a right of pre-emption (I will call it 'the option') granted to him by cl 9 of the

will of the late Lawrence Charles Gray (the testator). The option entitled Mr Allardyce to buy the testator's house for £50,000, a price representing a substantial discount on its value. The mechanics of the option were that the house was to be offered for sale to Mr Allardyce at that price, which it was, and Mr Allardyce was then to have one month from the testator's death in which to accept the offer, which he did. The purchase was then to be completed within three months from the day of acceptance. In the event, the purchase was not completed within that period. The issue is whether, despite the non-compliance with that term of the option, Mr Allardyce is still entitled to compel the transfer to him of the house for £50,000. Mr Michael O'Sullivan represented Mr Allardyce at the trial.

[2] The first defendant is Philip Roebuck, the testator's executor. He neither appeared nor was represented before me. The second, third and fourth defendants are Bernard Gray, Reginald Gray and Vera Dale. They are siblings of the testator and are his residuary beneficiaries. If Mr Allardyce has lost his right to enforce the option, the house will fall into residue. Ms Penelope Reed represented the three siblings. Their case is that, under the option clause, time for the completion of the purchase was of the essence and so Mr Allardyce has lost the benefit of the option.

THE FACTS: CHAPTER ONE

[3] The testator owned and lived at 38 Merlin Road, Welling, Kent. He was unmarried. He made his last will on 26 November 2001. He died on 25 March 2002, at the age of about 75. He had known Mr Allardyce and his wife, Rosemary, for about 15 years. He and Mr Allardyce shared gardening interests and Mrs Allardyce gave him organ classes. She also cared for him during the last two years of his life.

[4] By his will, the testator revoked his prior wills and named Mr Roebuck as his sole executor and trustee. By cl 4 he gave a legacy of his stamp collection. By cl 5 he gave pecuniary legacies totalling £66,500 to 14 legatees (including £2,000 to Mr Roebuck, £2,000 to Mr Allardyce, £3,000 to Mrs Allardyce, £16,000 to Reginald Gray and his wife, and £16,000 each to Bernard Gray and Vera Dale). Clause 6 gave his residuary estate to his executor on trust for sale and conversion. Clause 7 gave the net residue to the three siblings. Clause 8 was an investment clause. Clause 9, the option clause, provided as follows:

'9. I DIRECT that my present property together with the contents of 38 Merlin Road Welling or such other property in which I reside at the date of my death shall be offered for sale to KEITH ALLARDYCE of 51 Danson Crescent Welling Kent in the sum of Fifty thousand pounds (£50,000.00) who shall have the period of one calendar month from the date of my death in which to accept such offer failing which my trustees shall sell the property in whichever way they think fit. If KEITH ALLARDYCE accepts the offer of purchase he shall have a period of three months from day of acceptance to complete the purchase.'

[5] Following the testator's death, Mr Roebuck instructed TG Baynes (Baynes), solicitors, to act for him in administering the estate. Baynes wrote to Mr Allardyce on 28 March 2002 informing him of his £2,000 legacy. By a separate letter of the same day they also sent Mr Allardyce a copy of cl 9 and

a explained that it gave him the opportunity to buy 38 Merlin Road (the house) for £50,000. They asked him to accept their letter 'as an offer to you to accept this offer or let us have your written confirmation that you do not wish to take the offer up'.

b [6], Mr Allardyce replied to Baynes on 11 April 2002 confirming his acceptance of the offer at £50,000. He pointed out that his acceptance was within the prescribed month and added that he understood there was a period of three months from the day of acceptance within which to complete the purchase. On 9 May, Baynes wrote to him asking for details of his solicitors. Mr Allardyce's evidence was that he had hitherto assumed that Baynes would be acting for him in the matter. Mrs Allardyce telephoned Baynes and spoke to Mr Thomas, who explained that Baynes could not act for Mr Allardyce as they were acting for the executor. He recommended that Mr Allardyce should instruct Mrs Cross, a conveyancing executive with Gough Clinton & Broom (Goughs), solicitors. This was one of a number of telephone calls Mrs Allardyce made on her husband's behalf in connection with this matter: he was at work during the day and so it was more convenient for her to make the calls.

d [7] Mr Allardyce promptly instructed Goughs, and on 10 May he informed Baynes he had done so. Mrs Allardyce made it clear to Mrs Cross at the outset that the purchase had to be completed by 11 July, the expiry of the three-month period prescribed by cl 9. Her evidence was that Mrs Cross replied that this would not be a problem. On 13 May, Mrs Cross wrote to Mr Allardyce confirming the acceptance of his instructions to act in the purchase of the house for £50,000 and her letter noted 'that the deadline for completion of this transaction is 11th July 2002'.

e [8] Mrs Cross then proceeded on the basis that what was required of her was to achieve an exchange of contracts followed by completion. She was therefore regarding the transaction as no different from a conventional domestic purchase. It appears that she was not provided with a copy of the will, but her letter to Baynes of 20 May asking for a draft contract shows that she knew they were acting in the estate of the testator. Baynes did not reply to that letter and so Mrs Cross sent a chaser on 21 June. She asked for an urgent response because—

g 'we have been instructed by our Client that the Will of the late Mr L.C.Gray states that completion of this transaction to our Client must take place by the 11th July. Please confirm as to whether the same is correct.'

h [9] There was no prompt response to that either. On 24 June, Baynes submitted an application for a grant of probate of the testator's will. Probate was granted on 1 July. On 2 July, Baynes wrote—for the first time—to Goughs, saying that as soon as they had the relevant information to hand they would send a draft contract together with any supporting documents. At that stage, only nine days of the three-month period were left. On 3 July, Baynes followed that letter up with a somewhat surprising further one, which reads:

'Further to our letter of the 2nd July, we await hearing from you with confirmation of instructions in this matter.

We are acting for Mr Roebuck, the Executor of the late Mr Lawrence Charles Gray who by his Will stipulated that Mr Allardyce shall have the

period of one calendar month from the date of his death in which to accept the offer to purchase the above property for the sum of £50,000.00. If Mr Allardyce accepts the offer, he shall have a period of three months from the date of acceptance to complete the purchase. a

In the circumstances, we await hearing from you as soon as possible.'

[10] It is no surprise that Goughs' reply on 4 July explained that they did not understand that letter and enclosed copies of their own letters of 20 May and 21 June. By this stage Mr and Mrs Allardyce were becoming worried that the 11 July deadline was approaching and completion still did not seem to be imminent. On 5 July, Mrs Allardyce telephoned Goughs and spoke to someone whose initials are SMP. That person made an attendance note recording that the opportunity to buy the house for £50,000 derived from the testator's will and that the deadline for completion was 11 July. SMP also noted that 'I told her we chased [Baynes] yesterday but she [Mrs Allardyce] is very worried because of the deadline date.' b

[11] On 5 July, Baynes sent Goughs a draft contract, office copy entries, a property information form and a copy of the grant of probate. Goughs responded on the same day with some preliminary inquiries which Baynes answered on 6 July. By this stage not only were both Mr and Mrs Allardyce worried about the 11 July deadline, so was Mr Roebuck. He called at Baynes's offices on 8 July with some conveyancing forms he had completed. An attendance note records that 'He was worried at the delay in the sale of the property and had been approached by Mr Allardyce over the fact the completion should be this Thursday.' The position was, therefore, that the clients on both sides were conscious of the deadline, and were concerned it would not be met, whereas their respective solicitors appear to have regarded it as of little importance. c

[12] On 11 July, the final day for completion, Mrs Cross wrote to Mr Allardyce telling him the contract was ready for his signature and asking him to make an appointment to sign it. Mr Allardyce received her letter on 12 July, when he rang to arrange for an immediate payment of the deposit, also offering to pay the full price. He was asked to make an appointment and the earliest date he was given was 17 July, when he attended Goughs' offices, signed the contract and provided the £5,000 deposit. On 18 July, Mrs Cross wrote to Baynes saying she was ready to exchange contracts. Baynes replied on 5 August saying that: d

'With respect completion of the transaction was due on 12th July 2002. Your client has therefore not complied with the terms of the Will and we should be obliged if you would therefore return all the papers.'

[13] That, somewhat curt, response does not in my view reflect particularly well on Mr Roebuck. The required completion was a bilateral affair, involving a transfer of the house against payment of the price. It therefore required bilateral effort, and it can be said that in this regard Mr Roebuck and his solicitors were as much at fault in failing to achieve a completion by 11 July as were Mr Allardyce and his solicitors. e

[14] Mrs Cross's response on 7 August asked Baynes to provide her with a copy of the will. Mr Broom, a partner of Goughs, entered the scene and wrote to Baynes on 8 August. He summarised the history, made moderate complaints of Baynes's handling of the matter, said that Mr Allardyce was ready f

- a and willing to complete and that unless contracts were exchanged within 48 hours Mr Allardyce would apply to the court for an extension of time to complete. Baynes's response on 13 August was that there was a strict deadline for completion which had expired a month before. They said that, without Mr Roebuck's instructions, they could not exchange contracts. No such instructions were given. On 15 August, Mr Clinton of Goughs wrote to Mr and Mrs Allardyce explaining that it was improbable that Mr Roebuck would complete the sale. He advised them to seek separate advice as to their position as against both Mr Roebuck and Goughs. Mr Allardyce replied on 20 August, making a polite complaint about Goughs' handling of the matter and observing that there had apparently been a serious breakdown in communication between Baynes and Goughs. He had paid the £45,000 balance of the purchase price to Goughs on 12 August.

- [15] That summary of events outlines the first chapter of facts. I should, however, supplement them by pointing out that both Mr and Mrs Allardyce made witness statements and were cross-examined. Their evidence made it plain that they were from the outset fully aware of the 11 July deadline and understood it to be important. They explained its importance to Mrs Cross when they first instructed her and it is clear that she knew about it. Mr Allardyce also explained how, in order to enable it to be met, he responded immediately to all Mrs Cross's requests of him. Mrs Allardyce explained that she made most of the telephone calls to Mrs Cross and always reminded her of the deadline. She said that from about 11 June onwards she rang Goughs at least twice a week. She rang on 9 July and expressed her concern that completion was due by 11 July. She rang Mrs Cross again on 10 July and explained how worried she was that completion was due the following day and said that Mr Allardyce was in a position to provide the full £50,000 immediately and sign anything he had to. She rang again on 11 July and was told by Mrs Cross that if completion was a few days late it was nothing to worry about.

- [16] There are no contemporaneous records in evidence confirming all the calls Mrs Allardyce said she made. I have not had any evidence from Goughs and do not know whether they would dispute the volume of telephone calls Mrs Allardyce claims she made. But I see no reason not to accept the evidence of both Mr and Mrs Allardyce, and I do accept it. I find that Mr Allardyce was at all material times fully aware of the three-month deadline, that he understood it was important and that he (via his wife) impressed its importance on Mrs Cross at the outset and reminded her of it several times subsequently. The correspondence shows that Mrs Cross was also fully aware of the deadline. Unfortunately, she does not appear to have regarded it as important and she allowed it to pass. Baynes also knew of the deadline, but they too allowed it to pass even though it appears that their client, Mr Roebuck, was also worried about it. I find that Mr Allardyce was ready, willing and able to complete the purchase within the three-month period, but that the reason that he did not do so is because he was let down by Goughs. All that said, Mr Allardyce's personal innocence in the matter is, however, of no direct assistance to him. That is because, for present purposes, Goughs' acts, omissions and faults must be attributed to him as their client.

- [17] If any criticism at all is to be made of Mr Allardyce, it is perhaps that he did not provide Mrs Cross with a copy of cl 9 of the will. Had he done so, Mrs Cross would have seen, in black and white, that his right to buy derived

from a testamentary option. She would also have seen its precise terms, which might perhaps have reminded her that 'An option is nearly always a ticklish thing': Jordan CJ's observation in *Mackay v Wilson* (1947) 47 SR (NSW) 315 at 318, which aptly provides the opening thought in the preface to the first edition of *Barnsley's Land Options* (1978). In particular, she might have been reminded of the principle that the exercise of an option to acquire a property interest ordinarily requires the strict observance of any specified time limits, and she might therefore have appreciated the importance of doing all she could to ensure that the purchase was completed by 11 July. But I do not consider that Mr Allardyce in fact deserves any such criticism. The correspondence shows that he told Mrs Cross enough for her to understand that his opportunity to buy derived from a testamentary option; and if she had she approached her task with proper care she should have asked for a copy of the will at the outset or ought at least, as a matter of sensible caution, to have proceeded on the basis that it was essential to complete by 11 July. By early July it must have been obvious to her that the matter was not going to be completed by 11 July. She ought then to have taken urgent stock of the situation and considered carefully how best to ensure the protection of her client's interests.

[18] The problem, of course, was that Mrs Cross's approach to the task appears to have been that she was acting for a client who was buying a house for £50,000 and therefore what was required was a formal exchange of contracts followed by completion. I infer that she may simply have regarded 11 July as a non-essential target date. Baynes also appear to have been of the view that an exchange of contracts was what was required. In my judgment, both firms of solicitors were in error about this. The precise juridical nature of a testamentary option such as that given by cl 9 may not be easy to define. But I regard three things as clear. First, that neither at the moment of the testator's death nor at the moment of the acceptance of the offer within the one-month period was or could there be any question of Mr Allardyce having any contractual right to buy the house for £50,000. That is because there was (and would be) no signed documentation satisfying s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Second, that the absence of any such contract would not prevent Mr Allardyce from (if necessary) enforcing the accepted offer against the executor, his right to do so deriving from the will and being for this purpose akin to the right of a specific devisee. Third, that it cannot have been the intention of the testator that, once the offer was accepted, his executor and Mr Allardyce should proceed to a formal exchange of contracts. All that he can have intended was that the matter would proceed straight to completion. The will did not entitle either the executor or Mr Allardyce to compel the other to negotiate an exchange of contracts (nor could it), and such an exchange was unnecessary.

[19] The failure to complete the purchase by 11 July 2002 was potentially very serious for Mr Allardyce. A valuation report shows that, in July 2002, the house and contents were worth £192,000 so that, if he had finally lost his chance of buying them for £50,000, he had lost a valuable opportunity. The testator's net estate for probate was certified as not exceeding £208,000, largely represented by the house. I have explained how the testator bequeathed legacies totalling £66,500. Mr O'Sullivan suggested, in my view correctly, that as there was so little in the estate apart from the house, the testator must have intended that most of the money with which to pay the legacies would come from the sale to Mr Allardyce.

THE FACTS: CHAPTER TWO

a [20] I move to the second chapter of events, explained in the evidence of Jennifer White, a partner in Marsons, Mr Allardyce's solicitors. She explained that Mr Allardyce instructed Marsons on about 16 August 2002 in connection with the purchase of the house and with a potential professional negligence claim^a against Goughs. She sought Mr O'Sullivan's advice. His advice, given in

b early September 2002, was that Mr Allardyce's best course of action was to sue Goughs. Marsons sent a letter before action to Goughs on 20 January 2003, whose response was that Mr Allardyce should seek to enforce the option against Mr Roebuck. Ms White sought Mr O'Sullivan's advice again, which was that the prospects of success on such a claim were not good, and so she advised Mr Allardyce to press his claim against Goughs.

c [21] There was, however, then a change of heart. On 18 February 2003, Lawrence Collins J delivered his judgment in *Re Bowles (decd)*, *Hayward v Jackson* [2003] EWHC 253 (Ch). It was reported at [2003] 2 All ER 387 on about 29 April 2003, when Mr O'Sullivan read it. His view was that it reflected a change in the law as previously understood, that it gave Mr Allardyce a viable claim to enforce

d the option against Mr Roebuck and that Mr Allardyce should anyway pursue such a claim in order to mitigate his loss.

[22] Ms White therefore advised Mr Allardyce to press such a claim and on 2 May 2003 she wrote to Baynes referring to *Re Bowles* and indicating Mr Allardyce's intention to take proceedings to enforce the option. The letter refers to the house having been vested in the testator's three siblings by an assent,

e but that was a mistake: the house was then and still is vested in Mr Roebuck as executor. Ms White wrote a rather fuller letter before action to Baynes on 9 June 2003, with a copy to Parrott & Coales, the siblings' solicitors. The action was commenced in October 2003.

f THE ISSUES

[23] I have set out the background facts fully, but they played a relatively small part in the argument. Mr O'Sullivan and Ms Reed both recognised that the main question is whether or not, on the true interpretation of cl 9, the condition that the sale should be completed no later than three months from the day of the acceptance of the offer was one in respect of which time was of

g the essence. If it was, Mr Allardyce has lost the benefit of his option. If it was not, then, subject to a further argument of Ms Reed, he has not.

[24] Mr O'Sullivan's starting point, which was not in dispute, was that the court's function is to decide what the testator's intentions were with regard to cl 9. In particular, did he intend the time limits, or either of them, to be mandatory or

h merely directory? If his intention was that they were both mandatory, then punctual compliance with both was essential, and any failure so to comply was fatal to a claim to enforce the option. If his intention was that the time limits were merely directory, then time was not intended to be of the essence, and nor has anyone since sought to make it so. Mr O'Sullivan submitted that there was nothing

j in cl 9 from which it could be inferred that the testator intended the stipulated time for completion to be of the essence. In those circumstances, he submitted there was no good reason why the option cannot still be enforced. By contrast, Ms Reed submitted that the stipulated time for completion should be regarded as a term of the option in respect of which punctual performance was mandatory. She submitted that there was nothing in *Re Bowles* pointing to any different conclusion. Her submission is that the present case is almost indistinguishable from *Brooke v*

Garrod (1857) 2 De G & J 62, 44 ER 911, which she says requires a decision in favour of the defendants. a

[25] A well-established general principle in the law of contract is that, to be valid, the exercise of an option to acquire a property interest must be performed strictly in accordance with its prescribed terms. There are many reported authorities illustrating this, a relatively recent one being the decision of the Court of Appeal in *Di Luca v Juraise (Springs) Ltd* (2000) 79 P & CR 193. b
An option is an irrevocable offer that only matures into a bilateral contract upon its due exercise. If, therefore, the exercise of the option requires a notice to be given by a particular time, then unless the notice is given by that time the option will lapse. It is perhaps not strictly accurate to talk of time for the exercise being of the essence. The real point is that, unless the offer is accepted in accordance with its terms, a purported acceptance is no acceptance at all c and so is ineffective to create a binding bilateral contract or, therefore, to entitle the grantee of the option to enforce the right that its due exercise would have given him.

[26] That principle from the law of contract is also reflected in the reported authorities on the exercise of testamentary options. This is not surprising since, d at any rate until the passing of the 1989 Act, the valid exercise of a testamentary option ordinarily gave rise to a binding bilateral contract. Another principle also to be found in the authorities is that, in the case of a testamentary gift subject to a condition (whether precedent or subsequent), it is always a question of construction whether or not strict timely compliance with the condition is required for the gift to take effect. This is illustrated by the early e decision in *Taylor v Popham* (1782) 1 Bro CC 168, 28 ER 1059, but it finds a rather fuller exposition in *Re Goodwin* [1924] 2 Ch 26, [1924] All ER Rep 180. By his will the testator bequeathed an annuity to his wife but he provided that the gift was to be void 'unless [she] shall within six calendar months after my death absolutely release and discharge my estate' from liability in respect of an f annuity he had covenanted to pay her. The will contained a residuary gift but there was no gift over of the testamentary annuity on a failure of the widow to comply with the condition. The testator died in 1901. His widow died in 1921 having in the meantime neither released the covenanted annuity nor received any payments under either annuity. *Romer J* held that a release by the widow's g executors (over two decades late) would amount to sufficient compliance with the condition in the will. It is unnecessary to relate his reasoning for that conclusion, which turned on the facts. The particular importance of his judgment lies in the following statement of general principle:

'It is well settled by authority that where a gift in a will is made subject h to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the Court to determine whether the time so specified was of the essence of the matter. In determining that question the Court must j have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or guard against; and if the Court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have

a been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition.' (See [1924] 2 Ch 26 at 30–31, [1924] All ER Rep 180 at 182.)

b [27] The co-existence of the principle of strict compliance to be found in the option cases with the more flexible principle to be found in the conditional gift cases potentially provides the basis for an element of tension in a case such as the present in which the so-called option is (for reasons given) not in the nature of an offer the acceptance of which can result in a bilateral contract but which can at most only result in a right in the beneficiary essentially equivalent to that of the donee of a conditional gift.

c [28] I turn, with both principles in mind, to consider the correct interpretation of cl 9. It must be interpreted as a whole, but it is striking that it is composed of what can, in my view, properly be regarded as two provisions. The first provision requires Mr Roebuck to offer the house to Mr Allardyce 'for sale' at £50,000, and gives Mr Allardyce one month from the date of death

d within which to accept the offer. If he does not accept it, the clause provides that Mr Roebuck shall sell the house in whatever way he thinks fit. In my view—and whether one regards that provision as in the nature of an option, a right of pre-emption or a conditional gift—the time for acceptance of the offer was strictly limited to the specified one-month period, so that if it was not so accepted it lapsed. I regard this as the natural sense of that part of the clause.

e The offer was one that was expressly only open for acceptance for a specified period and so in principle could not be accepted after that period. Moreover, cl 9 provided expressly that if it was not accepted within the period, Mr Roebuck was to sell the house, a sale which was of course to be in the open market and at full value. That is perhaps not accurately described as an express

f gift over, but I regard it as providing a clear confirmatory indication that the testator intended that, immediately the month was up, Mr Roebuck was to be entitled—indeed bound—to proceed so to sell. If the expiration of the month did not represent a strict termination of the time for acceptance, then Mr Roebuck would be uncertain as to whether and when he could proceed to sell. I regard that as inconsistent with any intention that it would still have been

g open to Mr Allardyce to accept the offer outside the one-month period. I did not in fact understand Mr O'Sullivan to suggest that the time for the acceptance of the offer did not need to be complied with strictly. Nor of course did he need to do so, because it was so complied with.

h [29] The issue between the parties is as to whether, the offer having been accepted, time was of the essence for the purposes of the three-month completion period specified in the second part of the clause. The acceptance did not result in any enforceable contract, but it did, I consider, confer on Mr Allardyce an enforceable right under the will to compel the transfer of the house to him against payment of the £50,000. I do not, however, consider that

j the principle to be found in the option cases—namely, that the irrevocable offer made by the option must, if it is to be validly accepted, be accepted strictly according to its terms—necessarily compels the conclusion that there must also be like timely compliance with any conditions in the option as to the manner in which the accepted offer is thereafter to be carried to completion. Of course, the conditions may make it plain that timely compliance with them is essential. But cl 9 does not do so, at any rate expressly, with regard to the time for completion

of the accepted offer. In my view its fixing of the time for completion can therefore be regarded as either: (i) analogous to the provision in an ordinary sale and purchase contract as to the time for completion, or (ii) a testamentary condition which must be satisfied in order for Mr Allardyce to enjoy the bounty conferred on him by the accepted offer.

[30] If the former is an appropriate analogy (and in my view it is), then ordinarily the time for such contractual completion will not be of the essence. It will only be of the essence if the contract expressly so provides, or if the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence (see *United Scientific Holdings Ltd v Burnley BC*, *Cheapside Land Development Co Ltd v Messels Service Co* [1977] 2 All ER 62 at 83, [1978] AC 904 at 944 per Lord Simon of Glaisdale). Clause 9 does not, however, provide expressly that the time for completion was to be of the essence, nor in my view is there anything in the nature of the obligation created by the acceptance of the offer, or in the surrounding circumstances, pointing to an inference that the testator intended time to be of the essence. I also consider that there is a good practical reason for inferring that he did not intend it to be of the essence. First, the 'completion' which was to take place was a bilateral matter, requiring not merely the payment of the £50,000 by Mr Allardyce but the execution in his favour of a transfer; and it must have been foreseeable that there might be unavoidable delay in achieving completion within that period. In particular, it was foreseeable that it might not be practicable for Mr Roebuck to obtain probate within that period, without which he would be in no position to give a good title to the house (in fact he only obtained probate ten days inside the three-month period, and the correspondence shows that, until then, his solicitors were not even prepared to correspond with Goughs). Secondly, and related to this, given that the testator plainly intended to confer a substantial benefit on Mr Allardyce by the option, it is difficult to see why he might have wanted to deprive him of that benefit if—perhaps for reasons outside his personal control—he was unable to complete within the three-month period, but was nevertheless ready, willing and able to do so very shortly afterwards. It is true that the £50,000 was, by inference, intended to fund the payment of the bulk of the pecuniary legacies, so that a briefly delayed completion would result in a briefly delayed payment of the legacies. But I do not regard this as pointing to the inference that time was intended to be of the essence for the purposes of completion. In my view, it is outweighed by the factors pointing the other way. The legatees would be in substantially the same position even if the completion was delayed for a short while.

[31] If, alternatively, the term as to completion is better regarded as in the nature of a condition which had to be satisfied in order that Mr Allardyce could enjoy the bounty conferred on him by the accepted offer, then again, and for like reasons as I have just given, I can still identify no good reason why strict timely compliance was implicitly required. In particular, there is no express gift over, and nor is there even any provision that, if the purchase was not completed within the three-month period, Mr Roebuck was to proceed to sell the house. If, therefore, the principle to be found in the conditional gift cases is applicable, I regard it as supporting the conclusion that the time for completion was not intended to be of the essence.

[32] Ms Reed's submission was that any conclusion that the prescribed time for completion was not of the essence would be wrong. She said that the

a inclusion in cl 9 of the express direction that, if the offer was not accepted within the month, Mr Roebuck should sell showed that time was intended to be of the essence both as regards the time for the acceptance of the offer and for the completion of the purchase. I agree with her that it shows that the offer could only be accepted within the one-month period. But I do not follow why it points to the time for completion also being of the essence. The testator gave
b no like direction to the executor in the event that the purchase was not completed within the three-month period, and I cannot interpret cl 9 as impliedly giving him such a direction. On the contrary, I regard the omission to repeat the direction at the end of the clause as probably deliberate and as positively pointing away from any intention on the testator's part to make the time for completion as of the essence. Ms Reed points to the fact that cl 9
c provides that Mr Allardyce 'shall have' three months in which to complete. I agree that is ostensibly mandatory language: but it is no more so than that of the ordinary obligation as regards completion imposed by a contract for the sale and purchase of a house or of the terms of a condition to which a testamentary gift may be made subject.

d [33] In summary, I take the view that the correct interpretation of clause 9 is that Mr Allardyce must, if he is to effect a valid exercise of the option, accept the offer within one month of the testator's death. If he does not do so, the option lapses and the executor may proceed to sell the house in the market. If he does accept it, he is regarded as becoming the owner of the house in equity and the three-month period for completion is one in respect of which time is not intended
e to be of the essence.

[34] Counsel referred me to several authorities in support of their respective arguments. It is always important to bear in mind that the task of the court in a case such as this is to interpret the particular will in question, and reported authorities on other wills in different terms may at best provide only limited
f assistance. I must, however, refer to the cited authorities.

[35] *Dawson v Dawson* (1837) 8 Sim 346, 59 ER 137 was a case in which the testator had given his house to his trustees—

g 'upon trust to permit [Joseph] at any time within three months of my decease, to become the purchaser of the same at or for the price ... of £4000 ... But should [he] not complete such purchase within three months of my decease, then I direct that [my trustees] shall, within 12 months after my decease [sell the house as they shall think fit and hold the proceeds as part of my residuary estate].'

h Joseph was also one of the three trustees, although nothing turned on that. He informed his co-trustees within two months of the death of his wish to purchase the house, to which they agreed. But he did not pay the price within the three-month period and it was not until the last day of that period that his
j co-trustees instructed their solicitor to prepare a conveyance. An issue arose as to whether, the purchase not having been completed within the three-month period, a good title could still be made to the house, although the substantive issue appears to have been whether or not Joseph's right to the house had lapsed. In a short judgment, Shadwell V-C held that it had. The essence of his reasoning appears to have been that it was a condition of Joseph's right to the house that he should not only agree to buy it but should also have paid the price

within the three-month period, even if his co-trustees were not then in a position to convey the house to him. Shadwell V-C said: a

‘... the son was to pay the money, and then the trustees were to convey the house to him. The son ought, at the least, to have placed the purchase-money under the control of the trustees: but no such act was done. How then can a purchase be said to be completed, where there was no conveyance on one side, and no payment of purchase-money on the other? A mere verbal notification of an intention to purchase, can not be said to be a completion of the purchase.’ (See (1837) 8 Sim 346 at 349, 59 ER 137 at 138.) b

The decision was, therefore, that completion of the purchase (or at least payment of the purchase price) within the three-month period was a condition of the option and strict compliance with it was required for there to be a valid exercise of the option. c

[36] Ms Reed did not place specific reliance on *Dawson v Dawson*, and it appears to me, for two reasons, to be relevantly distinguishable from the present case. First, the option was not in two parts as in the present case: it did not provide a time for the acceptance of an offer, followed by a provision as to the time for completion if the offer was accepted. In effect, it provided that Joseph could only have the house if he completed its purchase within the three-month period and it was therefore the act of completion itself which was regarded as the acceptance of the offer made by the testamentary option. Secondly, the express provision that, if the purchase was not so completed, the trustees should sell the house within 12 months of the death provides in my view further support for the decision that the time for completion was intended to be of the essence, although Shadwell V-C did not rely upon this. d

[37] The authority upon which Ms Reed placed primary reliance is *Brooke v Garrod* (1857) 2 De G & J 62, 44 ER 911. By his will, the testator directed his trustees to offer his land to his brother for £2,500, and further directed them to convey it to him on payment of the £2,500. If, however, the brother should not within one month after the testator’s death accept the offer, or should not within two months after such acceptance, pay the £2,500, the trustees were to sell the land. The testator further directed the trustees to hold the £2,500, or other the proceeds of sale, for other siblings. The brother accepted the trustees’ offer at £2,500 within one month of the testator’s death, and three days later his solicitor asked for an abstract of title. The trustees’ solicitor acknowledged the solicitor’s request, and said that he was seeing his clients on it after which nothing happened until well after the expiry of the two-month period. The brother sought to enforce the purchase. Page-Wood V-C ((1857) 3 K & J 608, 69 ER 1252) held that, as the payment had not been made in time, the right of pre-emption had gone. Lord Cranworth LC dismissed the appeal. The relevant part of his judgment ((1857) 2 De G & J 62 at 66–67, 44 ER 911 at 913) reads: e

‘According to the terms of the will he was bound to pay the purchase-money of £2500 before the 29th of December [two months after the acceptance]. He did not pay the money at that time. Is he then within the terms of the will? Clearly not within the words. It is said, that although he did not pay within the time, he did what ought to be considered as f

g

h

i

- a equivalent to payment, or ought to exonerate him from any charge of neglect. Now, I have more than once had occasion to say that I think this Court has gone to too great an extent in departing from the precise terms of the contracts into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided
- b into two contracts, i.e., one contract to do an act and another to do it at a certain time, the Court may say that these are independent stipulations. But if the contract be that on payment of a sum of £1000 at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day: or why I should be compelled to perform not my contract but another contract into which I have not entered. If cases are found in the
- c books, which go to that extent, I can only say that I cannot see the principle on which they are founded. No authority has, however, been produced in which this Court has varied the terms of a gift under which a benefit is to be taken. The rule there is—*cujus est dare ejus est disponere*—and if the donor choose to say that in the event of a person paying £2500 on or before a
- d specified day the gift shall take effect, I do not see how the Court, if the money is not paid on or before the day, can take anything as an equivalent for the payment at the prescribed time. There may be a distinction where a person, being ready and willing to comply with a condition, has been prevented from so doing. That raises a question of a different class, and I should be loth to say that the Court would not find the means of giving
- e relief if the donee had done all that in him lay, and if the delay was to be attributed to the other contracting party.'

The Lord Chancellor then explained why, on the facts, that principle did not apply in the case before him.

- f [38] *Brooke v Garrod* bears a similarity to the present case, although there are also differences. First, Lord Cranworth LC treated the right conferred on the brother as a contractual right in the nature of a right of pre-emption. There is no question of any contractual right arising in the present case, and I do not know whether Lord Cranworth LC's decision would have been different if all he had regarded himself as being concerned with was a non-contractual testamentary
- g gift subject to a condition. Secondly, Lord Cranworth LC was plainly influenced by the fact that the will made it expressly clear that one condition of the right of pre-emption was that the brother should *pay* the £2,500 within the two-month period: it is to be noted that the will did not provide for *completion* of the purchase within that period (ie a conveyance against payment of the price).
- h [39] These facts make the case relevantly different from those of the present case. That is because, whilst I regard acceptance of the offer within the one-month period as a condition which had to be satisfied strictly if Mr Allardyce was to be entitled to buy the house for £50,000, I have explained why I do not regard the subsequent direction that the purchase was to be
- j completed within the three-month period as being a condition of like kind: that was merely a provision for the due fulfilment of a right which had been acquired on the acceptance of the offer. I accept of course that it was a term, or condition, of the option, but for reasons I have endeavoured to give I do not regard it as one in respect of which the time for its performance was intended to be of the essence. It can of course be added that the will in *Brooke v Garrod* also provided expressly that, if the brother did not pay the £2,500 within the

two-month period, the trustees were to sell the land, with the proceeds to belong to other of the testator's siblings. That was in the nature of an express gift over if the option was not punctually exercised and so it provides additional support for the correctness of Lord Cranworth LC's decision on the particular facts of the case, although it is not a feature upon which he appears to have placed any reliance.

[40] Moving to the last century, *Re Goldsmith's Will Trusts* [1947] 1 All ER 451, [1947] Ch 339 concerned a will by which the testator left his whole estate to his wife for life, and subject thereto left his house to B 'but subject to the payment of the sum of £800 to my trustees within six months of my decease to form part of my residuary estate'. B did not pay the £800 within the specified time but, following the widow's death, offered to pay it within six months of her death. The issue was whether the gift had lapsed. Wynn-Parry J did not refer to the option cases, but regarded the principle summarised in *Re Goodwin* [1924] 2 Ch 26, [1924] All ER Rep 180 in relation to conditional gifts as outlining the approach he ought to adopt. Although there was no gift over of the reversionary interest in the house in default of the timely payment of the £800, he held that the testator must have intended the payment to be made within the specified period because it would have augmented the widow's income from the residuary estate. The proposed late payment of the £800 could not put all the parties substantially in the position they would have been in had the payment been made punctually because the relevant parties included the widow, who was now dead. He held, therefore, that time for the payment of the £800 must be presumed to have been intended to be of the essence.

[41] *Re Avarð, Hook v Parker* [1947] 2 All ER 548, [1948] Ch 43 is an important decision. It was, so far as I am aware, the first reported case in which the court considered the apparent conflict between the strict approach of the option cases and the more flexible approach of the conditional gift cases. The testatrix devised two cottages to her sister for life, one of which was tenanted by Mr Cornwall. She directed her trustees 'at the expiration of one month's previous notice in writing from [Mr Cornwall] to be given by him within three calendar months after the death of [the sister] and upon payment by him of the purchase price of £5000 forthwith to convey' the cottages to Mr Cornwall. The sister died, and Mr Cornwall's personal representatives claimed to exercise the option some nine days after the expiration of the three-month period. The question was whether the option had lapsed.

[42] Roxburgh J was referred to the conditional gift cases, ending with *Re Goldsmith's Will Trusts*, and said he was at first disposed to apply the principle they illustrate, because there was no question of the lateness in the exercise of the option causing any detriment to anyone. He was also referred to *Brooke v Garrod*. He pointed out that in that case the court was apparently not referred to *Taylor v Popham* (1782) Bro CC 168, 28 ER 1059, an early conditional gift case. He said it was difficult to reconcile Lord Cranworth LC's statement of principle in *Brooke v Garrod* with the principle which emerges from the other line of cases. He decided, however, that it was his duty to follow *Brooke v Garrod*, and to 'leave the proper reconciliation of the various streams of authorities to others' ([1947] 2 All ER 548 at 550, [1948] Ch 43 at 49). He held, therefore, that the option had not been validly exercised. Assuming that case to have been correctly decided, it is obvious that the terms of the option were very different from those of cl 9 and I do not regard the decision as of assistance in interpreting cl 9 of the testator's will.

a [43] *Re Allgood (decd)*, *Chatfield v Allen* (18 December 1980, unreported) is a decision of the Court of Appeal (Buckley, Shaw and Oliver LJ). It concerned a will by which the testatrix directed her trustee to offer a house to its two tenants—

b '... at a price to be determined by an Estate Agent ... such offer to remain open for two months after my death and if within the said period they shall not have accepted the offer then I GIVE AND DEVISE the house to RICHARD TEMPLE COX ...'

c No valuation was obtained and no offer was made. The proceedings, issued nearly five years after the testatrix's death, asked whether the house could and should still be offered to the tenants. The Court of Appeal upheld the judge's decision that the testatrix intended time to be of the essence for the purposes of the exercise of the option. Buckley LJ (with whom Shaw and Oliver LJ agreed) pointed out that the case was not one in which the offer of the house was at a price stated by the testator and said that therefore no direct assistance on construction was to be derived from (inter alia) *Dawson v Dawson*, *Brooke v Garrod* or *Re Avarad*. He held, however, that the principle summarised by Romer J in *Re Goodwin* applied to the case and showed that time for the exercise of the option was intended to be of the essence: the case was one in which there was an express gift over. It is worth observing (in the light of the recent decision in *Re Bowles*)
d (decd), *Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] 2 All ER 387, [2003] Ch 422) that Buckley LJ did not suggest that there was any inconsistency between the principle on which *Brooke v Garrod* was decided and that explained in *Re Goodwin*, nor did he suggest that *Re Avarad* might have been incorrectly decided. Again, the terms of the option in *Re Allgood* were very different from those with which I am
e concerned.

f [44] Finally, I come to *Re Bowles*, the case that caused Mr O'Sullivan to advise that Mr Allardyce had a viable claim to enforce the option. It concerned a testamentary option in terms very different from those of cl 9. By his will the testator gave Mr Hayward the right to buy certain land 'at the figure agreed between my executors and the Capital Taxes Office as its value for inheritance tax
g purposes'. The will then provided that the executors were to notify Mr Hayward of this right within six months of his death and he was then to have three months in which to notify the executors of whether he wanted to buy at that price. The valuation process proved complicated, no value was agreed and, pending its agreement, Mr Hayward sought a declaration that time for the exercise of his
h option was not of the essence and that he could exercise it at any time until the expiry of a reasonable period after the value of the land had been agreed with the Capital Taxes Office and notified to him.

i [45] Lawrence Collins J reviewed the cases on conditional testamentary gifts (those within the *Re Goodwin* line of authorities) and those dealing with testamentary options. He referred to *Brooke v Garrod* and said of it ([2003] 2 All ER 387 at [42], [2003] Ch 422 at [42]):

'... it is entirely in line with the cases on gifts subject to a condition. The purchase price payable on the exercise of the option was payable within a fixed time, and the consequences of non-compliance were expressed. If the price was not paid, then the property was to be sold by public auction or

private contract, and the proceeds were to be held on various trusts for his siblings.'

[46] He then referred to *Re Avar*. He held that Roxburgh J was in error in regarding himself as faced with conflicting authorities, pointing out again that the decision in *Brooke v Garrod* was in line with the conditional gift cases. He said (at [50]):

'In *Avar*'s case there was no specified consequence for non-compliance, and plainly no prejudice to anyone caused by the few days which elapsed from the date of the exercise of the option. The case therefore fell plainly within the principle that if there is no gift over, and no prejudice, the court is unlikely to find that the testator intended the gift to fail on the basis that time is of the essence. Contrary to the view of Roxburgh J, I do not consider that there is any relevant distinction between a gift and the grant of an option. I am therefore satisfied that *Avar*'s case was wrongly decided.'

[47] Lawrence Collins J's conclusion was, therefore, that the principle identified in cases such as *Re Goodwin* applies equally to testamentary conditional gifts and to testamentary options, and he held that, on the facts of the case before him, time for the exercise of the option was not of the essence, but was exercisable within a reasonable time of the notification of the agreed price.

[48] It was no part of Ms Reed's submission that Lawrence Collins J came to a wrong decision on the facts of *Re Bowles* although she did submit that his reasoning for his conclusion was in part in error, since it proceeded on the basis that the decision in *Brooke v Garrod* was founded on the existence of an express gift over in default of a timely exercise of the option. Ms Reed pointed out that, although *Brooke v Garrod* was an 'express gift over' case, that was not the basis of Lord Cranworth LC's decision and she said that Lawrence Collins J's reconciliation of that decision with the conditional gift cases was therefore founded on an erroneous basis. She said that *Brooke v Garrod* could not be so reconciled and that it supported her submission that the time specified for completion in cl 9 should be regarded as of the essence.

[49] I agree with Ms Reed's submissions as to the basis of the decision in *Brooke v Garrod* and, if I may respectfully say so, I therefore recognise some difficulty with Lawrence Collins J's explanation of it. As it was an 'express gift over' case, it could have been decided on a basis consistent with the conditional gift cases. But it was not in fact so decided, and in my view its reasoning cannot be reconciled with those cases. It can also be said that it does not appear that Lawrence Collins J was referred to *Dawson v Dawson*, which I regard as also difficult to reconcile with them.

[50] I propose to say little more about either *Brooke v Garrod* or *Re Bowles*. I have explained why I do not regard the former as requiring a conclusion in the present case that the time for completion was intended to be of the essence, and no-one has suggested that there is anything in the latter case to support that conclusion. I hope my earlier reasoning has made clear why, quite apart from the decision in *Re Bowles*, I would anyway have concluded that the time specified in cl 9 for completion was not of the essence.

[51] Assuming that I were to decide that the time for completion was not of the essence, Ms Reed submitted further that that means, at best, that Mr Allardyce could only have a reasonable time within which to complete. She

a takes her 'reasonable time' proposition from Lawrence Collins J's decision in *Re Bowles* and says that three months was a reasonable time and so Mr Allardyce ought to have completed within that period. Alternatively, she submitted that, by an analogy with the principles she said apply to contracts for the sale of land, the long delay since 11 July 2002 entitles the court to treat Mr Allardyce as having done the equivalent of repudiating his right to buy, which Mr Roebuck must be taken to have accepted.

b [52] In the light of the history of this matter, I regard those as unattractive submissions and I do not accept them. The first proposition appears to be to the effect that, although time for completion within the specified three-month period was not intended to be of the essence, that was anyway a reasonable time within which to complete and so Mr Allardyce should not be entitled to any longer. The conclusion appears to me to be inconsistent with the starting premise. In addition, Lawrence Collins J's 'reasonable time' was for the acceptance of the offer, not for the completion of the purchase. As to the second proposition, it is correct that the purchase was not completed on 11 July 2002, but it was only in early August 2002 that Baynes asserted on behalf of Mr Roebuck that the time for completion had been of the essence and made it plain that he regarded Mr Allardyce's right to buy as at an end. Goughs' prompt response was that Mr Allardyce was ready, willing and anxious to proceed to an early exchange of contracts and completion and I am ready to presume that that would have happened if Mr Roebuck had been willing to co-operate. The inference, however, is that he was taking his stand on the time of the essence point and was not prepared to co-operate in either an early, or any, completion. In that respect I consider he was in error and that, but for his erroneous stance, the matter could and would have been promptly completed.

f [53] I infer that the advice that was being given to Mr Allardyce at that point was also that the time for completion was of the essence, which is why Mr Allardyce initially proposed to turn his fire exclusively on Goughs. I have explained how, following the reporting of *Re Bowles* in April 2003, Mr Allardyce promptly reasserted his right to enforce the purchase, although it was only in October 2003 that he actually issued proceedings. His failure to press for completion between mid-August 2002 and the end of April 2003 can be explained by the fact that he was advised he had no right to compel completion, or at least that any bid to do so would be likely to fail. In my view that advice was incorrect but, to the extent that it resulted in his failure to press the enforcement of his cl 9 rights, he cannot in my view be said to have either abandoned or waived them. I consider that he could only be said to have done either of those things if, being fully aware of his right to enforce cl 9, he had so acted as to justify an inference that he had elected to abandon or waive that right. In addition, Mr Roebuck has at no stage since 11 July 2002 purported to make time of the essence for the purposes of completion. Had he done so, Mr Allardyce would readily have completed.

j [54] The unexplained delay between April 2003 and the issue of proceedings in October 2003 is a little surprising given the previous history: I would have expected Mr Allardyce to have issued his proceedings without further delay. That said, I can still identify no facts justifying an inference that Mr Allardyce must be taken to have abandoned or waived his cl 9 rights during that period. Moreover, no point has been taken by Mr Roebuck (who has not defended the action) that he has lost his right to buy by reason of unreasonable delay since 11 July 2002; and nor did the siblings plead such a point in their defence. The

point has simply been advanced by Ms Reed by way of argument. In the circumstances I have outlined, I decline to hold that Mr Allardyce has lost his cl 9 right by his alleged delay. a

[55] I have therefore come to the conclusion, and hold, that Mr Allardyce is entitled to enforce his cl 9 option and I will, as asked, make a declaration to that effect. In addition, I will make an order for what will, in effect, be specific performance of the cl 9 obligation. I will hear counsel as to the form of the order. b

Order accordingly.

Gareth Williams Barrister.

Marks and Spencer plc v Freshfields Bruckhaus Deringer

[2004] EWHC 1337 (Ch)

CHANCERY DIVISION

LAWRENCE COLLINS J

1, 2 JUNE 2004

Solicitor – Duty – Conflict of interest – Acting for both parties in transaction – Whether conflict arising only when solicitor acting for both parties in same transaction.

The defendant firm of solicitors acted for the claimant retailer in the majority of its complex and/or high end contentious work and advised in relation to a number of commercial and employment matters. As a result it had acquired confidential information about the claimant's supply chain and logistical arrangements. The defendant was advising the claimant in connection with negotiations in relation to one of its main contractual arrangements (the main contract) with a view to restructuring it. The claimant learned that the defendant was acting on behalf of G in relation to a possible bid for the claimant by a consortium of G's family interests and financial institutions and applied for an injunction prohibiting the defendant from acting for or advising or otherwise assisting G or any related member of the consortium in relation to the acquisition of its shares, assets or business. The application was made on the bases: (i) that in relation to the main contract there was an actual potential conflict of interest between the interests of the claimant and the interests of the consortium to which the claimant had not consented; and (ii) that the defendant possessed confidential information belonging to the claimant which was or could be relevant to the retainer which the defendant had for the consortium. The defendant contended, *inter alia*, that a conflict of interest required that interests conflict in a single transaction, and that internal barriers and undertakings would suffice to protect confidential information.

Held – The rule that a fiduciary could not act for two principals with potentially conflicting interests without the informed consent of both was not limited to the context of conflicting interests in the same transaction, although there did have to be some reasonable relationship between the two matters. In the instant case there was a real or serious risk of conflict; the main contract was a very important part of the claimant's business and of the tactics of the bid and if the defendants acted for the consortium they would be in direct conflict with their existing duty to act in the best interests of the claimant in connection with the restructuring of the main contract. Moreover, given the great amount of confidential information relating to the affairs of the claimant held within the defendants, effective internal barriers could not be put in place. The injunction would therefore be granted (see [16], [23]–[28], below).

Dicta of Millett LJ in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 712, 713 and of Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 at 526 considered.

Notes

For the obligations of a solicitor acting for opposing interests, see 44(1) *Halsbury's Laws* (4th edn reissue) para 150. a

Cases referred to in judgment

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL. b

Baird Textiles Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

Baron Investments (Holdings) Ltd (in liq), Halstuk v Venvil [2000] 1 BCLC 272.

Bolkiah (Prince Jefri) v KPMG (a firm) [1999] 1 All ER 517, [1999] 2 AC 222, [1999] 2 WLR 215, HL.

Bristol and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698, [1998] Ch 1, [1997] 2 WLR 436, CA. c

Dunford and Elliott Ltd v Johnson and Firth Brown Ltd [1977] 1 Lloyd's Rep 505, CA.

Young v Robson Rhodes (a firm) [1999] 3 All ER 524.

Case referred to in skeleton argument

Koch Shipping Inc v Richards Butler (a firm) [2002] EWCA Civ 1280, [2002] 2 All ER (Comm) 957. d

Application

Marks & Spencer plc (M&S) applied for an injunction prohibiting Freshfields Bruckhaus Deringer (Freshfields), a firm of solicitors, from acting for or advising or otherwise assisting Revival Acquisitions Ltd and/or Philip Green and/or any other entity or individual owned by or acting in concert with Mr Green in relation to any acquisition or potential acquisition of the shares, assets or business of M&S. e

Kenneth MacLean QC and *James Goldsmith* (instructed by *Slaughter & May*) for M&S. f

Michael Brindle QC and *Edward Levey* (instructed by *Freshfields Bruckhaus Deringer*) for Freshfields.

LAWRENCE COLLINS J. g

[1] This is an application by Marks & Spencer plc (M&S) for an injunction prohibiting the intended defendant, Freshfields Bruckhaus Deringer, more commonly known as Freshfields, from acting for or advising or otherwise assisting Revival Acquisitions Ltd and/or Philip Green and/or any other entity or individual owned by or acting in concert with Mr Green in relation to any acquisition or potential acquisition of the shares, assets or business of M&S. h

[2] On 27 May Revival Acquisitions Ltd, a company owned by Mr Philip Green and his family, announced that it was considering making an offer for M&S and that it intended to approach the M&S board in the following few days with its proposal and to seek a recommendation of its offer. The offer, if it materialises, will be made by a consortium consisting of the family interests of Mr Green and a number of major financial institutions. In accordance with the modern practice M&S does not retain a single firm or even a couple of firms to advise it in relation to all legal issues arising in the course of its business. Instead it retains a number of legal advisers, said to be more than a dozen, to advise it in relation to different legal matters. One of those firms is Freshfields. j

a [3] Alastair Crawford, who is a partner in Freshfields and who specialises in dispute resolution, as it is now called, is the relationship partner responsible for client liaison with M&S. M&S's main contact at Freshfields on the commercial side is another partner, Mr Head, who specialises in corporate law, mergers and acquisitions, and joint ventures.

b [4] Last Saturday, 29 May, M&S first learned that Freshfields were acting on behalf of Mr Green in relation to his possible bid for M&S. Later that day in response to telephone calls, Mr Crawford telephoned Mr Ivens, who is head of the legal department of M&S, and confirmed that Freshfields were indeed acting for the consortium. M&S's evidence is that a number of other law firms who act for or who have previously acted for M&S contacted Mr Ivens last Friday to seek M&S's consent to their acting for other entities with an interest in the possible bid for M&S. The evidence is, depending on the nature of the relationship with the firm in question and after appropriate inquiry, that Mr Ivens either gave M&S's consent or declined to do so.

c [5] M&S complains that Freshfields made no mention to M&S that they were acting or intending to act for the consortium, nor had they sought the consent of M&S to do so, even though they were a firm which had acted for M&S in many matters and had charged somewhere between £1m and £1.5m in fees for the work they had done in recent years.

d [6] M&S's position is that it is concerned that by acting for the consortium in circumstances where Freshfields have an existing and ongoing retainer for M&S in respect of certain matters, Freshfields have placed themselves in a position of conflict of interest or potential conflict of interest and, in addition and quite separately, by acting for the consortium in circumstances where Freshfields have previously acted for M&S and obtained confidential information as a result of doing so, there is a real risk that such information may be disclosed by Freshfields to the consortium. In particular, M&S says that it retained Freshfields through e Mr Head and other members of the corporate department in early 2001 to advise in relation to the contractual arrangements entered into between M&S and George Davies concerning the Per Una women's wear brand of clothing and accessories. In the parlance of the firm, that has been referred to, presumably by its original file name, as Project George. It is well known that since Per Una was introduced by M&S in 2001 it has become one of the most successful and f profitable M&S product lines.

g [7] I am going to refer to a number of matters, some of which were dealt with in greater detail in the evidence and in the oral argument but I am endeavouring not to deal with any matters which are confidential, but if I do trespass into those matters I have invited counsel to stop me elaborating on them.

h [8] In late 2003 M&S and Mr Davies reached, in principle, agreement to restructure the Per Una contracts and Freshfields were retained by M&S. Freshfields gave some advice in late January on the matters which M&S should seek to include in any contractual negotiation. In February 2004 Freshfields advised M&S in relation to a notice served by Mr Davies pursuant to the Per Una j contracts, which raised some issues which are relevant to and would need to be addressed as part of the proposed restructuring. It is expected that heads of agreement will be agreed shortly and it was M&S's intention to ask Freshfields to commence drafting the relevant amending agreements.

[9] M&S say that Freshfields have over the last five years been used for the majority of M&S's complex and/or high end contentious work. Freshfields have also advised in relation to a number of important commercial and employment

matters. As a result, Freshfields have acquired confidential information about the supply chain, including the term of supply of contracts, pricing policies, supply volumes and M&S's attitude to termination and renewal of the same. In addition, they have acquired information about logistical arrangements such as processes for transportation, dependency on food supply lines and the Per Una product range, including the terms of the contractual arrangements with Mr Davies and also information about senior management contracts.

[10] In particular, they were instructed in the well-known *Baird* litigation (*Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737) in which they acted for M&S in the litigation brought by a supplier for alleged wrongful termination which involved important questions about estoppel and formation of contracts. M&S says that that litigation involved a massive disclosure exercise and the review by Freshfields of M&S's supplier contracts generally, and that they acquired detailed knowledge of the terms of the supply contracts, including terms of trade and M&S's policy towards entry into and termination of the same. In addition, they were instructed in relation to the possible expansion by M&S into a new market sector. That was something which did not go ahead but M&S say that the information would be of interest to a potential bidder.

[11] The application is made on two bases. The first is on the basis that M&S is an existing client of Freshfields who have been retained to advise M&S in connection with ongoing negotiations in relation to one of M&S's main contractual arrangements with a view to restructuring the arrangements. There is an actual potential conflict of interest between the interests of M&S and the interests of the consortium to which M&S has not consented. Secondly, as I have said, the application is based on the duty of confidentiality, on the basis that Freshfields are, in any event, as a result of the services performed by them for M&S over a number of years, in possession of confidential information belonging to M&S which is or may be relevant to the retainer which Freshfields have for the consortium.

[12] There is no very significant difference between the parties on the legal principles, although there is some difference of emphasis. A solicitor as a fiduciary cannot put himself in a position whereby there is an actual or potential conflict between his duty of loyalty to his existing client and his duty of loyalty to his new client without first obtaining the informed consent of both parties. As Millett LJ said in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 712, 713, [1998] Ch 1 at 18–19:

'A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other ... This is sometimes described as "the double employment rule" ... Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other ... If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability.'

[13] In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 at 526, [1999] 2 AC 222 at 234–235, Lord Millett expanded on these matters in a case which did

a not in fact involve solicitors but accountants who had got into a situation where they were in possession of information from a previous retainer. He said:

b '... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.'

c [14] That was a case not involving an existing client but a former client. It was in that context where, after talking about the position of a former client where the court's intervention was founded on the protection of confidential information, he went on to say that it was otherwise where the court's intervention was sought by an existing client because a fiduciary could not at the same time act both for and against the same client and his firm was in no better position.

d [15] The cases establish that the potential conflict must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility: see *Baron Investments (Holdings) Ltd (in liq), Halstuk v Venvil* [2000] 1 BCLC 272 (a conflict of interest, or double employment, case), and cf Laddie J in *Young v Robson Rhodes (a firm)* [1999] 3 All ER 524 (a confidentiality/Chinese wall case).

e [16] Most of the cases refer to the problem in the context of conflicting interests in the same transaction, but it seems to me clear that it goes somewhat beyond that. Although *Bolkiah's* case is not directly in point because it is a former client case and not therefore (see Hollander and Salzedo *Conflicts of Interests and Chinese Walls* (2000) p 27 (para 3-22)) an application of the double employment rule, the way in which Lord Millett expresses himself is wholly inconsistent with the double employment rule being limited to same matter conflicts. I accept f there must be some reasonable relationship between the two matters, but they do not, in my judgment, have to be the same.

[17] The principles are confirmed by the *Guide to the Professional Conduct of Solicitors* (8th edn, 1999).

g [18] So far as the confidentiality aspects are concerned, to the extent that they apply on the second way in which M&S puts the case, *Bolkiah's* case supports the view that a pre-existing Chinese wall was a more effective method of protecting confidentiality than an ad hoc arrangement, but I do not think that M&S in this case is seriously arguing that an ad hoc scheme cannot be effective.

h [19] The way in which Freshfields were instructed was that on 4 May they were contacted by the chairman of Arcadia Group, which is owned by j Mr Green's family to ask whether they would act on behalf of the consortium. Mr O'Brien was the partner who was so approached and he instituted a conflicts procedure and was given clearance by the firm, obviously after having taken account of all the matters in which they were or had been instructed by M&S to accept instructions on behalf of the consortium. The view which they took, no doubt bona fide, was that the Davies contractual arrangements had been entered into in the ordinary course of business and were not material in relation to a possible bid. A problem first arose on about 19 May when Mr O'Brien became aware that those arrangements would be the subject of a due diligence question by Mr Green. Freshfields, he said, did not instigate the question, nor had they told the consortium that they had acted in the matter, but he instituted a formal information barrier in consequence.

[20] In essence, Freshfields say that this is really a very common situation and if every City firm of solicitors were forced to conclude that any unrelated matter, however much in the ordinary course, on which it might have advised, even if the arrangement were continuing, might blow up into an issue of major significance, the consequence would be unworkable. In situations such as the present, it would be normal to find that a solicitor invited to act for a potential bidder would have some engagement, even still current, to advise the target company on discrete issues not amounting to main corporate advice. a
b

[21] Freshfields also say that the suggested conflict of interest is not real but purely theoretical. They also say that the barriers and the undertakings which were given are sufficient, at least so far as the current Davies contract—Project George 2—is concerned. To the extent that they have not so far given any undertakings in relation either to the previous George Project or to any of the other matters, it will be a very simple matter to put those in place. The undertakings to which I refer include one given yesterday over the hearing of this application on behalf of the consortium that it would not seek from Freshfields any of the information said by M&S to be confidential. c

[22] Freshfields say that this case is not a case anything like a single transaction. There was no reason to think that the Davies arrangements were material. This is a takeover bid, it may not even be hostile, and it is not the same as a conflict between two rival bidders or retailers. Freshfields were not the general corporate lawyers of M&S, and most of the evidence is really about confidential information and not about conflict. They also say on the instructions of the consortium, but without any evidence, that it would be difficult if not impossible, given the passage of time, to find another firm of solicitors to act for the consortium. d
e

[23] My conclusion, taking all these matters into account, is that there should be an injunction. It is accepted by both sides that this is not an *American Cyanamid* case (see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396) where the balance of convenience is relevant. I have to decide now whether Freshfields should be allowed to continue to act for the consortium. There is, of course, a discretion in the grant of an injunction, but not to be exercised by me on the balance of convenience. An example where the discretion was exercised against the grant of an injunction in the case of confidential information in the context of a takeover bid is *Dunford and Elliott Ltd v Johnson and Firth Brown Ltd* [1977] 1 Lloyd's Rep 505 to which I was referred, and that was a case where some of the information had already seeped out and been acted upon. Therefore, it was not right to discriminate between shareholders by restraining certain persons from either bidding or using that information in the course of a bid. f
g

[24] I am satisfied that there is a real or serious risk of conflict. The Davies contract is a very important part of the M&S business. On the evidence before me, it is also a very important part of the tactics of the bid and it does seem likely that some form of criticism will be made of it, and that if Freshfields are acting for the consortium they will be putting their names or at any rate approving documents which are in direct conflict with their present duty to act in the best interests of M&S in connection with the restructuring of the contracts. In particular, I was told, although this may not be fully reflected in the evidence, that steps could be taken by M&S to ensure that the contracts continue irrespective of any bid. h
j

[25] I do not see, on the other hand, any significant reason why if there is this conflict of interest Freshfields should not be enjoined. As I say, this is not a

a balance of convenience case, but even if it were the inconvenience would not be that of Freshfields. It would not be inconvenienced except by not being able to earn the fees by not continuing to act, and any prejudice would be suffered by their clients who are not before me. I find it hard to accept in the absence of very clear evidence that there will be no reasonably competent firm in the City able to help them, although I do accept, of course, that a number of firms who are experienced in corporate takeovers is relatively limited.

b [26] The principal ground for an injunction, therefore, is the actual or potential conflict of interest in which Freshfields find themselves.

[27] On the second, and alternative, basis of the application, there is, obviously, a huge amount of confidential information relating to the affairs of M&S within Freshfields. Some of it is, plainly, material to a potential bid, if only to be discarded as not being sufficiently important. I cannot see, even with a firm of the size of Freshfields, that any effective barriers could be put in place given the very large numbers of people concerned even on the two matters in relation to which I have details of the personnel involved. If the other matters are taken into account, there must be very many members at Freshfields who have a great deal of knowledge about the affairs of M&S. In those circumstances, it seems to me that, to the extent that the information is confidential, and I am satisfied that there is a great deal of confidential information, Chinese walls would not be perceived to be—perception here is very important—sufficient.

d [28] For those reasons, I will grant the injunction.

Application granted.

Celia Fox Barrister.

D (a child) v O

[2004] EWHC 1036 (Ch)

CHANCERY DIVISION

LLOYD J

7 MAY 2004

Variation of Trusts – Bare trust – Variation of statutory power of advancement – Trustee Act 1925, s 32 – Variation of Trusts Act 1958, s 1.

The proceeds of two life insurance policies were held on bare trusts for three minors in equal shares. The income of the claimant's fund had been applied to meet her school bills but was insufficient to do so completely and the trustees had advanced capital for that purpose. Section 32^a of the Trustee Act 1925 authorised trustees to apply 'any capital money subject to a trust' for the advancement or benefit of any person entitled to the capital of the trust property but no more than half of the presumptive or vested share or interest of the beneficiary might be paid or applied by way of advancement. The court had jurisdiction to vary a trust under s 1^b of the Variation of Trusts Act 1958 where 'property ... is held on trusts ... arising ... under any will, settlement or other disposition'. The trustees made an application to the court to vary the trusts applying to the claimant's fund intended to secure that, if necessary, the whole of the capital of the claimant's fund could be used to pay for her education.

Held – The whole trust fund, and the claimant's fund separately, were property held on trusts arising 'under any will, settlement or other disposition'. The court therefore had jurisdiction to exercise the powers conferred by the 1958 Act in relation to the funds, so long as it was satisfied that the proposed variation of the trust was for the benefit of the relevant beneficiary. As the court was satisfied that it would be for the claimant's benefit for the limit imposed by s 32 of the 1925 Act on the application of the capital of the fund for her education to be lifted, the variation of the trusts applying to her fund would be approved (see [11], [18], below).

Notes

For the statutory power of advancement and for the jurisdiction of the court to vary trusts, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) paras 945, 958.

For the Trustee Act 1925, s 32, see 48 *Halsbury's Statutes* (4th edn) (2001 reissue) 493.

For the Variation of Trusts Act 1958, s 1, see 48 *Halsbury's Statutes* (4th edn) (2001 reissue) 561.

Cases referred to in judgment

Allen v Distillers Co (Biochemicals) Ltd, Albrice v Distillers Co (Biochemicals) Ltd [1974] 2 All ER 365, [1974] QB 384, [1974] 2 WLR 481.

Chapman v Chapman [1954] 1 All ER 798, [1954] AC 429, [1954] 2 WLR 723, HL.
Kehr (decd), Re, Martin v Foges [1951] 2 All ER 812, [1952] Ch 26.

a Section 32, so far as material, is set out at [8], below

b Section 1, so far as material, is set out at [14], below

- a *Pilkington v IRC* [1962] 3 All ER 622, [1964] AC 612, [1962] 3 WLR 1051, HL.
Worthington v M'Craer (1856) 23 Beav 81, 53 ER 32.

Application

- b The trustees of the claimant's trust fund applied for a variation of the trusts applying to her fund so as to permit the power of advancement under s 32 of the Trustee Act 1925 to be exercised in relation to the whole fund. The application was made in writing and dealt with on paper without a hearing.

Simon Taube QC (instructed by *Boodle Hatfield*) for the claimant.

LLOYD J.

- c [1] This is an edited version of a judgment given on an application made in writing and dealt with on paper without a hearing, though with the benefit of written submissions from Mr Simon Taube QC on behalf of the claimant, and treated as having been heard in private. This version may be disclosed and published, whereas the full version is subject to embargo. This version is limited,
d as regards summary of the facts and discussion of the law, to the point which may be of interest beyond the particular parties.

- [2] The proceedings relate to part of the proceeds of two life insurance policies. It is sufficient for present purposes to say that the proceeds are, in the events which have happened, held on trust in equal shares for three persons all of whom are under age, one of whom is the claimant, C. Under the trusts, which
e were set out in deeds of assignment of the policies, the trustee had certain powers of appointment, but those powers were not exercised. Subject to and in default of any such appointment the fund was to be held on trust for the three minors equally. In practice, though the fund representing the proceeds of the policies has not yet been divided, it is treated, for reasons which do not matter, as if there
f were separate funds for each beneficiary. This application is concerned with C's fund.

[3] The income of C's fund has in fact been applied to meet her school bills, but it is already inadequate. Part of the capital has also been advanced, under s 32 of the Trustee Act 1925, to be used for the same purposes.

- g [4] The application is intended to secure that, if necessary, the whole capital can be applied for this purpose.

- h [5] I have come to the conclusion that I should approve the extension of the statutory power of advancement as being for C's benefit. This point does, however, raise legal issues which may be of some wider interest and on which different views have been expressed. It is for that reason that, unusually on a paper application, I am giving reasons for my order.

- j [6] The trusts applying to the policies incorporate a number of provisions such as a wide investment clause, but nothing that bears on the application of the income or capital. There is an express power to revoke, vary or add administrative provisions of the trusts. The power of advancement is not an administrative power and the desired result cannot be achieved by using this power.

[7] C is absolutely entitled to her fund and, but for her being under age, she could call for it, give the trustee a good receipt for it and spend it as she chooses. Since she is only 12 years old she cannot do so. Section 31 of the 1925 Act applies to the fund and enables the income to be applied for her maintenance education or benefit even though she cannot give a receipt for it. That section applies '[w]here any property is held by trustees in trust for any person for any interest

whatsoever' (see sub-s (1)), which clearly includes property held on trust for a minor absolutely. a

[8] Section 32 of the 1925 Act is in different terms. It authorises trustees to apply 'any capital money subject to a trust' for the advancement or benefit of any person entitled to the capital of the trust property or any share thereof, including, expressly, an absolute entitlement (see sub-s (1)). The provisos include, not surprisingly, (1)(b), whereby, if the person for whose benefit the fund is advanced 'is or becomes absolutely and indefeasibly entitled to a share in the trust property' the money so applied is treated as paid on account of his share. The references to the use of the power in relation to a beneficiary who is already absolutely entitled leave me in no doubt that the section applies to the present trusts of the proceeds of the policies. b

[9] In *Re Kehr (decd)*, *Martin v Foges* [1951] 2 All ER 812, [1952] Ch 26 a minor was absolutely entitled to a share of a deceased's intestate estate, the deceased having died domiciled in Germany but having also left property in England in relation to which an English grant of letters of administration had been issued. Danckwerts J held that the English personal representatives could appoint trustees in respect of the minor's share of the estate situated in England, and that those trustees would be able to exercise in respect of that share powers under the 1925 Act including the powers conferred by ss 31 and 32. That is consistent with my conclusion, though the point at issue there was different. c

[10] However, by virtue of proviso (a) to s 32(1), no more than half of the presumptive or vested share or interest of the beneficiary may be paid or applied by way of advancement. That limit is commonly relaxed in modern trust deeds, but there is nothing to that effect in the documents in the present case. d

[11] On the evidence I am satisfied that it would be for C's benefit for the limit imposed by s 32 of the 1925 Act on the application of the capital of the fund for her education to be lifted. The question is whether and on what basis the court has power to achieve this result. There are two possible sources of jurisdiction. e

[12] The Court of Chancery had an ancient jurisdiction to authorise the application of income and, in more limited circumstances, capital, for the maintenance of a minor even if this was not authorised by the terms of the trust. This jurisdiction is recognised in the speeches in *Chapman v Chapman* [1954] 1 All ER 798 esp at 810 and 818, [1954] AC 429 esp at 455–456 and 469 per Lord Morton of Henryton and Lord Asquith of Bishopstone respectively. As to the application of capital, *Lewin on Trusts* (17th edn, 2000) p 801 (para 32-06) refers to a number of cases. One of them, in which specific reference was made to the court's ability to authorise the expenditure of capital to which a minor was absolutely entitled for his or her maintenance, is *Worthington v M'Craer* (1856) 23 Beav 81, 53 ER 32. It seems to me that this would be a possible basis on which the court could proceed in the present circumstances. f

[13] However, since the decision in *Chapman's* case, the relevant area of law has been transformed by the Variation of Trusts Act 1958. While this Act does not take away any jurisdiction that the court already had, it seems to me that it would be more appropriate to proceed under the 1958 Act if that is possible. g

[14] The 1958 Act applies 'where property ... is held on trusts arising ... under any will, settlement or other disposition' (see s 1(1)). On the face of it, the proceeds of the insurance policies are held on trusts arising under a settlement, albeit that they are held for the three children in equal shares absolutely. The idea of varying a bare trust might perhaps seem a little odd, and but for the beneficiary not being of full legal capacity it is difficult to imagine how the question could h

a arise. Given that lack of capacity, and the constraints on the extent of the statutory provisions which do authorise the trustees to act in certain ways, it does not seem to me so surprising that the 1958 Act should apply to property held on a bare trust, at least for a minor.

b [15] A similar point, though in relation to a fund of a very different kind, was argued before Eveleigh J in the Queen's Bench Division, in *Allen v Distillers Co (Biochemicals) Ltd, Albrice v Distillers Co (Biochemicals) Ltd* [1974] 2 All ER 365, [1974] QB 384. That concerned the funds to be received pursuant to the compromise of the thalidomide litigation, and the desire of many of the parents of children affected to ensure that the sums held for their children should not become their absolute property at the age of 18. The judge held that he did have power to achieve that, but he rejected the argument that he could do so under c the 1958 Act. He was shown authority under the 1958 Act for the proposition that the Act could be used to defer the vesting of property in a beneficiary, if it would be for that person's benefit to do so. He did not dispute that, but he held that the 1958 Act did not apply to the money to be paid pursuant to the compromise. He said ([1974] 2 All ER 365 at 373–374, [1974] QB 384 at 394):

d '... I do not think that the payment out to the trustees in the first instance gives rise to the kind of trust contemplated by the 1958 Act. As a common lawyer struggling with this problem I am reminded of the first sentence in the chapter on Trusts contained in Snell's Equity (27th Edn (1973), p 87): "No one has yet succeeded in giving an entirely satisfactory definition of a Trust." e An agent may hold and deal with property of his principal in such circumstances as to constitute him a trustee for his principal but leaving aside the manner in which the trust is created no one would contemplate the possibility of there being a trust of the kind referred to in the 1958 Act. The Act contemplates the situation where a beneficial interest is created which f did not previously exist and probably one which is related to at least one other beneficial interest. Moreover, the Act is designed to deal with the situation where the original disposition was intended to endure according to its terms but which in the light of changed attitudes and circumstances it is fair and reasonable to vary. In any event, I do not think that the so-called variation would be a variation at all. It would be a new trust made on behalf g of an absolute owner.'

[16] Eveleigh J was not considering the sort of case of absolute entitlement with which I am concerned. In the case before him there was no prior trust of any kind. Despite the potential width of the word 'disposition', it would be difficult to conclude that money paid by an alleged tortfeasor by way of h compensation for injury to a minor was 'property ... held on trusts arising ... under any will, settlement or other disposition'. Accordingly I would not venture to disagree with his conclusion that the 1958 Act did not apply to the fund that he was concerned with.

j [17] His observation that the 1958 Act is concerned with a trust where there is more than one beneficial interest was not necessary to his decision. If it were right the 1958 Act could not apply to C's fund, at any rate once it is split off from the rest of the fund. In my judgment it is not correct. Whether it could be appropriate in any circumstances to exercise the power conferred by the 1958 Act in relation to a fund held for a minor absolutely so as to reduce his or her entitlement in any respect, for example as was sought in *Allen's* case by deferring the date when the person in question can call for the fund, I do not need to decide.

What is proposed in the present case would have the effect, in a sense, of accelerating the benefit for C, by allowing the whole of the fund to be used for her benefit while she is still under age. In other circumstances it may be possible to use the power under s 32 of the 1925 Act in such a way that the trust property does not become vested in the beneficiary (see *Pilkington v IRC* [1962] 3 All ER 622, [1964] AC 612). On the present and foreseeable facts of this case this is no more than theoretical. It could not be for C's benefit to divert any part of the fund from her.

[18] In my judgment both the whole trust fund, and C's fund separately, are 'property ... held on trusts arising ... under any will, settlement or other disposition'. It is therefore open to the court to exercise the powers conferred by the 1958 Act in relation to the funds, so long as it is satisfied that the proposed variation of the trusts is for the benefit of the relevant beneficiary. I am satisfied that it is for C's benefit to vary the trusts applying to her fund so that the whole fund, not merely one-half, may be applied pursuant to s 32 of the 1925 Act. I have therefore approved on her behalf a variation of the trusts applying to C's fund so as to permit the powers under s 32 to be exercised in relation to the whole, not only half, of the fund.

Order accordingly.

Celia Fox Barrister.

R (on the application of Ullah) v Special Adjudicator

Do v Secretary of State for the Home Department

[2004] UKHL 26

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD WALKER OF GESTINGTHORPE,
BARONESS HALE OF RICHMOND AND LORD CARSWELL

26–29 APRIL, 17 JUNE 2004

Immigration – Deportation – Refugee – Asylum – Deportation of asylum seekers not leading to torture or inhuman or degrading treatment or punishment – Whether other rights and freedoms of asylum seekers therefore excluded from consideration – Human Rights Act 1998, Sch 1, Pt I, arts 2, 3, 4, 5, 6, 7, 8, 9.

In the first of two conjoined appeals the claimant entered the United Kingdom from Pakistan and applied for asylum, claiming to have a well-founded fear of persecution as a result of his religious beliefs. The Secretary of State dismissed his claim for asylum and held that he had not qualified for permission to remain in the country by reason of any article of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The special adjudicator dismissed the claimant's appeal, finding that he did not have a well founded fear of persecution and that while art 9^a of the convention, guaranteeing the freedom of religion, could be engaged in such a situation, the Secretary of State had acted lawfully and proportionately in pursuance of the legitimate aim of immigration control. The claimant's application for judicial review was refused and his appeal to the Court of Appeal was heard together with the appeal of the claimant in the second case. That claimant, who had entered the United Kingdom from Vietnam, had also applied for asylum based on her fear of religious persecution. The adjudicator found that her removal to Vietnam would not breach her rights to under arts 3^b and 5^c of the convention, which prohibited torture and guaranteed the right to liberty and security. The immigration appeal tribunal found any interference there might be with the claimant's religious activities would not amount to a violation of her rights under art 9. The Court of Appeal dismissed the appeals in both cases, holding that where the convention was invoked on the sole ground of the treatment to which an alien was likely to be subjected by the state he or she was removed to, and that treatment was not sufficiently severe to engage art 3, the court was not required to recognise that any other article of the convention was, or might be, engaged. Both claimants appealed. The other articles of the convention considered by the House of Lords included art 2^d, which guaranteed

a Article 9 is set out at [57], below

b Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

c Article 5, so far as material, is set out at [42], below

d Article 2, so far as material, is set out at [40], below

the right to life, art 4^e, which prohibited slavery and forced labour, arts 6^f and 7^g, which provided for the right to a fair trial and that there should be no punishment without law, and art 8^h, which provided for the right to respect for private and family life. a

Held – Where, in relation to the removal of an individual from the United Kingdom, the anticipated treatment in the receiving state would be in breach of the requirements of the convention, but such treatment did not meet the minimum requirements of art 3, other articles of the convention might be engaged. The possibility of relying on art 2 was established, if the facts were strong enough. It was probable that a claim under art 4, if strong enough, would succeed under art 3, but it would be inconsistent with the humanitarian principles underpinning the convention to accept that, if the facts were strong enough, a claim would be rejected even if it were based on art 4 alone. The European Court of Human Rights had not excluded the possibility of relying on art 6, and even on art 5, while fully recognising the great difficulty of doing so and the exceptional nature of such cases. Article 7 was not likely to arise often in the context of immigration decisions to expel aliens, but it could do so, and the principles laid down by the European Court of Human Rights in respect of extradition and expulsion involving a real risk of a flagrant violation of fair trial rights would likewise apply. Reliance on art 8 could not be ruled out in principle and while it was hard to conceive that a person could successfully resist expulsion in reliance on art 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on art 3, such a possibility in principle was not ruled out. In the instant appeals, however, the claimants' cases did not come within the possible parameters of a flagrant, gross or fundamental breach of art 9 such as to amount to a denial or nullification of the rights conferred by it, and the appeals would, accordingly, be dismissed (see [15]–[22], [25], [26], [39]–[53], [62], [67], [70], below). b
c
d
e
f

Devaseelan v Secretary of State for the Home Dept [2003] Imm AR 1 approved.

Dehwari v Netherlands (2001) 29 EHRR CD 74, *Drozdz v France* (1992) 14 EHRR 745, *Soering v UK* (1989) 11 EHRR 439, *Einhorn v France* App No 71555/01 (16 October 2001, unreported), *Bensaid v UK* (2001) 11 BHRC 297 and *Boultif v Switzerland* (2001) 33 EHRR 1179 considered. g

Decision of the Court of Appeal [2003] 3 All ER 1174 affirmed on different grounds.

Notes

For the right to life, the prohibition of torture, slavery and servitude, and forced or compulsory labour, the right to liberty and security of the person, the right to a fair trial, for the prohibition of retrospective laws, for the right to respect for private and family life, and for freedom of thought, conscience and religion, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 123–127, 134, 148, 150, 151, 156, 157. h

For the Human Rights Act 1998, Sch 1, Pt I, arts 2–9, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553–555. j

e Article 4, so far as material, is set out at [41], below

f Article 6, so far as material, is set out at [44], below

g Article 7, so far as material, is set out at [45], below

h Article 8 is set out at [46], below

Cases referred to in opinions

- a** *A-G for Canada v Cain*, *A-G for Canada v Gilhula* [1906] AC 542, [1904–7] All ER Rep 582, PC.
ARJ v Australia Comm No 692/96 (11 August 1996, unreported), UNHRC.
Abdulaziz v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR; *affg* (1983) 6 EHRR 28, E Com HR.
- b** *Ahmed v Austria* [1998] INLR 65, ECt HR.
Al-Adsani v UK (2001) 12 BHRC 88, ECt HR.
Bahaddar v Netherlands (1998) 26 EHRR 278, [1998] ECHR 25894/94, ECt HR.
Bankovic v Belgium (2001) 11 BHRC 435, ECt HR.
Bensaid v UK (2001) 11 BHRC 297, ECt HR.
Boudellaa v Bosnia and Herzegovina (2002) 13 BHRC 297, ECt HR.
- c** *Boultif v Switzerland* (2001) 33 EHRR 1179, [2001] ECHR 54273/00, ECt HR.
Canada v Schmidt [1987] 1 SCR 500, Can SC.
Chahal v UK (1996) 1 BHRC 405, ECt HR.
Cruz Varas v Sweden (1992) 14 EHRR 1, [1991] ECHR 15576/89, ECt HR.
Cyprus v Turkey (1976) 4 EHRR 482, ECt HR.
- d** *D v UK* (1997) 2 BHRC 273, ECt HR.
Dehwari v Netherlands (2001) 29 EHRR CD 74, E Com HR.
Devaseelan v Secretary of State for the Home Dept [2002] UKIAT 702, [2003] Imm AR 1.
Drozdz v France (1992) 14 EHRR 745, ECt HR.
Einhorn v France App No 71555/01 (16 October 2001, unreported), ECt HR.
Gonzalez v Spain App No 43544/98 (29 June 1999, unreported), ECt HR.
- e** *Henao v Netherlands* App No 13669/03 (24 June 2003, unreported), ECt HR.
Hilal v UK (2001) 11 BHRC 354, ECt HR.
HLR v France (1997) 26 EHRR 29, [1997] ECHR 24573/94, ECt HR., ECt HR.
Horvath v Secretary of State for the Home Dept [2000] 3 All ER 577, [2001] 1 AC 489, [2000] 3 WLR 379, HL.
- f** *Jabari v Turkey* (2000) 9 BHRC 1, ECt HR.
Kacaj v Secretary of State for the Home Dept [2002] Imm AR 213, IAT; *rvsd* [2002] EWCA Civ 314, [2002] All ER (D) 203 (Mar).
Loizidou v Turkey (1995) 20 EHRR 99, ECt HR.
Mamatkulov v Turkey (2003) 14 BHRC 149, ECt HR.
MAR v UK (1997) 23 EHRR CD 120, E Com HR.
- g** *Minister of Justice v Burns (Amnesty International intervening)* 2001 SCC 7, (2001) 11 BHRC 314, Can SC.
Moustaquim v Belgium (1991) 13 EHRR 802, [1991] ECHR 12313/86, ECt HR.
Ocalan v Turkey (2003) 15 BHRC 297, ECt HR.
Osman v UK (1998) 5 BHRC 293, ECt HR.
- h** *Ould Barar v Sweden* (1999) 28 EHRR CD 213, ECt HR.
R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
R (on the application of Holub) v Secretary of State for the Home Dept [2001] 1 WLR 1359, CA.
- j** *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 3 All ER 821, [2004] 3 WLR 58; *affg* sub nom *Razgar v Secretary of State for the Home Dept*, *Nadarajah v Secretary of State for the Home Dept* [2003] EWCA Civ 840, [2003] Imm AR 529.
R (on the application of Saadi) v Secretary of State for the Home Dept [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131.

- Razaghi v Sweden* App No 64599/01 (11 March 2003, unreported), ECt HR. a
Secretary of State for the Home Dept v Z [2002] EWCA Civ 952, [2002] Imm AR 560.
Sepe v Secretary of State for the Home Dept [2003] UKHL 15, [2003] 3 All ER 304, [2003] 1 WLR 856.
Soering v UK (1989) 11 EHRR 439, [1989] ECHR 10438/88, ECt HR.
Suresh v Canada (Minister of Citizenship and Immigration) 2002 SCC 1, [2002] 4 LRC 640, Can SC. b
Tomic v UK App No 17837/03 (14 October 2003, unreported), ECt HR.
Vilvarajah v UK (1992) 14 EHRR 248, [1991] ECHR 13163/87, ECt HR.

Cases cited in list of authorities

- 15 Foreign Students v UK* (1977) 9 DR 185, E Com HR.
A-G for Canada v Cain, *A-G for Canada v Gilhula* [1906] AC 542, [1904-7] All ER Rep 582, PC. c
Ahmed v Secretary of State for the Home Dept [1990] Imm AR 61, CA.
Ahmed (Iftikhar) v Secretary of State for the Home Dept [2000] INLR 1, CA.
Ajayi v UK App No 27663/95 (22 June 1999, unreported), ECt HR.
Al-Fawwaz, Re, Re Eiderous [2001] UKHL 69, [2002] 1 All ER 545, sub nom *R (Al-Fawwaz) v Governor of Brixton Prison*, *R (Abdel Bary) v Governor of Brixton Prison*, *R (Eiderous) v Governor of Brixton Prison* [2002] 1 AC 556, [2002] 2 WLR 101. d
Amechrane v UK App No 5961/72 (1973) 16 YB 356, ECt HR.
Amuur v France (1996) 22 EHRR 533, [1996] ECHR 19776/92, ECt HR.
Amrollahi v Denmark [2002] ECHR 56811/00, ECt HR.
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs, *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, [2004] 2 LRC 581, Aust HC. e
Application No 9012/80 v Switzerland (1980) 24 DR 205, E Com HR.
Application No 10427/83 v UK (1986) 9 EHRR 369, ECt HR.
Atkinson v US Government [1969] 3 All ER 1317, [1971] AC 197, [1969] 3 WLR 1074, HL. f
Aylor-Davis v France (1994) 76 DR 164, E Com HR.
Bankovic v Belgium (2001) 11 BHRC 435, ECt HR.
Batayav v Secretary of State for the Home Dept [2003] EWCA Civ 1489, [2004] ACD 5.
Berrehab v Netherlands (1989) 11 EHRR 322, ECt HR.
Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR. g
Beshara v Germany App No 43696/98 (30 October 1998, unreported), E Com HR.
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
Buckley v UK (1997) 23 EHRR 101, [1996] ECHR 20348/92, ECt HR.
Canada (Minister of Justice) v Burns 2001 SCC 7, [2001] 5 LRC 19, Can SC. h
Carpenter v Secretary of State for the Home Dept Case C-60/00 [2003] All ER (EC) 577, [2003] QB 416, [2003] 2 WLR 267, [2002] ECR I-6279, ECJ.
Ciliz v Netherlands [2000] 2 FLR 469, ECt HR.
Cyprus v Turkey (2002) 11 BHRC 45, ECt HR.
Djali v Immigration Appeal Tribunal [2003] EWCA Civ 1371, [2004] 1 FCR 42. j
Djavit An v Turkey [2003] ECHR 20652/92, ECt HR.
E v Secretary of State for the Home Dept, *R v Secretary of State for the Home Dept* [2004] EWCA Civ 49, [2004] All ER (D) 16 (Feb).
Finucane v McMahon (1990) 1 IR 165, Ir HC and SC.
Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 1113, HL.

- Giamia v Belgium* (1980) 21 DR 73, E Com HR.
- Glaser v UK* [2000] 3 FCR 193, ECt HR.
- Goodwin v UK* (2002) 13 BHRC 120, ECt HR.
- Hadiqva v Secretary of State for the Home Dept* [2003] EWCA Civ 701, [2003] Imm. AR 490.
- Hatami v Sweden* (1999) 27 EHRR CD 8, ECt HR.
- HM v Secretary of State for the Home Dept* [2003] EWCA Civ 583, [2003] Imm AR 470.
- Ireland v UK* (1978) 2 EHRR 25, [1978] ECHR 5310/71, ECt HR.
- Jain v Secretary of State for the Home Dept* [2000] Imm AR 76, CA.
- Jaramillo v UK* App No 24865/94 (23 October 1995, unreported), ECt HR.
- Jin v Hungary* App No 58073/00 (16 November 2000, unreported), ECt HR.
- Judge v Canada* Comm No 829/1998 (20 October 2003, unreported), UNHRC.
- Kindler v Canada (Minister of Justice)* [1993] 4 LRC 85, Can SC.
- Kokkinakis v Greece* (1994) 17 EHRR 397, [1993] ECHR 14307/88, ECt HR.
- Krombach v Bamberski* Case C-7/98 [2001] All ER (EC) 584, [2001] QB 709, [2001] 3 WLR 488, [2001] ECR I-1935, ECJ.
- Krotov v Secretary of State for the Home Dept* [2004] EWCA Civ 69, [2004] All ER (D) 179 (Feb).
- Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] UKHL 19, [2002] 3 All ER 209, [2002] 2 AC 883, [2002] 2 WLR 1353.
- Lawrence v Texas* (2003) 15 BHRC 111, US SC.
- Loucks v Standard Oil Co of New York* (1918) 120 NE 198, NY Ct of Apps.
- Lynas v Switzerland* (1976) 6 DR 141, E Com HR.
- Mohamed v President of the Republic of South Africa* [2001] 5 LRC 636, SA CC.
- N v Secretary of State for the Home Dept (Terence Higgins Trust intervening)* [2003] EWCA Civ 1369, [2004] 1 WLR 1182.
- Ng Extradition, Reference (Canada), Re* [1993] 4 LRC 133, Can SC.
- Niemietz v Germany* (1992) 16 EHRR 97, [1992] ECHR 13710/88, ECt HR.
- Oppenheimer v Cattermole (Inspector of Taxes), Nothman v Cooper (Inspector of Taxes)* [1975] 1 All ER 538, [1976] AC 249, [1975] 2 WLR 347, HL.
- Pellegrini v Italy* (2002) 35 EHRR 44, ECt HR.
- Poku v UK* (1996) 22 EHRR CD 94, E Com HR.
- Pretty v UK* (2002) 12 BHRC 149, ECt HR.
- R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860, [2000] 1 WLR 1855, CA.
- R v Secretary of State for the Home Dept, ex p Mahmood* [2001] 2 FCR 63, [2001] 1 WLR 840, CA.
- R (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry)* [2001] EWCA Civ 2048, [2002] 1 WLR 1249.
- R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297.
- R (on the application of Bagdanavicius) v Secretary of State for the Home Dept* [2003] EWCA Civ 1605, [2003] All ER (D) 150 (Nov).
- R (on the application of Elliot) v Secretary of State for the Home Dept* [2001] EWHC Admin 559, [2001] All ER (D) 235 (Jul), DC.
- R (on the application of Farrakhan) v Secretary of State for the Home Dept* [2002] EWCA Civ 606, [2002] 4 All ER 289, [2002] QB 1391, [2002] 3 WLR 481.
- R (on the application of M (a child)) v Comr of Police of the Metropolis* [2001] EWHC Admin 553, [2002] Crim LR 215, DC.

- R (on the application of ProLife Alliance) v BBC* [2002] EWCA Civ 297, [2002] 2 All ER 756, [2002] 3 WLR 1080; *rvsd* [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185; [2003] 2 WLR 1403. a
- R (on the application of Q) v Secretary of State for the Home Dept* [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36, [2003] 3 WLR 365.
- R (on the application of Ramda) v Secretary of State for the Home Dept* [2002] EWHC 1278 (Admin), [2002] All ER (D) 227 (Jun), DC. b
- R (on the application of Samaroo) v Secretary of State for the Home Dept* [2001] EWCA Civ 1139, [2001] UKHRR 1150.
- R (on the application of Yiadom) v Secretary of State for the Home Dept* Case C-357/98 [2001] All ER (EC) 267, [2000] ECR I-9265, ECJ.
- R (on the application of Yogathas) v Secretary of State for the Home Dept*, *R (on the application of Thangarasa) v Secretary of State for the Home Dept* [2002] UKHL 36, [2002] 4 All ER 800, [2003] 1 AC 920, [2002] 3 WLR 1276. c
- Raidl v Austria* (1995) 82 DR 134, E Com HR.
- Refugee Appeal No 71864/00* (2 June 2000, unreported), NZ Refugee Status Appeals Authority.
- Sadutto, Re* [2004] EWHC 563 (Admin), [2004] All ER (D) 12 (Mar), DC. d
- Salazar v Sweden* App No 28987/95 (7 March 1996, unreported), E Com HR.
- Samaroo v Secretary of State for the Home Dept* [2001] EWCA Civ 1139, [2001] UKHRR 1150.
- SCC v Sweden* App No 46553/99 (15 December 2002, unreported), E Com HR.
- Secretary of State for the Home Dept v S* [2002] UKIAT 5613, IAT. e
- Sen v Netherlands* (2003) 36 EHRR 81, [2003] ECHR 41478/98, ECt HR.
- Singh v UK* (1996) 1 BHRC 119, ECt HR.
- Slivenko v Latvia* (2003) 15 BHRC 660, ECt HR.
- Smith v UK* (2000) 29 EHRR 493, [1999] ECHR 33985/96, ECt HR.
- Sorabjee v UK* [1996] EHRLR 216, ECt HR.
- T v Australia* Comm No 706/96 (4 December 1997, unreported), UNHRC. f
- Tanko v Finland* (1994) 94 DR 77, E Com HR.
- TI v UK* [2000] INLR 211, ECt HR.
- Tyrer v UK* (1978) 2 EHRR 1, [1978] ECHR 5856/72, ECt HR.
- X v Switzerland* (1980) 24 DR 205, E Com HR.
- X v UK* (1986) 9 EHRR 369, E Com HR. g
- Yildiz v Austria* [2003] 2 FCR 182, ECt HR.

Appeals

R (on the application of Ullah) v Special Adjudicator h

The claimant, Ahsan Ullah, appealed with the permission of the court from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Kay and Dyson LJ) on 16 December 2002 ([2002] EWCA Civ 1856, [2003] 3 All ER 1174) dismissing his appeal from the decision of Harrison J on 16 July 2002 ([2002] EWHC 1584 (Admin), [2002] Imm AR 601) refusing his application to quash the decision of the defendant special adjudicator, promulgated on 17 September 2001, dismissing his appeal against the refusal of the Secretary of State for the Home Department of his claim for asylum and rejection of his claim that it would be contrary to the Human Rights Act 1998 to remove him to his home country, Pakistan. The Secretary of State for the Home Department appeared as an interested party. JUSTICE, the National Council for Civil Liberties (Liberty) and j

a the Joint Council for the Welfare of Immigrants were given leave to intervene. The facts are set out in the opinion of Lord Carswell.

Do v Secretary of State for the Home Department

b The claimant, Thi Lien Do, appealed, with the permission of the court, from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Kay and Dyson LJ) on 16 December 2002 ([2002] EWCA Civ 1856, [2003] 3 All ER 1174) dismissing her appeal from the determination of the immigration appeal tribunal (Judge Holden, M Padfield and SS Ramsuair) on 7 January 2002 upholding the decision of a special adjudicator (HS Coleman), promulgated on 5 September 2001, upholding the refusal of the defendant Secretary of State to grant the claimant asylum and rejecting her claim that it would be contrary to the Human Rights Act 1998 to remove her to her home country, Vietnam. JUSTICE, the National Council for Civil Liberties (Liberty) and the Joint Council for the Welfare of Immigrants were given leave to intervene. The facts are set out in the opinion of Lord Carswell.

d *Nicholas Blake QC* and *Martin Soorjoo* (instructed by *Thompson & Co*) for Mr Ullah. *Manjit Gill QC* and *Christa Fielden* (instructed by *Sheikh & Co*) for Ms Do. *Lord Goldsmith QC*, A-G, *Monica Carss-Frisk QC* and *Lisa Giovannetti* (instructed by the *Treasury Solicitor*) for the Special Adjudicator. *Lord Goldsmith QC*, A-G, *Monica Carss-Frisk QC* and *Lisa Giovannetti* (instructed by the *Treasury Solicitor*) for the Secretary of State.

e *Philip Havers QC* and *Shaheen Rahman* (instructed by *Roger Smith*) for JUSTICE. *Rabinder Singh QC* and *Raza Husain* (instructed by *Alexander Gask*) for Liberty and the Joint Council for the Welfare of Immigrants.

Their Lordships took time for consideration.

f 17 June 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

g [1] My Lords, the primary issue in these appeals, brought by leave of the Court of Appeal, is agreed to be: whether any article of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the European Convention) other than art 3 could be engaged in relation to a removal of an individual from the United Kingdom where the anticipated treatment in the receiving state will be in breach of the requirements of the European Convention, but such treatment does not

h meet the minimum requirements of art 3 of the European Convention. Although the issue is expressed in this general way, the specific right in question in these appeals, which were heard together, is the right to freedom of thought, conscience and religion guaranteed by art 9 of the European Convention and in particular the freedom ‘either alone or in community with others and in public or

j private, to manifest his religion or belief, in worship, teaching, practice and observance’.

[2] Mr Ullah is a citizen of Pakistan and an active member of the Ahmadhiya faith. He arrived in this country from Karachi in January 2001 and applied for asylum, claiming to have a well-founded fear of persecution in Pakistan as a result of his religious beliefs. The Secretary of State dismissed his claim for asylum and held that Mr Ullah had not qualified for permission to remain in this country by

reason of any article of the European Convention. Mr Ullah's appeal to an adjudicator was dismissed. The adjudicator found that he did not have a well-founded fear of persecution. She also found that although arts 9, 10 and 11 of the European Convention could be engaged in a situation of this kind, Mr Ullah would suffer no serious infringement of these rights in Pakistan; the Secretary of State was acting lawfully in pursuance of the legitimate aim of immigration control; and his decision to remove Mr Ullah to Pakistan was proportionate to any difficulties he might face on his return. An application for judicial review of this decision was dismissed by Harrison J, who recognised the importance of the issues and gave permission to appeal.

[3] Miss Do is a citizen of Vietnam and entered this country in November 2000. She applied for asylum, based on her fear of persecution as a practising Roman Catholic in Vietnam. The Secretary of State refused her application and concluded that she did not qualify for protection under any article of the convention. On appeal an adjudicator upheld the dismissal of Miss Do's asylum claim and found that it would not be a breach of arts 3 and 5 of the European Convention to remove her to Vietnam. The Immigration Appeal Tribunal dismissed an appeal against this decision, going on to hold that any interference there might be with Miss Do's activities as a religious teacher would not amount to a violation of her rights under art 9. She applied for, and was granted, permission to appeal to the Court of Appeal.

[4] The Court of Appeal (Lord Phillips of Worth Matravers MR, Kay and Dyson LJ) heard the appeals of Mr Ullah and Miss Do together and dismissed them (see [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770). The court did not disturb the findings of fact made in either case. The importance of the decision lies in the court's statement of principle:

'[63] For these reasons we hold that a removal decision to a country that does not respect art 9 rights will not infringe the 1998 Act where the nature of the interference with the right to practise religion that is anticipated in the receiving state falls short of art 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practise religion in such circumstances will not result in the engagement of the human rights convention unless the interference is "flagrant".

OTHER ARTICLES

[64] This appeal is concerned with art 9. Our reasoning has, however, wider implications. Where the human rights convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage art 3, the English court is not required to recognise that any other article of the human rights convention is, or may be, engaged. Where such treatment falls outside art 3, there may be cases which justify the grant of exceptional leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the human rights convention.'

[5] Counsel for both appellants sought to persuade the House that the interference with their art 9 rights which the appellants would suffer if returned to Pakistan and Vietnam respectively would be more serious than the adjudicators had found. I do not for my part accept this submission. I am not

a persuaded that the adjudicators erred in the facts they found or the inferences they drew. It follows that even if the legal question raised at the outset were resolved in favour of the appellants, this ruling would not prevent the removal of the appellants. To that extent the question raised is academic. But it is a question of legal and practical importance. It has been fully argued, with the benefit of valuable interventions on behalf of JUSTICE, Liberty and the Joint Council for

b the Welfare of Immigrants. The House should give such assistance as, on the present state of the Strasbourg authorities, it can. For this purpose it is necessary to return to first principles.

[6] As Lord Slynn of Hadley recorded in *R (on the application of Saadi) v Secretary of State for the Home Dept* [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131:

c ‘[31] In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory. Even as late as 1955 the eighth edition of *Oppenheim’s International Law* pp 675–676 (para 314) stated: “The reception of aliens is a matter of discretion, and every

d state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.” Earlier in *A-G for Canada v Cain*, *A-G for Canada v Gilhula* [1906] AC 542 at 546, [1904–7] All ER Rep 582 at 584–585, the Privy Council in the speech of Lord Atkinson decided: “One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it

e pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book I, s. 231; book 2, s. 125.” This principle still applies subject to any treaty obligation of a state or rule of the state’s domestic law which may apply to the exercise of that control. The

f starting point is thus in my view that the United Kingdom has the right to control the entry and continued presence of aliens in its territory. Article 5(1)(f) seems to be based on that assumption.’

This is a principle fully recognised in the Strasbourg jurisprudence: see, for example, *Vilvarajah v UK* (1992) 14 EHRR 248 at 286 (para 102), *Chahal v UK* (1996)

g 1 BHRC 405 at 422 (para 73), *D v UK* (1997) 2 BHRC 273 at 283 (para 46), *Bensaid v UK* (2001) 11 BHRC 297 at 307 (para 32), *Boultif v Switzerland* (2001) 33 EHRR 1179 at 219 (para 46). As these statements of principle recognise, however, the right of a state to control the entry and residence of aliens is subject to treaty obligations which the state has undertaken. Obviously relevant in this context are the Geneva

h Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) and the 1967 Protocol to that convention (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the Geneva Convention), giving a right of asylum to any person who—

i ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’

That provision has, of course, been the subject of much detailed examination. But such examination is not called for here, since it has been held that the appellants do not fall within the provision, and the correctness of those decisions is not in

issue before the House. It is enough to note that the focus of the Geneva Convention is on those who are not citizens of the country in which they seek asylum and who have no right to enter it or remain there save such as that convention may give them.

[7] By art 1 of the European Convention the contracting states undertook to secure 'to everyone within their jurisdiction' the rights and freedoms defined in s 1 of the convention. The corresponding obligation in art 2 of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (the ICCPR) extends to all individuals within the territory of the state and subject to its jurisdiction, but the difference of wording is not significant for present purposes. Thus the primary focus of the European Convention is territorial: member states are bound to respect the convention rights of those within their borders. In the ordinary way, a claim based on the convention arises where a state is said to have acted within its own territory in a way which infringes the enjoyment of a convention right by a person within that territory. Such claims may for convenience be called 'domestic cases'.

[8] The European Convention as originally drafted made no express reference to immigration or extradition save in sanctioning (in art 5(1)(f)) 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Those who negotiated the European Convention may have contemplated that member states' decisions on immigration and extradition would fall outwith the scope of the convention. Such an argument on immigration was indeed put forward by Her Majesty's government in *Abdulaziz v UK* (1985) 7 EHRR 471 at 495 (para 59). But the European Commission on Human Rights rejected this interpretation, and so did the European Court of Human Rights (the ECtHR), which held in para 60:

'Thus, although some aspects of the right to enter a country are governed by Protocol No. 4 as regards States bound by that instrument, it is not to be excluded that measures taken in the field of immigration may affect the right to respect for family life under Article 8. The Court accordingly agrees on this point with the Commission.'

The Commission ((1983) 6 EHRR 28 at 39 (para 59)) had held that:

'... immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8.'

As this quotation makes plain, however, this was a domestic case: the applicants were wives settled here; they complained that their husbands had been refused leave to enter or remain; they alleged an interference with their family life here.

[9] Domestic cases as I have defined them are to be distinguished from cases in which it is not claimed that the state complained of has violated or will violate the applicant's European Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's European Convention rights in that other territory. I call these 'foreign cases', acknowledging that the description is imperfect, since even a foreign case assumes an exercise of power by the state affecting a person physically present within its territory. The question was bound to arise whether the European Convention could be relied on to resist expulsion or extradition in

a a foreign case. It is a question of obvious relevance to these appeals, since the appellants do not complain of any actual or apprehended interference with their art 9 rights in the United Kingdom.

[10] A clear, although partial, answer to this question was given in *Soering v UK* (1989) 11 EHRR 439, a case in which the applicant resisted extradition to the United States to stand trial in Virginia, contending that trial there would infringe b his right to a fair trial under art 6 of the European Convention and that his detention on death row, if convicted and sentenced to death, would infringe his rights under art 3. Neither the conduct of the trial nor the conditions of detention would, of course, be within the control or responsibility of the United Kingdom. The court did not reject the applicant's complaint under art 6 as ill-founded in principle, but dismissed it on the facts in para 113 (at 479) of its judgment:

c 'The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a d flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.'

[11] The applicant's complaint under art 3 was discussed by the ECtHR (at 466–469) at much greater length, in paragraphs which call for citation:

e '85. As results from Article 5(1)(f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition," no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has f consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee. What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

g 86. Article 1 of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I," sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnoître*" in the French text) h the listed rights and freedoms to persons within its own "jurisdiction." Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its j extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular ... These considerations cannot, however, absolve the

Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction. a

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society." b

88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard. The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593)], which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture." The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article. c
d
e
f
g
h

89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it j

a is increasingly in the interest of all nations that suspected offenders who flee
abroad should be brought to justice. Conversely, the establishment of safe
havens for fugitives would not only result in danger for the State obliged to
harbour the protected person but also tend to undermine the foundations of
extradition. These considerations must also be included among the factors
b to be taken into account in the interpretation and application of the notions
of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the
existence or otherwise of potential violations of the Convention. However,
where an applicant claims that a decision to extradite him would, if
implemented, be contrary to Article 3 by reason of its foreseeable
consequences in the requesting country, a departure from this principle is
c necessary, in view of the serious and irreparable nature of the alleged
suffering risked, in order to ensure the effectiveness of the safeguard
provided by that Article.

91. In sum, the decision by a Contracting State to extradite a fugitive may
give rise to an issue under Article 3, and hence engage the responsibility of
that State under the Convention, where substantial grounds have been
shown for believing that the person concerned, if extradited, faces a real risk
of being subjected to torture or to inhuman or degrading treatment or
punishment in the requesting country. The establishment of such
responsibility inevitably involves an assessment of conditions in the
requesting country against the standards of Article 3 of the Convention.
d Nonetheless, there is no question of adjudicating on or establishing the
responsibility of the receiving country, whether under general international
law, under the Convention or otherwise. In so far as any liability under the
Convention is or may be incurred, it is liability incurred by the extraditing
Contracting State by reason of its having taken action which has as a direct
e consequence the exposure of an individual to proscribed ill-treatment.
f

This is an important authority, strongly relied on by the appellants, first, for its
statement of principle and, secondly, as showing that art 3 of the European
Convention at least can, on appropriate facts, be relied on in a foreign case.

[12] The principle in *Soering v UK* was followed in *Chahal v UK* (1996) 1 BHRC
g 405, a foreign case in which it was sought to deport an Indian citizen, believed to
be a Sikh separatist, on grounds of his threat to national security. The ECtHR
upheld the applicant's complaint, and held (at 424):

h '80. The prohibition provided by art 3 against ill-treatment is equally
absolute in expulsion cases. Thus, whenever substantial grounds have been
shown for believing that an individual would face a real risk of being
subjected to treatment contrary to art 3 if removed to another state, the
responsibility of the contracting state to safeguard him or her against such
treatment is engaged in the event of expulsion ... In these circumstances, the
activities of the individual in question, however undesirable or dangerous,
j cannot be a material consideration. The protection afforded by art 3 is thus
wider than that provided by arts 32 and 33 of the [Geneva Convention
relating to the Status of Refugees].

81. The court's judgment in *Soering v UK* (1989) 11 EHRR 439 at 467–468
(para 88), which concerned extradition to the United States of America,
clearly and forcefully expresses the above view. It should not be inferred
from the court's remarks (para 89) concerning the risk of undermining the

foundations of extradition that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state's responsibility under art 3 is engaged. a

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security. b

The *Soering v UK* ruling was also followed in *D v UK* (1997) 2 BHRC 273, another foreign case and a strong decision, since the substantial treatment found to be capable of violating art 3 was neither the responsibility of the United Kingdom authorities (save for implementation of the decision to expel) nor of any intentional conduct on the part of the state to which he was to be deported. The *Soering v UK* ruling has also been recognised, with differing outcomes on the facts, in foreign cases such as *Cruz Varas v Sweden* (1992) 14 EHRR 1, *Vilvarajah v UK* (1992) 14 EHRR 248, *HLR v France* (1997) 26 EHRR 29, *Gonzalez v Spain* App No 43544/98 (29 June 1999, unreported), *Dehwari v Netherlands* (2001) 29 EHRR CD 74 and *Hilal v UK* (2001) 11 BHRC 354. Given this weight of authority, the respondents have accepted that reliance may be placed on art 3 of the European Convention in a foreign case, and the agreed issue stated at the outset of this opinion reflects that acceptance. c

[13] The respondents drew attention in argument to substantive differences between expulsion and extradition: such differences plainly exist, and may affect the application of the *Soering v UK* principle. But the ECtHR has held the principle to be potentially applicable in either situation. In *Cruz Varas v Sweden* (1992) 14 EHRR 1 at 34 (para 70), it said: d

'Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above [*Soering*] principle also applies to expulsion decisions and *a fortiori* to cases of actual expulsion.' e

The ECtHR has relied on this paragraph, directly or indirectly, in a series of later cases, among them *Vilvarajah v UK* (1992) 14 EHRR 248 at 286 (para 103), *Chahal v UK* (1996) 1 BHRC 405 at 422–423 (para 74), *HLR v France* (1997) 26 EHRR 29 at 49 (para 34), *Ahmed v Austria* [1998] INLR 65, *Jabari v Turkey* (2000) 9 BHRC 1 at 8 (para 38) and *Hilal v UK* (2001) 11 BHRC 354 at 367–368 (para 59). f

[14] The ECtHR has taken account of this jurisprudence when ruling on the territorial scope of the European Convention. In *Loizidou v Turkey* (1995) 20 EHRR 99 at 130 (para 62), it said: g

'In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.' h

This ruling was elaborated in *Bankovic v Belgium* (2001) 11 BHRC 435 at 450, where a Grand Chamber of the ECtHR said: i

a '67. In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the convention.

b 68. Reference has been made in the court's case law, as an example of jurisdiction "not restricted to the national territory" of the respondent state (*Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99 at para 62), to situations where the extradition or expulsion of a person by a contracting state may give rise to an issue under arts 2 and/or 3 (or, exceptionally, under arts 5 and/or 6) and hence engage the responsibility of that state under the convention (*Soering v UK* ((1989) 11 EHRR 439 at 468–469 (para 91)), *Cruz Varas v Sweden* ((1992) 14 EHRR 1 at 33–34 (paras 69, 70)), and *Vilvarajah v UK* ((1992) 14 EHRR 248, [1991] ECHR 13163/87 at 286–287 (para 103)). However, the court notes that liability is incurred in such cases by an action of the respondent state concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad (see also *Al-Adsani v UK* (2001) 12 BHRC 88 at 99–100 (para 39)).'

[15] The crucial issue dividing the parties is, therefore, whether, in a foreign case, reliance may be placed on any article of the European Convention other than art 3, and in particular whether reliance may be placed on art 9. It is convenient to start with art 2, the right to life. The applicant in *D v UK* (1997) 2 BHRC 273 based his claim on art 2 as well as art 3: neither the Commission nor the ECtHR rejected this claim as untenable in principle, but neither found it necessary to review the art 2 complaint separately from that under art 3. In *Gonzalez v Spain* App No 43544/98 (29 June 1999, unreported) the applicant's complaint under art 2 was rejected on the facts, as was his complaint under art 3. In *Dehwari v Netherlands* (2001) 29 EHRR CD 74, a foreign case concerned with expulsion to Iran, the applicant's claim based on art 2 failed on the facts. But the claim was not rejected in principle, and having referred to the case law on art 3 the Commission said (at 75):

g '59. The Commission has previously examined the question whether analogous considerations apply to Article 2, in particular whether this provision can also engage the responsibility of a Contracting State where, upon expulsion or other removal, the person's life is in danger. To this end the Commission reiterated that Article 2 contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition of intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2 [*Bahaddar v Netherlands* (1998) 26 EHRR 278].

j 60. The Commission finds nothing to indicate that the expulsion of the applicant would amount to a violation of the general obligation contained in the first sentence of paragraph 1 of Article 2 of the Convention.

61. As to the prohibition of intentional deprivation of life, including the execution of a death penalty, the Commission does not exclude that an issue might arise under Article 2 of the Convention or Article 1 of Protocol No. 6 in circumstances in which the expelling State knowingly puts the person concerned [at] such high risk of losing his life as for the outcome to be a

near-certainty. The Commission considers, however, that a “real risk”—within the meaning of the case law concerning Article 3 (see para. 58 above)—of loss of life would not as such necessarily render an expulsion contrary to Article 2 of the Convention or Article 1 of Protocol No. 6, although it would amount to inhuman treatment within the meaning of Article 3 of the Convention (cf. [*Bahaddar v Netherlands* (1998) 26 EHRR 278 at 287 (para 78)]).

62. The Commission has examined the applicant’s allegations but finds it insufficiently substantiated that his expulsion would disclose such a high risk of loss of life as to trigger the applicability of Article 2 of the Convention or Article 1 of Protocol No. 6.’

These statements must, I think, be taken to establish the possibility in principle of relying on art 2 in a foreign case, if the facts are strong enough. Given the special importance attached to the right to life by modern human rights instruments it would perhaps be surprising if art 3 could be relied on and art 2 could not.

[16] Authority on the applicability in a foreign case of art 4 of the European Convention (the right not to be held in slavery or servitude, and not to be required to perform forced or compulsory labour) is scant. The House was referred only to one admissibility decision: see *Ould Barar v Sweden* (1999) 28 EHRR CD 213. The ECtHR (at 215) found the applicant’s complaint under art 4 (as well as his complaints under arts 2 and 3) to be inadmissible on the facts, although it was recognised—

‘that the expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under Article 3 of the Convention.’

The respondents are probably right to submit that a claim under art 4, if strong enough, would succeed under art 3. But it would seem to be inconsistent with the humanitarian principles underpinning the European Convention to accept that, if the facts were strong enough, a claim would be rejected even if it were based on art 4 alone.

[17] There is more Strasbourg authority on the potential applicability of arts 5 and 6 in foreign cases, although it remains somewhat tentative. In *Soering v UK* the ECtHR did not exclude the applicability of art 6: see para 113, quoted in [10], above. In *Bankovic v Belgium* such an exceptional case was recognised as possible: see para 68 of the ECtHR’s judgment quoted in [14], above. *Drozdz v France* (1992) 14 EHRR 745 was not, within my definition, a foreign case. It involved no removal. The applicants complained of the fairness of their trial in Andorra (which the ECtHR held it had no jurisdiction to investigate) and of their detention in France, which was not found to violate art 5. The case is important, first, for the ruling (at 793 (para 110) of the ECtHR’s judgment) that member states are obliged to refuse their co-operation with another state if it emerges that a conviction ‘is the result of a flagrant denial of justice’. Secondly, the case is notable for the concurring opinion of Judge Matscher, who said (at 795):

‘According to the Court’s case law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a State may violate Articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the

Convention; other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable.'

In *MAR v UK* (1997) 23 EHRR CD 120, an expulsion case, the applicant's complaints under arts 5 and 6 of the European Convention, as well as those under arts 2 and 3, were found to be admissible and to call for examination on the merits. The case was settled. In *Dehwari v Netherlands* (2001) 29 EHRR CD 74 at 78 (para 86) the Commission echoed the observation of the ECtHR in para 113 of its judgment in *Soering v UK*: see [10], above. The applicant in *Einhorn v France* App No 71555/01 (16 October 2001, unreported) sought to resist extradition to the United States. One of his complaints related to the fairness of the trial he would undergo there. The ECtHR held in para 32 of its judgment—

'that it cannot be ruled out that an issue might exceptionally be raised under art 6 of the European Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country ...'

The court added (at para 33) that:

'The extradition of the applicant to the United States would therefore be likely to raise an issue under art 6 of the European Convention if there were substantial grounds for believing that he would be unable to obtain a retrial in that country and would be imprisoned there in order to serve the sentence passed on him in absentia.'

The applicant failed on the facts. In *Mamatkulov v Turkey* (2003) 14 BHRC 149 a retrospective complaint of extradition to Uzbekistan was made. It was not established that the applicants had been denied a fair trial, and accordingly no issue was held to arise under art 6(1) of the European Convention. *Tomic v UK* App No 17837/03 (14 October 2003, unreported) was the most recent authority on arts 5 and 6 cited to the House. It was an expulsion case. The ECtHR ruled (at para 3):

'The court does not exclude that an issue might exceptionally be raised under art 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country, particularly where there is the risk of execution ... Whether an issue could be raised by the prospect of arbitrary detention contrary to art 5 is even less clear. However, the applicant's submissions do not disclose that he faces such a risk under either provision.'

Both sides drew comfort from this body of authority. The respondents pointed out that in no foreign case had either the Commission or the ECtHR found a violation of arts 5 or 6. The appellants pointed out that while certain complaints under these articles had failed for want of proof, neither the Commission nor the ECtHR had rejected a complaint under these articles as inadmissible in principle. Both contentions, as it seems to me, are correct.

[18] As observed in [8], above, *Abdulaziz v UK* (1985) 7 EHRR 471 was not a foreign case since the applicants' complaint related not to the violation of their convention rights under art 8 which would occur if they were removed to another country but to the violation of those rights which they would suffer here if their husbands were refused entry or leave to remain. Several authorities cited fell into the same category. But some did not, and were of a hybrid nature. The removal of a person from country A to country B may both violate his right to

respect for his private and family life in country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B. The applicant in *Moustaquim v Belgium* (1991) 13 EHRR 802 was a Moroccan national who arrived in Belgium in 1965 when he was aged under two. In 1984, 19 years later, after a career of juvenile crime, he was deported, but the deportation order was suspended in 1989 and he returned to Belgium. He complained that his deportation had violated his right to private and family life under art 8. The ECtHR held (at 813 (para 36)) that there had been interference by a public authority with his right to family life guaranteed in art 8(1) and (at 815 (para 46)) that this was not justified under art 8(2). In *Bensaid v UK* (2001) 11 BHRC 297 the applicant was an Algerian national who had arrived in this country in 1989 as a visitor, married a United Kingdom citizen in 1993 and was given notice of intention to deport him in 1997. He was suffering from a psychotic illness and sought, unsuccessfully, to contend that his removal to Algeria would violate his rights under art 3 because of the lack of psychiatric facilities there. He also complained that his removal would breach his rights under art 8. The court held (at 309–310 (para 46)):

‘Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by art 8. However, the court’s case law does not exclude that treatment which does not reach the severity of art 3 treatment may nonetheless breach art 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity ...’

The claim failed because the interference was found to be justified (at 310 (para 48)). I would here refer to, but need not repeat, the more detailed analysis I have made of this case in *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 3 All ER 821, [2004] 3 WLR 58. The applicant in *Boultif v Switzerland* (2001) 33 EHRR 1179 entered Switzerland in 1992, married a Swiss wife and was imprisoned for crime. In 1998 the Swiss authorities refused to renew his residence permit. The ECtHR’s approach was expressed in its judgment (at 1186):

‘39. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention.

40. In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant’s residence permit in Switzerland interfered with the applicant’s right to respect for his family life within the meaning of Article 8(1) of the Convention.

41. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was “in accordance with the law”, motivated by one or more of the legitimate aims set out in that paragraph, and “necessary in a democratic society”.

The court found that the interference was not justified under art 8(2), and the complaint therefore succeeded. This authority compels the conclusion that reliance may be placed on art 8 in a foreign case where the applicant can show that

a removal will seriously interfere with his rights guaranteed by art 8 and such interference is not shown to be justified.

[19] The House was referred to one case only in which the Strasbourg court had considered art 9 of the European Convention in a foreign case: see *Razaghi v Sweden* App No 64599/01 (11 March 2003, unreported). The applicant resisted expulsion to Iran on a number of grounds arising from his adultery in Iran and his conversion to Christianity. He relied on art 2 and art 1 of the Sixth Protocol, on art 3, on art 6 and on art 9. The ECtHR accepted that the complaint under art 3 raised issues which required examination on the merits but rejected the complaint under art 6 on the facts. The court added:

c ‘As regards the applicant’s right to freedom of religion, the court observes that, in so far as any alleged consequence in Iran of the applicant’s conversion to Christianity attains the level of treatment prohibited by art 3 of the European Convention, it is dealt with under that provision. The court considers that the applicant’s expulsion cannot separately engage the Swedish government’s responsibility under art 9 of the European Convention.’

d It seems that the focus of the application was on art 3. It is not clear whether (as the respondents contended) the court held that art 9 could never apply in a foreign expulsion case, or whether (as the appellants contended) the court regarded the art 9 complaint as so inextricably linked with the art 3 complaint as to raise no separate issue.

e [20] In determining the present question, the House is required by s 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the ECtHR: see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [26], [2001] 2 All ER 929 at [26], [2003] 2 AC 295. This reflects the fact that the European Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the ECtHR. From this it follows that a national court subject to a duty such as that imposed by s 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

h [21] Seeking to perform that duty, I consider that the only possible answer to the question posed at the outset of this opinion is Yes. I have accepted the possibility of relying on art 2 in [15], above. I have questioned in [16] whether a claim based on art 4 alone might not succeed. The authority cited in [17] shows that the ECtHR has not excluded the possibility of relying on art 6, and even art 5, while fully recognising the great difficulty of doing so and the exceptional nature of such cases. I do not think, on authority briefly cited in [18] and more fully discussed in *Razgar’s* case, that reliance on art 8 can be ruled out in principle. I find it hard to think that a person could successfully resist expulsion in reliance on

art 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on art 3. But I would not rule out such a possibility in principle unless the ECtHR has clearly done so, and I am not sure it has. It is unnecessary for present purposes to consider other articles of the European Convention. I would be inclined to accept, as the Court of Appeal decided in *R (on the application of Holub) v Secretary of State for the Home Dept* [2001] 1 WLR 1359 and as Mr Blake QC conceded, that reliance could not in this context be placed on the right to education protected by art 2 of the First Protocol to the European Convention, but this conclusion was resisted by Mr Rabinder Singh QC and it is unnecessary to decide the point.

[22] In answering the agreed issue as I do in the foregoing paragraph, I differ from the conclusion of the Court of Appeal [2004] 3 All ER 174 expressed in [64], quoted at [4], above. That conclusion does not in my opinion reflect the current effect of the Strasbourg jurisprudence. The basis upon which a state may be held liable in a foreign case was explained by the ECtHR in the context of art 3 in *Soering v UK* (1989) 11 EHRR 439 at 468–469 (para 91), quoted in [11], above, and this explanation has been relied on by the court in later cases such as *Cruz Varas v Sweden* (1992) 14 EHRR 1 at 33–34 (para 69) and *Vilvarajah v UK* (1992) 14 EHRR 248 at 286–287 (para 103). It is essentially the basis for which Mr Blake and Mr Gill QC for the appellants contended, and which they called the causation principle.

[23] In resolving the issue expressed at the outset of this opinion, the primary source must be the Strasbourg jurisprudence. It is reassuring that the Human Rights Chamber for Bosnia and Herzegovina understood the effect of that jurisprudence much as I do: see *Boudellaa v Bosnia and Herzegovina* (2002) 13 BHRC 297 at 363 (para 259). A similar approach was adopted by the Human Rights Committee of the United Nations, interpreting the ICCPR in *ARJ v Australia* Comm No 692/96 (11 August 1996, unreported), when it ruled:

‘6.8 What is at issue in this case is whether by deporting Mr J to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the ICCPR. States parties to the ICCPR must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the ICCPR. Relevant for the consideration of this issue is the state party’s obligation, under art 2, para (1), of the ICCPR, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR. The right to life is the most fundamental of these rights.

6.9 If a state party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the ICCPR will be violated in another jurisdiction, that state party itself may be in violation of the ICCPR.’

This is also the approach which the Supreme Court of Canada adopted when it said in *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 4 LRC 640 at 661 (a torture case):

[53] We discussed this issue at some length in *Minister of Justice v Burns (Amnesty International intervening)* 2001 SCC 7, (2001) 11 BHRC 314. In that case, the United States sought the extradition of two Canadian citizens to

face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the minister had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s 12. We agreed, however, with the respondents' argument under s 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the *potential* consequences of the act of extradition" ((2001) 11 BHRC 314 at [60]) (emphasis in original). We cited, in particular, *Canada v Schmidt* [1987] 1 SCR 500 at 522, in which La Forest J recognised that—"in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances." In that case, La Forest J referred specifically to the possibility that a country seeking extradition might torture the accused on return.

[54] While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here.'

[24] While the Strasbourg jurisprudence does not preclude reliance on articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to art 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: see *Soering v UK* (1989) 11 EHRR 439 at 468–469 (para 91), *Cruz Varas v Sweden* (1992) 14 EHRR 1 at 33–34 (para 69), *Vilvarajah v UK* (1992) 14 EHRR 248 at 286–287 (para 103). In *Dehwari v Netherlands* (2001) 29 EHRR CD 74 at 75 (para 61) (see [13], above) the Commission doubted whether a real risk was enough to resist removal under art 2, suggesting that the loss of life must be shown to be a 'near-certainty'. Where reliance is placed on art 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: see *Soering v UK* (1989) 11 EHRR 439 at 479 (para 113) (see [10], above), *Drozd v France* (1992) 14 EHRR 745 at 793 (para 110), *Einhorn v France* App No 71555/01 (16 October 2001, unreported) (para 32), *Razaghi v Sweden* App No 64599/01 (11 March 2003, unreported), *Tomic v UK* App No 17837/03 (14 October 2003, unreported). Successful reliance on art 5 would have to meet no less exacting a test. The lack of success of applicants relying on arts 2, 5 and 6 before the ECtHR highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as arts 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the ECtHR ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly

immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under arts 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr CMG Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Dept* [2002] UKIAT 702, [2003] Imm AR 1 at [111]:

‘The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.’

[25] I have largely accepted the appellants’ arguments on principle. But even if it were assumed that art 9(1) of the European Convention could be relied on to resist the appellants’ expulsion to Pakistan and Vietnam respectively, they fall far short of showing facts capable of supporting such a claim, as I have held in [5], above. For these reasons, and also for those given by Lord Steyn and Lord Carswell, I would therefore dismiss both appeals.

LORD STEYN.

[26] My Lords, in my view the Court of Appeal was right to dismiss the appeals of Mr Ullah, an Ahmadi preacher from Pakistan, and Miss Do, a Roman Catholic from Vietnam. Both entered the United Kingdom and claimed that they feared persecution if returned to their own countries. The Secretary of State refused their asylum claims. While there is discrimination on the ground of religion in Pakistan and Vietnam, I am satisfied that the lower courts were entitled to find that the threshold of what constitutes persecution under the terms of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) and the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the Refugee Convention) was not satisfied by either appellant. They appealed to immigration adjudicators on the alternative ground that their removal to their own countries would constitute a breach of art 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the European Convention). Article 9 contains guarantees of freedom of thought, conscience and religion. The adjudicators and first instance judges decided that on the facts these alternative claims failed. In the case of Mr Ullah it was found that his preaching in Pakistan did not cause serious problems for him. In the case of Miss Do the circumstances in which she practised her faith in Vietnam did not differ significantly from those encountered by the other eight million Catholics in that country. In my view on the facts found by the adjudicators neither appellant came within a measurable distance of establishing that art 9 was engaged. The two cases were wholly unmeritorious.

THE PRINCIPAL QUESTION OF LAW

[27] The starting point of the legal analysis of the Court of Appeal was that in making a decision to expel an alien account must be taken of art 3 of the European Convention. Article 3 contains the guarantee that no one shall be subjected to torture or to inhuman or degrading treatment. Using the two cases before it as the basis for a wide-ranging inquiry, the Court of Appeal then posed

- a for itself the question whether a decision to expel an alien need ever be tested against any other guarantees contained in the European Convention: see [2003] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770. This was an ambitious undertaking requiring the Court of Appeal to focus on a number of fundamental rights under the European Convention which were not in issue without having before it the spectrum of circumstances which could arise in different contexts.
- b The judgment of the court is, however, a comprehensive and careful one. It must be analysed in detail.

THE CONCLUSION OF THE COURT OF APPEAL

[28] The Court of Appeal came to the following conclusion (at [64]):

- c 'This appeal is concerned with art 9. Our reasoning has, however, wider implications. Where the human rights convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage art 3, the English court is not required to recognise that any other article of the human rights convention is, or may be,
- d engaged.'

The Court of Appeal ruled out as a matter of law the possibility that any article other than art 3 could ever be engaged. It will be necessary to examine whether the principles of the European Convention, and the evolving jurisprudence of the European Court of Human Rights (the ECtHR), justified this conclusion.

UNCONTROVERSIAL MATTERS

- [29] There is much in the legal analysis of the Court of Appeal which is uncontroversial. The Court of Appeal (at [47]) emphasised the principle of territoriality expressed in art 1 of the European Convention. The notion of jurisdiction is essentially territorial. However, the ECtHR has accepted that in exceptional cases acts of contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the European Convention: see *Ocalan v Turkey* (2003) 15 BHRC 297 at 325–326 (para 93), *Bankovic v Belgium* (2001) 11 BHRC 435. The effect of the decision of the ECtHR in *Soering v UK* (1989) 11 EHRR 439 was that the extraditing or deporting state is itself liable for taking actions the direct consequence of which is the exposure of an individual abroad to the real risk of proscribed treatment. The Court of Appeal rightly stated that *Soering v UK* is an exception to the essentially territorial foundation of jurisdiction. It is important, however, to bear in mind that apart from specific bases of jurisdiction such as the
- g flag of a ship on the high seas or consular premises abroad, there are exceptions of wider reach which can come into play. Thus contracting states are bound to secure the rights and freedoms under the European Convention to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad: see *Cyprus v Turkey* (1976) 4 EHRR 482 at 586 (para 8). Moreover, the doctrine of positive obligations under certain guarantees of the European Convention may in exceptional cases require states to protect individuals from exposure to foreseeable flagrant risks of violations of core guarantees caused by expulsions: see *D v UK* (1997) 2 BHRC 273.
- h

[30] The Court of Appeal stressed the public importance of maintaining immigration control in the United Kingdom. The Court of Appeal was right to do so. As a matter of international law states have the right to control the entry,

residence and expulsion of aliens. This right is, however, subject to the treaty obligations under the Refugee Convention and the European Convention: see *Henao v Netherlands* App No 13669/03 (24 June 2003, unreported). A consequence of this general principle is that, except in wholly exceptional circumstances (such as was visualised in *D v UK*, aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to benefit from medical, social or other forms of assistance provided by the expelling state: see *Henao v Netherlands*.

[31] The Court of Appeal explained why art 3 of the European Convention could become engaged. The rationale is that 'it would affront the humanitarian principles that underlie the human rights convention and the refugee convention for a state to remove an individual to a country where he or she is foreseeably at real risk of being seriously ill-treated' ([2003] 3 All ER 1174 at [47]). As far as it goes this proposition is unassailable. The Court of Appeal contented itself with saying that art 3 provides the test of such treatment. The potential scope of art 3 was helpfully explained by the ECtHR in *Henao v Netherlands* as follows:

'While it is true that art 3 has been more commonly applied by the court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-state bodies in the receiving country, the court has, in the light of the fundamental importance of art 3, reserved to itself sufficient flexibility to address the application of that article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under art 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that article. To limit the application of art 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling state (see *Bensaid v UK* (2001) 11 BHRC 297 at 307–308 (paras 32, 34)).'

THE REFUGEE CONVENTION

[32] Three related matters were not discussed by the Court of Appeal but were raised in oral argument. The first was the link between what could constitute persecution under the Refugee Convention and fundamental rights under the European Convention. Specifically, a question was raised about the extent to which human rights may inform the meaning of persecution. In an illuminating analysis Professor Hathaway *The Law of Refugee Status* (1991) summarised the position (at p 112) as follows:

'In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.'

This view has already been approved by the House on two previous occasions: see *Horvath v Secretary of State for the Home Dept* [2000] 3 All ER 577 at 581, [2001] 1 AC 489 at 495 per Lord Hope of Craighead, *Sepet v Secretary of State for the Home Dept* [2003] UKHL 15 at [7], [2003] 3 All ER 304 at [7], [2003] 1 WLR 856 per Lord Bingham of Cornhill. I would respectfully also endorse it.

EXTRADITION AND EXPULSION

- a [33] The second point related to the distinction between extradition and expulsion. Undoubtedly the purpose of the two procedures is different. The procedures serve different public interests. But in the context of the possible engagement of fundamental rights under the European Convention the ECtHR has not in its case law drawn a distinction between cases in the two categories:
- b see *Cruz Varas v Sweden* (1992) 14 EHRR 1 at 34 (para 70). For my part I would also not do so.

POSITIVE OBLIGATIONS

- c [34] The third point is that nowhere in the judgment is there any direct discussion of the development by the ECtHR of positive obligations under the European Convention. The convention is mainly concerned with what a state must not do. But for the purpose of rendering fundamental rights under the European Convention more effective, the ECtHR has developed certain positive obligations viz obligations which require states to take action. Professor Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) p 2, gave the following examples of recognised categories:

- e ‘... examples include to investigate a killing, to protect vulnerable persons from serious ill-treatment inflicted by others, to provide arrested persons with a prompt explanation of the reasons for their arrest, to provide free legal assistance for impecunious criminal defendants, to provide legal recognition of the new gender acquired by transsexuals who have successfully completed gender re-assignment treatment and to deploy reasonable police resources to protect media organisations from unlawful violence directed at curbing the legitimate exercise of free expression.’

- f It is not possible to consider whether articles other than art 3 may become engaged without taking into account the possible impact of positive obligations under the European Convention on immigration decisions. It is a large subject, and one that was only briefly touched on in oral argument. I will, however, have to make some reference to it. A comprehensive discussion of the subject will have to await another day.

PRECEDENT

- h [35] In its review of the decisions of the ECtHR the Court of Appeal ([2003] 3 All ER 1174 at [47]) observed ‘While the Strasbourg court has contemplated the possibility of such a step [viz the extension of the *Soering v UK* principle to articles other than art 3], it has not yet taken it’. I understand this to be a view that even where the ECtHR ruled that other articles are engaged or may become engaged this does not amount to an authoritative precedent in the absence of a finding of a violation in the particular case. In my view this is too narrow an approach to the evolving jurisprudence of the ECtHR. Where it concludes that there was no breach of a convention right, the ECtHR may nevertheless rule on the reach of the right.

THREE CRITICAL DECISIONS

[36] It will be useful as a starting point to examine how the Court of Appeal analysed three critical decisions. The Court of Appeal (at [43]) categorised *Abdulaziz v UK* (1985) 7 EHRR 471 as follows:

'In the leading case of *Abdulaziz v UK* (1985) 7 EHRR 471 applicants living within this jurisdiction complained that their art 8 rights were infringed because their husbands were not permitted entry in order to join them. The United Kingdom argued that neither art 8, nor any other article of the human rights convention applied to immigration control. *In rejecting this argument the court remarked that the applicants were not the husbands but the wives and that they were not complaining of being refused leave to enter or remain in the United Kingdom, but as persons lawfully settled in the country of being deprived or threatened with deprivation of the company of their spouses.*' (My emphasis.)

The fact that the applicants were wives rather than husbands was one basis of the decision. The ECtHR observed ((1985) 7 EHRR 471 at 495 (para 60)):

'The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (Mrs. Cabales), or threatened with deprivation (Mrs. Abdulaziz and Mrs. Balkandali), of the society of their spouses there. *Above all*, the Court recalls that the Convention and its Protocols must be read as a whole; consequently a matter dealt with mainly by one of their provisions may also, in some of its aspects, be subject to other provisions thereof. Thus, although some aspects of the right to enter a country are governed by Protocol No. 4 as regards States bound by that instrument, it is not to be excluded that measures taken in the field of immigration may affect the right to respect for family life under art 8. The Court accordingly agrees on this point with the Commission.'

(My emphasis.)

It is clear, therefore, that the over-arching basis for the conclusion was that decisions in the field of immigration must respect fundamental rights under art 8.

[37] The next case is *Soering v UK* (1989) 11 EHRR 439. Directly at issue was the question whether the extradition of the applicant to Virginia on a charge of capital murder could engage art 3. The ECtHR held (at 469 (para 91)):

'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'

The Court of Appeal analysed *Soering v UK* as if it provided no authority that articles other than art 3 may be engaged. That is, however, not correct. The following passage in the judgment of the ECtHR (at 466), which was not cited or referred to by the Court of Appeal, demonstrates this:

'85. As results from Article 5(1)(f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition," no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee. What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered

a outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.'

b There is a footnote (86) to the second quoted sentence. It states: 'See, *mutatis mutandis*, [*Abdulaziz v UK* (1985) 7 EHRR 471 at 494–495 (paras 59–60)]—in relation to rights in the field of immigration.' The right engaged in *Abdulaziz v UK* was, of course, art 8. In other words, the ECtHR made clear again that articles other than art 3 could be engaged. The issue identified in the third quoted sentence was answered in the affirmative in *Soering v UK* ((1989) 11 EHRR 439 at 467–468 (para 88)).

c [38] The consideration of *Bensaid v UK* (2001) 11 BHRC 297 by the Court of Appeal also needs to be examined. The court held that the removal to Algeria of a person suffering from schizophrenia involving a psychotic illness would not violate art 3 because it had not been shown on the facts that adequate healthcare was not available in Algeria. Dealing with the possible application of art 8 the ECtHR held (at 309–310 (para 46)):

d 'Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by art 8. However, the court's case law does not exclude that treatment which does not reach the severity of art 3 treatment may nonetheless breach art 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity ...'

e The Court of Appeal said ([2003] 3 All ER 1174 at [46]):

f 'Part of the reasoning of the court suggests that the treatment that a deportee is at risk of experiencing in the receiving state might so severely interfere with his art 8 rights as to render his deportation contrary to the convention. The more significant art 8 factor was, however, the disruption of private life within this country. *There is a difference in principle between the situation where art 8 rights are engaged in whole or in part because of the effect of removal in disrupting an individual's established enjoyment of those rights within this jurisdiction and the situation where art 8 rights are alleged to be engaged solely on the ground of the treatment that the individual is likely to be subjected to in the receiving state.*' (My emphasis.)

h The distinction in the last sentence is not founded on Strasbourg jurisprudence. In both cases, if the high threshold of showing a real risk of a flagrant breach is satisfied on the facts, the engagement of art 8 could in principle be based on the expulsion from the United Kingdom. In any event, the Court of Appeal doubted that art 8 could be engaged by referring to the possible exception of *Bensaid v UK* (2001) 11 BHRC 297 at 310 (para 47) with emphasis added. The doubt was not justified. Indeed, a differently constituted Court of Appeal in *R (on the application of Razgar) v Secretary of State for the Home Dept* [2003] EWCA Civ 840 at [20], [2003] Imm AR 529 at [20] held that 'it is clear that the European Court of Human Rights considered that article 8 was engaged on the facts of [*Bensaid v UK*]'.

j [39] Simply on the basis of the three decisions discussed so far there was, contrary to the Court of Appeal's view, a significant body of decisions of the ECtHR which demonstrate that in respect of immigration decisions articles other than art 3 may be engaged.

OTHER ARTICLES OF THE EUROPEAN CONVENTION

[40] It may now be useful if I embarked on my own brief tour d'hORIZON on the question whether in principle articles other than art 3 could become engaged in immigration decisions on the expulsion of aliens. Article 2(1) provides:

'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

Like art 3 this provision is absolute and not subject to derogation in time of war or public emergency under art 15. The Court of Appeal underlined the central importance of art 3 in the scheme of the European Convention. But the right to life under art 2 is also of fundamental importance. If art 3 may be engaged it is difficult to follow why, as a matter of logic, art 2 could be peremptorily excluded. There may well be cases where art 3 is not applicable but art 2 may be: see *Kacaj v Secretary of State for the Home Dept* [2002] Imm AR 213 (a decision of the Immigration Appeal Tribunal), per Collins J. The positive obligation on member states to provide individuals with suitable protection against immediate threats to their lives from non-state actors abroad may be relevant, in exceptional circumstances, to an immigration decision: see *Osman v UK* (1998) 5 BHRC 293. Another example could be *D v UK* (1997) 2 BHRC 273, which was admittedly a wholly exceptional case. It concerned the proposed expulsion to St Kitts of a person suffering from AIDS in an advanced degree. The ECtHR found that his expulsion would amount to a breach of art 3. It is, however, clear that but for this decision, the applicant would have succeeded under art 2 (at 286 (para 59)). There are principled grounds for not drawing a bright-line between arts 2 and 3.

[41] Article 4 provides:

'(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.'

Article 4(1) is absolute and not subject to derogation in time of war or public emergency. It is no doubt right that in the modern world a case alleging slavery is perhaps a little unlikely. A case asserting forced labour is less unlikely but, if it arises, would no doubt fall under art 3. But what if the applicant relied only on art 4? Is he to be turned away on the basis that art 4 cannot as a matter of legal principle be engaged? Surely that would be contrary to the spirit of a human rights convention.

[42] Article 5(1) provides: 'Everyone has the right to liberty and security of person.' Then follows a list of cases in which a person may be deprived of his liberty, eg after conviction. For present purposes art 5(4) is also relevant. It provides:

'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

These are qualified guarantees and they are subject to derogation in times of war and public emergency.

[43] In terms of the maintenance of the rule of law, which underlies all human rights instruments, art 5 is of great importance. Imagine a case of intended expulsion to a country in which the rule of law is flagrantly flouted, habeas corpus is unavailable and there is a real risk that the individual may face arbitrary

a detention for many years. I could, of course, make this example more realistic by citing the actualities of the world of today. It is not necessary to do so. The point is clear enough. Assuming that there is no evidence of the risk of torture or inhuman or degrading treatment, is the applicant for relief to be told that the European Convention offers in principle no possibility of protection in such extreme cases? I would doubt that such an impoverished view of the role of a human rights convention could be right.

b [44] Article 6(1) provides:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

c This is a qualified right and it is subject to derogation in time of war or public emergency. Moreover, in deciding what amounts to a fair trial the triangulation of interests of the accused, the victim and the public interest may require compromises, eg to protect children in abuse cases, women in rape cases, and national security. On the other hand, there are universal minimum standards. It is important to bear in mind the status of the right to a fair trial. It is a universal norm. It requires that we do not allow any individual to be condemned unless he has been fairly tried in accordance with law and the rule of law. The guarantee of a fair trial is a core value under the European Convention. In *Einhorn v France* App No 71555/01 (16 October 2001, unreported) which was not cited in the Court of Appeal, the ECtHR summarised the position. It observed (at para 32):

‘... the court reiterates that it cannot be ruled out that an issue might exceptionally be raised under art 6 of the European Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country (see *Soering v UK* (1989) 11 EHRR 439 at 491 (para 113) and, mutatis mutandis, *Drozdz v France* (1992) 14 EHRR 745 at 793 (para 110)).’

This was said in the context of extradition but, on the principles laid down by the ECtHR, the same would apply in an expulsion case. In *Einhorn v France*, as in the earlier cases, no violation was found established. That cannot, however, affect the binding force of the Strasbourg jurisprudence on the point. It can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported art 6 may be engaged.

g [45] Article 7 provides:

h ‘(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

j (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.’

This is among the first tier of core obligations under the European Convention. It is absolute and non derogable. It is not likely to arise often in the context of immigration decisions to expel aliens. It could, however, arise. Bearing in mind

the principles laid down by the ECtHR in respect of extradition and expulsion involving a real risk of a flagrant violation of fair trial rights, the same must be the case in respect of this obligation. a

[46] Article 8 provides:

‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. b

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ c

Article 8 contains qualified guarantees, which are derogable in time of war and public emergency. On the other hand, the European jurisprudence make clear that it enshrines core values.

[47] It has already been explained how in the important decisions of *Abdulaziz v UK* and *Bensaid v UK* the ECtHR accepted that extradition and expulsion may in cases of a real risk of a flagrant violation of the guarantee of family or private life engage art 8. *Moustaquim v Belgium* (1991) 13 EHRR 802 involved an application of these principles. *Boultif v Switzerland* (2001) 33 EHRR 1179 was decided after *Bensaid v UK*. An Algerian had entered Switzerland in 1992. In 1993 he married a Swiss citizen. In 1997 he was sentenced to two years’ imprisonment for robbery. d
In 1998 the Swiss authorities refused to renew his residence permit. He was expelled. He brought a claim under art 8. The ECtHR held (at 1186): e

‘39. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention. f

40. In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant’s residence permit in Switzerland interfered with the applicant’s right to respect for his family life within the meaning of Article 8(1) of the Convention. g

41. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was “in accordance with the law”, motivated by one or more of the legitimate aims set out in that paragraph, and “necessary in a democratic society”.’ h

Perhaps a little surprisingly the ECtHR found a violation of art 8 and ordered a modest sum to be paid by way of just satisfaction. Another possible field of application could be the expulsion of an alien homosexual to a country where, short of persecution, he might be subjected to a flagrant violation of his art 8 rights. In *Secretary of State for the Home Dept v Z* [2002] EWCA Civ 952, [2002] Imm AR 560 this point came before the Court of Appeal. Schiemann LJ (with whom the other members of the court agreed) was not prepared to rule out such an argument. In my view he was right not to do so. Enough has been said to demonstrate that on principles repeatedly affirmed by the ECtHR art 8 may be engaged in cases of a real risk of a flagrant violation of an individual’s art 8 rights. j

- a** [48] Now I turn to a cluster of qualified guarantees, viz art 9 (freedom of thought, conscience and religion), art 10 (freedom of expression), art 11 (freedom of assembly and association) and art 14 (prohibition of discrimination). It is easy to see how these articles could be relevant to the question of what may constitute persecution under the Refugee Convention. Beyond such cases it is less easy to visualise the application of any of these articles to a decision to expel an alien.
- b** The jurisprudence of the ECtHR does not provide much help. On the other hand, the possible engagement of these articles has not been ruled out. I would also not rule out their possible application in the field of immigration decisions. Saying never in law often requires courts to swallow their words in circumstances not previously contemplated.

c CONCLUSION

[49] It follows that the ruling of the Court of Appeal that an English court is entitled to proceed on the basis that, except for art 3, articles of the European Convention can never be engaged in respect of immigration decisions to expel an alien was wrong.

- d** [50] It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged.

e DISPOSAL

[51] I have read the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Carswell. I agree with their opinions and conclusions. I would also dismiss the appeals.

f LORD WALKER OF GESTINGTHORPE.

[52] My Lords, I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree that these appeals should be dismissed for the reasons given by Lord Bingham. The difficulties which I perceive in this area are centred on art 8 of the European

- g** Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and are better addressed in my opinion on the appeal in *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 3 All ER 821, [2004] 3 WLR 58, on which the House heard argument immediately after these appeals.

h BARONESS HALE OF RICHMOND.

[53] My Lords, I have had the advantage of reading the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Steyn and Lord Carswell. For the reasons they give, I agree that these appeals should be dismissed. In

- j** common with my noble and learned friend, Lord Walker of Gestingthorpe, I believe that the application of art 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in this difficult area requires further analysis. This is addressed in my opinion in *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 3 All ER 821, [2004] 3 WLR 58, where it arises directly.

LORD CARSWELL.

[54] My Lords, the appeal before the House furnishes a good illustration of the extent of the changes made to our domestic law by the incorporation by the Human Rights Act 1998 of provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) (the European Convention), the enlargement of the source material which has to be taken into account by the courts of the United Kingdom and the way in which they have to approach the issues before them where convention rights come into play. Before the Act came into operation, the sole legal issue in an asylum case was whether the applicant came within the protection of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) and the 1967 Protocol to that convention (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the Geneva Convention), by establishing that he or she had a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion. The Secretary of State for the Home Department retained a residual discretion to grant the applicant exceptional leave to remain in the United Kingdom on compassionate or humanitarian grounds, even though that legal condition had not been satisfied, and adopted policies to govern the grant of such leave. Since the 1998 Act came into operation public authorities (including the courts) may not act in a way which is incompatible with a convention right (s 6) and the courts must by s 2 take into account the body of material commonly known by the convenient term of 'Strasbourg jurisprudence'. The differences which the Act has made in the approach to the issues in asylum appeals such as those before the House, in the material put before the courts and in the content and reasoning of decisions are profound, as may be seen from the opinions given by your Lordships.

[55] Ahsan Ullah is a citizen of Pakistan who is an active member of the Ahmadiyya faith. He has been an Ahmadi all his life, as have all the members of his family. Members of his faith, according to the undisputed evidence before the adjudicator, suffer from a degree of religious persecution from Muslim extremists, who are opposed to the Ahmadiyya faith, and Mr Ullah claimed that he was subjected to a variety of restrictions of religious freedom and social discrimination. He also claimed that he had suffered harassment and attacks on himself and his family since he began preaching his faith in December 1998.

[56] Mr Ullah entered the United Kingdom on false documents in January 2001 and claimed asylum. The Secretary of State refused asylum and certified the claim under para 9 of Sch 4 to the Immigration and Asylum Act 1999. The adjudicator dismissed Mr Ullah's claim to be entitled to asylum under the Geneva Convention and upheld the certificate, with the consequence that he was not entitled to appeal to the Immigration Appeal Tribunal. Mr Ullah also alleged under s 65 of the 1999 Act that the Secretary of State in taking his decision to refuse him asylum had acted in breach of his human rights and appealed on this ground also to the adjudicator. She dismissed Mr Ullah's claim under each of the articles of the European Convention on which he relied. She held that arts 2 and 3 were not engaged, as the appellant had not established that there were substantial grounds that his life would be at risk or that he would suffer any of the treatment prohibited by art 3. She held that arts 6 and 7 were not engaged. In relation to arts 9, 10 and 11 she held that although they might be engaged, each of them was a qualified provision and the government's action in seeking to remove the appellant to Pakistan in pursuance of the need for proper immigration control was proportionate.

a [57] Mr Ullah sought to bring an application for judicial review of the adjudicator's decision and was given permission limited to the ground which he advanced under art 9 of the European Convention, which provides:

b '(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

c (2) Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

The application was dismissed by Harrison J, who was prepared to accept that art 9 could in principle be engaged but held that only a flagrant denial of the rights contained in that article would suffice to enable the appellant to resist being returned to Pakistan, a test which was not satisfied on the facts of the case (see d [2002] EWHC 1584 (Admin), [2002] Imm AR 601).

[58] Thi Lien Do is a citizen of Vietnam, who entered the United Kingdom clandestinely on 20 November 2000 and shortly thereafter claimed asylum on the ground of her fear of persecution as the result of her religious beliefs as a Roman Catholic. She practised her religion in Vietnam and taught the elements of her faith to children. She claimed that she suffered from discrimination and experienced difficulties in following her faith. There was evidence to support Miss Do's claim that her freedom to practise her religion was circumscribed in a number of respects and it was not in dispute that although she could return to Vietnam and practise her religion there, she would have to do so in reduced circumstances.

f [59] The Secretary of State refused Miss Do's claim for asylum, on the ground that she had not established a well-founded fear of persecution, and certified the claim under para 9(4)(a) of Sch 4 to the 1999 Act. Miss Do appealed to the adjudicator against the Secretary of State's decision relating to persecution and also under s 65 of the 1999 Act, on the ground of breach of her convention rights. At the hearing her counsel relied on arts 3 and 5 of the European Convention, but g not on arts 8 and 9. The adjudicator dismissed the asylum claim and the human rights appeal.

[60] Miss Do appealed with leave to the Immigration Appeal Tribunal, which upheld the adjudicator's conclusion on the asylum claim. The tribunal considered the issue of the engagement of art 9 of the European Convention, although it had h not been relied upon before the adjudicator, and held that having regard to the adjudicator's findings on the evidence there was no infringement of this article.

[61] Mr Ullah appealed, with the judge's permission, to the Court of Appeal against the dismissal of his application for judicial review. Miss Do appealed, with permission granted by Tuckey LJ, and the appeals were conjoined. The j court held that the adjudicator and the IAT were correct to dismiss Miss Do's appeal on the asylum issue. The argument before the court and the thrust of its judgment were accordingly directed almost wholly to consideration of the engagement of art 9 of the European Convention, the issue on which the appeal to this House turned.

[62] The Court of Appeal dismissed both appeals on the ground that art 9 was not engaged: see [2003] 3 All ER 1174. At [63] and [64], which have been quoted

in full in the opinion of my noble and learned friend Lord Bingham of Cornhill, it committed itself firmly to the proposition that the only article of the European Convention which could be engaged in cases such as those of the present appeals is art 3. It stated categorically in [64]:

‘Where the human rights convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage article 3, the English court is not required to recognise that any other article of the human rights convention is, or may be, engaged.’

This conclusion was strongly attacked by counsel for the appellants and the interveners. For the reasons set out in the opinions of my noble and learned friends Lord Bingham and Lord Steyn, I agree that it cannot be upheld, and I propose to explore fairly shortly some aspects of the grounds for so deciding.

[63] It is not in dispute that sovereign states are entitled to regulate the entry of aliens into their territory, a principle, as Lord Bingham has set out in [6], above which is fully recognised in the Strasbourg jurisprudence. The primary focus of the European Convention is territorial, but, as examination of the Strasbourg jurisprudence shows, it cannot now be said that persons seeking asylum in a member state of the Council of Europe are unable to invoke any of the provisions of the European Convention when resisting an expulsion decision. I do regard it as important, however, that member states should not attempt to impose European Convention standards on other countries by decisions which have the effect of requiring adherence to those standards in those countries.

[64] The Court of Appeal accepted the correctness of the argument advanced on behalf of the Secretary of State, which was the cornerstone of the Attorney General’s argument in this House, that an exception to the territoriality principle exists when there is a real risk that an applicant for asylum will be ill-treated in his own country in a way which would constitute a serious breach of art 3 of the European Convention, but that the exception is limited to that article. It held at [39] that the underlying rationale is that—

‘it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment, even though such ill-treatment may not satisfy the criteria of persecution under the refugee convention. Article 3 provides the test of such treatment.’

[65] As authority for the existence of this exception the Court of Appeal recognised the weight to be given to the decision of the European Court of Human Rights (ECtHR) in *Soering v UK* (1989) 11 EHRR 439, whose correctness has been accepted in a series of subsequent decisions (a number of which are listed in [12], above). *Soering v UK* was a case of extradition rather than refusal of asylum, but although the two classes of case raise different issues, those differences are not material for present purposes and the principle laid down can be taken to apply with equal validity to expulsion cases, as the ECtHR held in *Chahal v UK* (1996) 1 BHRC 405 at 424 (para 80). Lord Bingham has in [11], above set out extensive quotations from the decision in *Soering v UK*, and it is not necessary to repeat them again. It is sufficient to say that the basis for the court’s decision was that to return an applicant for asylum in such circumstances would conflict with ‘one of the fundamental values of the democratic societies making up the Council of Europe’. This approach finds an echo in the phrase adopted by the Supreme Court of Canada in *Suresh v Canada* (*Minister of Citizenship and*

a *Immigration*) 2002 SCC 1, [2002] 4 LRC 640 at 659–660 (para 49), describing it as conduct that would ‘shock the Canadian conscience’.

b [66] The issue is whether this exception is confined to cases falling within the bounds of art 3, as the Court of Appeal concluded, or whether it is capable of being of wider ambit, as the appellants and interveners contended. One might indeed have preferred, if the matter were *res integra*, to see the exception expressed in terms of general humanitarian considerations, which could be applied flexibly throughout the states which are parties to the European Convention, rather than being tied to specific articles of the convention. The risk in defining it by reference to the latter is that courts of law will tend to fit expulsion cases into a Procrustean bed of legal categories. The matter is not, however, *res integra*, as examination of the Strasbourg jurisprudence shows, for c the ECtHR has approached it by reference to the individual articles of the European Convention. It is to be hoped that the courts which have to apply the principles will be able to retain a substantial degree of flexibility in order to fulfil the humanitarian objectives of the European Convention in such cases, while upholding the proper rights of states to decline to admit aliens.

d [67] The Court of Appeal concluded its review of the Strasbourg jurisprudence by stating at [47] that: ‘To date, with the possible exception of *Bensaid v UK*, the application of this extension has been restricted to art 3 cases.’ It was correct to state that the only actual decisions applying the extension were *Soering v UK* and *Chahal v UK*, both art 3 cases. But there is a strong current of authority contained in statements made by the ECtHR to the effect that other e articles could be engaged. Lord Bingham has set out in his opinion the roll-call of Strasbourg cases in which this possibility has been accepted by the court, and I gratefully adopt this without repeating it. Both Lord Bingham and Lord Steyn have set out reasons why in principle arts 2, 4, 5, 7 and 8 could be engaged in appropriate cases, and I respectfully agree with their reasons and conclusions. I f am myself satisfied that a fair reading of the Strasbourg cases requires a national court to accept that these articles could possibly be engaged and that the exception to the territoriality principle is not confined to art 3. There does not appear to be any conceptual reason why art 9 should not be capable in principle of engagement, although I find it difficult to envisage a case, bearing in mind the flagrancy principle to which I am about to refer, in which there could be a g sufficient interference with the art 9 rights which does not also come within the art 3 exception. It may be for this reason that the ECtHR appeared in *Razaghi v Sweden* App No 64599/01 (11 March 2003, unreported) to reject the possibility of engagement of art 9, although, as Lord Bingham has pointed out, the basis of the court’s ruling concerning art 9 is not entirely clear. For present purposes I think h it sufficient to say that I would not rule it out.

[68] The ECtHR has consistently stated that before any article of the European Convention other than art 3 could be regarded as engaged, it would require an extremely serious breach of the provisions of that article. In *Soering v UK* (1989) 11 EHRR 439 at 479 (para 113) it said of its judgment:

i ‘The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.’

[69] The adjective ‘flagrant’ has been repeated in many statements where the European Court has kept open the possibility of engagement of articles of the

convention other than art 3, a number of which are enumerated in [24], above in the present appeal. The concept of a flagrant breach or violation may not always be easy for domestic courts to apply—one is put in mind of the difficulties which they have had in applying that of gross negligence—but it seems to me that it was well expressed by the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Dept* [2002] UKIAT 702, [2003] Imm AR 1 at [111] when it applied the criterion that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar. a
b

[70] If it could be said that in principle art 9 is capable of engagement, it does not seem to me that the case of either appellant comes within the possible parameters of a flagrant, gross or fundamental breach of that article such as to amount to a denial or nullification of the rights conferred by it. I accordingly agree that both appeals should be dismissed. c

Appeals dismissed.

Kate O'Hanlon Barrister.

a **R (on the application of Razgar) v Secretary of State for the Home Department**

[2004] UKHL 27

b **HOUSE OF LORDS**

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD CARSWELL

4–6 MAY, 17 JUNE 2004

c *Immigration – Deportation – Refugee – Asylum – Deportation of asylum seeker not leading to torture or inhuman or degrading treatment or punishment – Whether asylum seeker's right to respect for private and family life capable of being engaged – Human Rights Act 1998, Sch 1, Pt I, art 8.*

d The claimant was an Iraqi of Kurdish origin. He left Iraq and travelled to Germany in 1997 where he claimed asylum. His claim was refused. He remained in Germany for over a year during which time he asserted that he had been detained, subjected to racist abuse, and told he would be returned to Iraq. He left Germany for the United Kingdom in 1999 and claimed asylum. The German authorities accepted responsibility for examining his asylum claim under the
e convention for determining the state responsible for examining applications for asylum lodged in one of the member states of the European Community and the Secretary of State, without considering the merits of the claimant's asylum claim, refused asylum on the basis that Germany was a safe third country. Arrangements were made for his removal. The claimant started to undergo
f treatment from a consultant psychiatrist. Representations were made to the Secretary of State on his behalf and further representations were made on the coming into force of the Human Rights Act 1998 when the claimant became entitled to appeal under the Immigration and Asylum Act 1999 on human rights grounds. The Secretary of State maintained his decision to remove the claimant and certified under s 72(2)(a)^a of the 1999 Act that the allegation of a breach of his
g human rights was manifestly unfounded. The claimant applied for judicial review of that certification. In the course of those proceedings he relied on, inter alia, reports by his psychiatrist whose opinion was that sending him back to Germany would be very detrimental to his mental and physical well-being and that he would make a serious attempt to kill himself. The judge quashed the
h Secretary of State's certificate, holding that the claimant's case would not clearly fail on an appeal to an adjudicator, and the Court of Appeal agreed. The Secretary of State appealed to the House of Lords. In relation to the issue of principle before the House, the claimant submitted that, because of the consequences for his mental health, removal would violate his right to respect for his private life under art 8^b of the European Convention for the Protection of Human Rights and
j Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The Secretary of State contended that, absent a breach of art 3^c of the convention, which

a Section 72, so far as material, is set out at [14], below

b Article 8, so far as material, provides: 'Everyone has the right to respect for his private ... life ...'

c Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

prohibited torture or inhuman or degrading treatment or punishment, art 8 could not apply. The second issue before the House was whether the judge had been right to quash the Secretary of State's certification of the claimant's allegation of a breach of human rights as manifestly unfounded. a

Held – (1) The rights protected by art 8 of the convention could be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal did not violate art 3, if the facts relied on were sufficiently strong (see [9], [10], [26], [27], [59], [72], below); *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] 3 All ER 785 applied; *Bensaid v UK* (2001) 11 BHRC 297 and *Pretty v UK* (2002) 12 BHRC 149 considered. b

(2) In considering whether a challenge to the Secretary of State's decision to remove a person clearly had to fail, the reviewing court had to consider how an appeal would have been likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were one. In the instant case (Lord Walker and Baroness Hale dissenting), if the claimant's extreme fear of removal to Germany were found to be genuine, whether or not well-founded, the possibility of a finding, properly made, that return to Germany would violate his right under art 8 could not be ruled out in limine. It followed that the Secretary of State could not have properly certified his claim to be manifestly unfounded. The appeal would therefore be dismissed (see [17], [24]–[27], [66], [75]–[79], below). c

Notes d

For the right to respect for private life, see 8(2) *Halsbury's Laws* (4th edn reissue) para 150. e

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555. f

Cases referred to in opinions

Abdulaziz v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR; *affg* (1983) 6 EHRR 28, E Com HR.

Amrollahi v Denmark [2002] ECHR 56811/00, ECt HR.

BB v France App (1998) Reports of Judgments and Decisions 1998-VI, p 2595, ECt HR. g

Beldjoudi v France (1992) 14 EHRR 801, ECt HR.

Bensaid v UK (2001) 11 BHRC 297, ECt HR.

Berrehab v Netherlands (1988) 11 EHRR 322, [1988] ECHR 10730/84, ECt HR.

Boughanemi v France (1996) 22 EHRR 228, [1996] ECHR 22070/93, ECt HR.

Boultif v Switzerland (2001) 33 EHRR 1179, [2001] ECHR 54273/00, ECt HR. h

Ciliz v Netherlands [2000] 2 FLR 469, ECt HR.

Costello-Roberts v UK [1994] 1 FCR 65, ECt HR.

D v UK (1997) 2 BHRC 273, ECt HR.

Devaseelan v Secretary of State for the Home Dept [2002] UKIAT 702, [2003] Imm AR 1. j

Gul v Switzerland (1996) 22 EHRR 93, [1996] ECHR 23218/94, ECt HR.

Henao v Netherlands App No 13669/03 (24 June 2003, unreported), ECt HR.

Jakupovic v Austria [2003] 2 FCR 361, ECt HR.

Keenan v UK (2001) 10 BHRC 319, ECt HR.

Marckx v Belgium (1979) 2 EHRR 330, ECt HR.

Moustaquim v Belgium (1991) 13 EHRR 802, [1991] ECHR 12313/86, ECt HR.

- a** *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369, [2004] 1 WLR 1182.
Nasri v France (1995) 21 EHRR 458, [1995] ECHR 19465/92, ECt HR.
Pretty v UK (2002) 12 BHRC 149, ECt HR.
R v Secretary of State for the Home Dept, ex p Adan, R v Secretary of State for the Home Dept, ex p Aitseguer [2001] 1 All ER 593, [2001] 2 AC 477, [2001] 2 WLR 143, HL.
- b** *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800, [2001] 3 WLR 1598.
R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23; *affg* [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770.
- c** *R (on the application of Yogathas) v Secretary of State for the Home Dept, R (on the application of Thangarasa) v Secretary of State for the Home Dept* [2002] UKHL 36, [2002] 4 All ER 800, [2003] 1 AC 920, [2002] 3 WLR 1276.
Sandralingam v Secretary of State for the Home Dept, Rajendrakuma v Immigration Appeal Tribunal [1996] Imm AR 97, CA.
SCC v Sweden (2000) 29 EHRR CD 245, E Com HR.
- d** *Secretary of State for the Home Dept v Kacaj* [2002] Imm AR 213, IAT; *rvsd* [2002] EWCA Civ 314, [2002] All ER (D) 203 (Mar).
Sen v Netherlands (2003) 36 EHRR 81, [2003] ECHR 41478/98, ECt HR.
Slivenko v Latvia (2003) 15 BHRC 660, ECt HR.
Tomic v UK App No 17837/03 (14 October 2003, unreported), ECt HR.

e **Cases cited in list of authorities**

- Baah v Secretary of State for the Home Dept* [2002] UKIAT 5998, IAT.
Beqiri v Secretary of State for the Home Dept [2002] UKIAT 725, IAT.
Berkani v Secretary of State for the Home Dept [2002] UKIAT 704, IAT.
Bulus v Sweden (1984) 6 EHRR CD 587, ECt HR.
- f** *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (1998) 4 BHRC 563, [1999] 1 AC 69, [1998] 3 WLR 675, PC.
Edore v Secretary of State for the Home Dept [2003] EWCA Civ 716, [2003] 3 All ER 1265, [2003] 1 WLR 2979.
Fadele v UK (1990) 70 DR 159, E Com HR.
- g** *Hadiova v Secretary of State for the Home Dept* [2003] EWCA Civ 701, [2003] Imm AR 490.
HM v Secretary of State for the Home Dept [2003] EWCA Civ 583, [2003] Imm AR 470.
M (Croatia) v Secretary of State for the Home Dept [2004] UKIAT 24, IAT.
- h** *Mehemi v France* (2004) 38 EHRR 301, [1997] ECHR 25017/94, ECt HR.
Nhundu v Chiwera (1 June 2001, unreported), IAT.
Nsona v Netherlands (2001) 32 EHRR 170, [1996] ECHR 23366/94, ECt HR.
R v DPP, ex p Kebilene, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
- j** *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
R v Secretary of State for the Home Department, ex parte Turgut [2001] 1 All ER 719, CA.
R (Asif Javed) v Secretary of State for the Home Dept, R (Zulfiqar Ali) v Secretary of State for the Home Dept, R (Abid Ali) v Secretary of State for the Home Dept [2001] EWCA Civ 789, [2002] QB 129, [2001] 3 WLR 323.

- R (Khadir) v Secretary of State for the Home Dept* [2003] EWCA Civ 475, [2003] INLR 426. a
- R (Kurtolli) v Secretary of State for the Home Dept* [2003] EWHC 2744 (Admin), [2004] INLR 198.
- R (on the application of Ala) v Secretary of State for the Home Dept* [2003] EWHC 521 (Admin), [2003] All ER (D) 283 (Mar).
- R (on the application of Changuizi) v Secretary of State for the Home Dept* [2002] EWHC 2569 (Admin), [2003] Imm AR 355. b
- R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
- R (on the application of Ekinci) v Secretary of State for the Home Dept* [2003] EWCA Civ 765, [2003] All ER (D) 215 (Jun).
- R (on the application of H) v Secretary of State for the Home Dept* [2003] EWHC 2968 (Admin), [2003] All ER (D) 130 (Dec). c
- R (on the application of L) v Secretary of State for the Home Dept* [2003] EWCA Civ 25, [2003] 1 All ER 1062, [2003] 1 WLR 1230.
- Saad v Secretary of State for the Home Dept, Diriye v Secretary of State for the Home Dept, Osorio v Secretary of State for the Home Dept* [2001] EWCA Civ 2008, [2002] Imm AR 471. d
- Singh v Immigration Appeal Tribunal* [1986] 2 All ER 721, [1986] 1 WLR 910, HL.
- Smith v UK* (2000) 29 EHRR 493, [1999] ECHR 33985/96, ECt HR.
- Subesh v Secretary of State for the Home Dept* [2004] EWCA Civ 56, [2004] All ER (D) 326 (Mar).
- Tatete v Switzerland* App No 41874/98 (17 June 1998, unreported), ECt HR. e
- Vujnovic v Secretary of State for the Home Dept* [2003] EWCA Civ 1843, [2003] All ER (D) 317 (Dec).

Appeal

The Secretary of State for the Home Department appealed with permission of the Appeal Committee of the House of Lords given on 5 November 2003 from the decision of the Court of Appeal (Judge, Dyson LJ and Pumfrey J) on 19 June 2003 ([2003] EWCA Civ 840, [2003] Imm AR 529) dismissing his appeal from the decision of Richards J on 20 November 2002 ([2002] EWHC 2554 (Admin), [2003] Imm AR 269) allowing the application of the claimant, Mohammed Ali Razgar, to quash the certificate of the Secretary of State under s 72(2)(a) of the Immigration and Asylum Act 1999 contained in a letter dated 9 April 2001. The facts are set out in the opinion of Lord Bingham of Cornhill. f

Lord Goldsmith QC, A-G, Neil Garnham QC and Michael Fordham (instructed by the Treasury Solicitor) for the Secretary of State. h

Nicholas Blake QC, Raza Husain and Tublu Mukherjee (instructed by Clore & Co) for Mr Razgar.

Their Lordships took time for consideration.

17 June 2004. The following opinions were delivered. j

LORD BINGHAM OF CORNHILL.

[1] My Lords, Mr Razgar is an asylum seeker from Iraq whom the Secretary of State for the Home Department proposes to remove to Germany under the provisions of the Convention determining the State responsible for examining

a Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806) (the Dublin Convention). Mr Razgar resists such removal on the ground that it would violate his rights under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention). The Secretary of State does not accept that removal *b* would violate Mr Razgar's rights under art 8, and has certified under s 72(2)(a) of the Immigration and Asylum Act 1999 that the claim is manifestly unfounded. The consequence of that certification, if it stands, is to preclude any appeal by Mr Razgar against his removal from within this country. In these proceedings Mr Razgar has challenged the Secretary of State's certification and has succeeded before Richards J ([2002] EWHC 2554 (Admin), [2003] Imm AR 269) and the Court of Appeal (Judge, Dyson LJ and Pumfrey J) ([2003] EWCA Civ 840, [2003] Imm AR 529). *c* In this appeal by the Secretary of State two main questions arise, one of pure principle and one directed to the facts of this case so far as they are now known and the process of review. The question of principle is agreed to be:

d 'Can the rights protected by art 8 be engaged by the foreseeable consequences for health or welfare of removal from the United Kingdom pursuant to an immigration decision, where such removal does not violate art 3?'

The second issue is whether the judge was right to quash the Secretary of State's certification of Mr Razgar's claim as manifestly unfounded.

e THE PRINCIPLE

[2] This appeal was heard immediately following the appeals in *R (on the application of Ullah) v Special Adjudicator* and *Do v Immigration Appeal Tribunal*. The opinions of the House in those appeals are directly germane to the issue of principle in the present case (see [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 *f* WLR 23) and should be read, to the extent that they are relevant, as incorporated in this opinion. In this appeal it is, however, necessary to give more detailed consideration to art 8 of the convention.

[3] In the course of argument both sides made generous reference to authority, but each side relied on one authority in particular as encapsulating the *g* pith of its argument. For the Secretary of State, the Attorney General placed strong reliance on a recent admissibility decision of the European Court of Human Rights (the Strasbourg court) in *Henao v Netherlands* App No 13669/03 (24 June 2003, unreported). The applicant was a Colombian national who was arrested, tried and imprisoned for carrying drugs into the Netherlands. While *h* serving his sentence he was found to be HIV-positive and received appropriate treatment. He resisted deportation to Colombia at the end of his sentence on the ground that he would face difficulties in obtaining treatment for his condition in Colombia, placing reliance on art 3 of the convention. In holding that the application was manifestly ill-founded, the Strasbourg court said:

j 'The court reiterates at the outset that contracting states have the right, as a matter of well-established international law and subject to their treaty obligations including the convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, contracting states must have regard to art 3 of the convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the court has repeatedly stressed in its line of

authorities involving extradition, expulsion or deportation of individuals to third countries that art 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question. While it is true that art 3 has been more commonly applied by the court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-state bodies in the receiving country, the court has, in the light of the fundamental importance of art 3, reserved to itself sufficient flexibility to address the application of that article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under art 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that article. To limit the application of art 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling state (see *Bensaid v UK* (2001) 11 BHRC 297 at 307–308 (paras 32, 34)). According to established case law aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. However, in exceptional circumstances an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of art 3 (see *D v UK* (1997) 2 BHRC 273 at 285 (para 54)). In that case the court found that the applicant's deportation to St Kitts would violate art 3, taking into account his medical condition. The court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent state together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent state in violation of art 3 (see *D v UK* at 284–285 (paras 51–54)). The court has therefore examined whether there is a real risk that the applicant's expulsion to Colombia would be contrary to the standards of art 3 in view of his present medical condition. In so doing, the court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *SCC v Sweden* (2000) 29 EHRR CD 245). The court notes that the applicant stated on 16 August 2002 that he felt well and had worked, although he did suffer from certain side-effects of his medication. The court further notes that, according to the most recent medical information available, the applicant's current condition is reasonable but may relapse if treatment is discontinued. The court finally notes that the required treatment is in principle available in Colombia, where the applicant's father and six siblings reside. In these circumstances

a the court considers that, unlike the situation in the above-cited case of *D v UK*
or in the case of *BB v France* App No 39030/96 Commission's report of 9
March 1998, subsequently struck out by the court by judgment of 7
September 1998 Reports of Judgments and Decisions 1998-VI, p 2595, it does
not appear that the applicant's illness has attained an advanced or terminal
stage, or that he has no prospect of medical care or family support in his
b country of origin. The fact that the applicant's circumstances in Colombia
would be less favourable than those he enjoys in the Netherlands cannot be
regarded as decisive from the point of view of art 3 of the convention.'

[4] As is clear from this judgment, the applicant in *Henao v Netherlands* placed
reliance on art 3 alone. Read in isolation, the judgment might suggest that only
c art 3 can be relied on to resist a removal decision made by the immigration
authorities. But the House has held in *Ullah's* case and *Do's* case that that is not
so, and it seems clear that the court confined its attention to art 3 because that
was the sole ground of the application. The case does however illustrate the
stringency of the test applied by the court when reliance is placed on art 3 to resist
d a removal decision. It also shows, importantly for the Secretary of State, that
removal cannot be resisted merely on the ground that medical treatment or
facilities are better or more accessible in the removing country than in that to
which the applicant is to be removed. This was made plain in *D v UK* (1997) 2
BHRC 273 at 285 (para 54). Although the decision in *Henao v Netherlands* is
directed to art 3, I have no doubt that the court would adopt the same approach
e to an application based on art 8. It would indeed frustrate the proper and
necessary object of immigration control in the more advanced member states of
the Council of Europe if illegal entrants requiring medical treatment could not,
save in exceptional cases, be removed to the less developed countries of the world
where comparable medical facilities were not available. I do not understand the
f Court of Appeal to have proposed a test based on relative standards of treatment,
when it said ([2003] Imm AR 529 at [22]), with reference to art 8:

'We prefer a somewhat different test. We suggest that, in order to
determine whether the article 8 claim is capable of being engaged in the light
of the territoriality principle, the claim should be considered in the following
g way. First, the claimant's case in relation to his private life in the deporting
state should be examined. In a case where the essence of the claim is that
expulsion will interfere with his private life by harming his mental health,
this will include a consideration of what he says about his mental health in
the deporting country, the treatment he receives and any relevant support
h that he says that he enjoys there. Secondly, it will be necessary to look at
what he says is likely to happen to his mental health in the receiving country,
what treatment he can expect to receive there, and what support he can
expect to enjoy. The third step is to determine whether, on the claimant's
case, serious harm to his mental health will be caused or materially
j contributed to by the difference between the treatment and support that he
is enjoying in the deporting country and that which will be available to him
in the receiving country. If so, then the territoriality principle is not
infringed, and the claim is capable of being engaged. It seems to us that this
approach is consistent with the fact that the [the Strasbourg court]
considered the merits of the article 8 claim in *Bensaid v UK* (2001) 11 BHRC
297]. It is also consistent with what was said in paragraphs 46 and 64 of [R (on

the application of Ullah v Special Adjudicator, Do v Secretary of State for the Home Dept [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770].'

If there is any doubt on this point, it should be dispelled. The convention is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits.

[5] The bedrock of Mr Razgar's case was the decision of the Strasbourg court in *Bensaid v UK* (2001) 11 BHRC 297. This authority featured largely in the decisions of the judge and the Court of Appeal and must be considered in a little detail. The applicant was an Algerian national who entered the United Kingdom in 1989 and was permitted to remain for a period which expired in 1992. In 1993 he married a United Kingdom citizen and was in due course granted indefinite leave to remain as a foreign spouse. In 1996 he left the United Kingdom for a month to visit Algeria, and following his return was refused leave to enter on the ground that his indefinite leave to remain had been obtained by deceptively entering into a marriage of convenience. It was proposed to remove him. Before this, he had been diagnosed as a schizophrenic suffering from psychotic illness of such severity that compulsory detention in a psychiatric hospital was considered. In the event, he responded to treatment and his illness was successfully managed out of hospital save for one brief period. The applicant relied on arts 3 and 8 of the convention to resist removal. He contended that the nearest hospital at which his psychiatric illness could be treated in Algeria was some 75–80 km from his home village, and adduced evidence that there was a high risk of his suffering a relapse of psychotic symptoms on returning. He had lost all insight into the fact that he was ill and believed the persecutory delusions and abuse which he experienced, including voices telling him to harm other people. He had previously felt so hopeless and depressed as to contemplate suicide. In the opinion of a psychiatrist, there was a substantial likelihood that forcible repatriation would result in significant and lasting adverse effect.

[6] In its judgment the Strasbourg court first considered the applicant's claim under art 3 and concluded that implementation of the decision to remove him to Algeria would not violate art 3 of the convention. As in *Henao v Netherlands*, the case was contrasted with the exceptional facts of *D v UK* (1997) 2 BHRC 273:

'40. The court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by art 3, particularly where the case does not concern the direct responsibility of the contracting state for the infliction of harm, the court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of art 3. It does not disclose the exceptional circumstances of *D v UK* ... where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts.' (See (2001) 11 BHRC 297 at 309.)

[7] The Strasbourg court then turned to consider the applicant's complaint based on art 8. For the applicant it was submitted (at para 44) that—

'withdrawal of that treatment [NHS treatment since 1996] would risk a deterioration in his serious mental illness, involving symptoms going beyond horrendous mental suffering—in particular there would be a real and immediate risk that he would act in obedience to hallucinations telling him to harm himself and others. This would plainly impact on his psychological integrity. In addition to the ties deriving from his eleven years in the United

a Kingdom, the treatment which he currently receives is all that supports his precarious grip on reality, which in turn enables some level of social functioning.'

b The government (at para 45) did not accept that the removal of the applicant from the United Kingdom, where he was illegally, to his country of nationality, where medical treatment was available, would show any lack of respect for his right to private life. Even if there was an interference, such would be justified under art 8(2) on the basis that immigration policy was necessary for the economic well-being of the country and the prevention of disorder and crime.

c [8] The Strasbourg court concluded that implementation of the decision to remove the applicant to Algeria would not violate art 8 of the convention, for reasons set out in paras 46–48 of its judgment (at 309–310):

d '46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by art 8. However, the court's case law does not exclude that treatment which does not reach the severity of art 3 treatment may nonetheless breach art 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity ...

e 47. Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by art 8 ... Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.

g 48. Turning to the present case, the court recalls that it has found above that the risk of damage to the applicant's health from return to his country was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of art 8 of the convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the court considers that such interference may be regarded as complying with the requirements of the second paragraph of art 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims.'

j The Strasbourg court then went on to consider the applicant's complaint under art 13 of the convention that he had no effective remedy against the expulsion. In its judgment on this point the Strasbourg court described the applicant's art 3 complaint as 'arguable' (at 311 (para 54)) and found (at 312 (para 58)) that in judicial review the applicant had available to him an effective remedy in relation

to his complaints under arts 3 and 8 of the convention concerning the risk to his mental health of being expelled to Algeria. a

[9] This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on art 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough art 8 may in principle be invoked. It is plain that 'private life' is a broad term, and the Strasbourg court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Strasbourg court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In *Pretty v UK* (2002) 12 BHRC 149 at 183 (para 61), the Strasbourg court held the expression to cover 'the physical and psychological integrity of a person' and went on to observe that— b

'Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world ...' c

Elusive though the concept is, I think one must understand 'private life' in art 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ('The Developing Scope of Article 8 of the European Convention on Human Rights' [1997] EHRLR 265 at 270): d

'Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security.' e

[10] I would answer the question of principle in [1], above, by holding that the rights protected by art 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate art 3, if the facts relied on by the applicant are sufficiently strong. In so answering I make no reference to 'welfare', a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state. f

THE SECRETARY OF STATE'S CERTIFICATION g

A—The facts h

[11] Mr Razgar is aged 26 and is an Iraqi of Kurdish origin. He says that in about 1995 his father was hanged as a communist opponent of the Ba'athist regime then in power and he himself was arrested, imprisoned and tortured for two-and-a-half years. These facts have not been tested, but his body is said to bear marks consistent with severe flogging. At the end of 1997 (he says) he bribed his way out of prison and travelled via Turkey to Germany. On arrival in Germany he claimed asylum but his claim was refused. He remained in Germany for over a year, during which he says that he was detained, subjected to racist abuse and told he would be returned to Iraq. He arrived in the United Kingdom on 22 February 1999 and at once claimed asylum. In April 1999 the German authorities accepted responsibility j

a for examining his asylum claim under art 8 of the Dublin Convention and in May the Secretary of State decided to certify the claim on safe third country grounds. For reasons which need not be explored the relevant notice was not served until May 2000 and the removal directions given in May 1999 did not come to Mr Razgar's notice. In November 1999 he had started to undergo treatment from a consultant psychiatrist of high standing, Dr Sathananthan, whose report dated 16
b May 2000 (based on an examination on 29 February 2000) was forwarded to the Secretary of State following service of the safe third country notice. The report described Mr Razgar as suffering from severe depression although not at that time thinking of self-harm. He had nightmares not only of Saddam Hussein's security men trying to torture him but also of the German police. The psychiatrist considered that:

c 'Incarceration and custody is likely to cause a relapse on the progress he has made so far. Given Mr [Razgar's] subjective fear of ill-treatment in Germany, I feel that he would not make any progress there in rehabilitating from Post Traumatic Stress Disorder, or indeed from his depression.'

d The Secretary of State at once rejected the representations made by Mr Razgar's solicitors and declined to defer his removal directions. In a letter dated 23 May 2000 Dr Sathananthan reported to Mr Razgar's solicitors that he (now in custody) had telephoned—

e 'and appeared to be in great distress. He said that he did not want to return to Germany where he had experienced racist attacks, he said he would kill himself if he was sent back there ... From what he said over the telephone his score would now be 29 [on the Beck's Depression Inventory whereas it had been 26] indicating a worsening of his depressive mood complicating Post Traumatic Stress Disorder ... I feel incarceration has caused a setback
f from the progress Mr [Razgar] has made so far, and this is detrimental to his mental health. One cannot rule out the possibility that he might carry out his threat to commit suicide.'

[12] Mr Razgar applied for permission to seek judicial review of the Secretary of State's decision to remove, but permission was refused by the judge and an
g application for permission to appeal was in the end discontinued. In response to Mr Razgar's application a detailed letter dated 4 July 2000 was written on behalf of the Secretary of State, in the course of which it was said:

h '13. The Secretary of State accepts that both the prospect and the actual removal of your client to Germany may have a negative impact upon him. In view of your client's mental health problems the Secretary of State has carefully considered whether there are substantial grounds for believing that your client's proposed and/or actual removal to Germany would be a sufficiently compelling, compassionate factor such as to cause him to depart from his normal policy and practice. Although your client may be exposed
j to psychological stress as a result of his removal to Germany, the Secretary of State does not accept, on all the evidence submitted to him, that the risk to your client reaches that level of severity of physical or mental suffering as to warrant departing from his usual practice in this case. He takes the view that there are adequate, appropriate and equivalent psychiatric facilities in Germany which will be available to your client upon his return to that country.'

14. The Secretary of State has also given very careful consideration to Mr Razgar's ties with the United Kingdom, but he is not persuaded that there are sufficient grounds for allowing your client to remain in this country for such compassionate reasons. Mr Razgar does not, in fact, have any family or other close ties with the United Kingdom.'

Further representations were made to the Secretary of State on 2 October 2000 on the coming into force of the Human Rights Act 1998, when Mr Razgar became entitled to appeal on human rights grounds under s 65 of the 1999 Act. These were supported by a report by Mr Stefan Keßler, the effect of which was helpfully summarised by Richards J ([2003] Imm AR 269):

'24. Mr Keßler in his first report dated 19 September 2000 stated that he had worked as a refugee adviser for 15 years and had other substantial credentials in the refugee field in Germany. In his view there was little chance of the claimant gaining refugee status in Germany. His legal status, if returned, was that he would receive a "*Duldung*", a form of tolerated status giving temporary protection from prosecution for remaining in Germany, though the stay would still be technically illegal. It was not the same as a residence permit. It did not carry with it the normal rights to live and work in Germany and it resulted in restrictions on residence and freedom of movement. The claimant's mental condition would be considered a "chronic condition" rather than acute and the claimant would therefore have no right to medical treatment by a psychiatrist, nor would he have any right to treatment by a psychotherapist. The relevant authorities would have a discretion to pay for treatment but would be very reluctant to pay for psychiatric or psychotherapeutic treatment save in case of very urgent need, that is to say immediate danger.

25. Mr Keßler also stated that other aspects of the German system might cause stress for the claimant's mental health, namely that the place where he would be allowed to reside might be quite remote, as well as the fact that his freedom of movement could be restricted and there could be limitations on benefits and on the right to work.'

In a letter dated 7 February 2001 the Secretary of State maintained his decision to remove, and in a further letter of 9 April 2001 he communicated the decision which is now the subject of challenge:

'4. The Secretary of State has noted that Germany is a full signatory to the [Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171)] and to the ECHR. He routinely and closely monitors the practice and procedures of Member States, including Germany, in the implementation of the ECHR in order to satisfy himself that its obligations are fulfilled. He is satisfied that your client's human rights would be fully respected in Germany and that your client would not be subjected to inhuman or degrading treatment or punishment if removed there. He is also satisfied that your client will be able to raise any continuing protection concerns that he may have under the provisions of the ECHR with the authorities in Germany. In the circumstances, the Secretary of State does not accept that your client's removal to Germany would be in breach of his human rights. Indeed, he regards your continued assertion to this respect, particularly following the consideration already given to the matter which has been supported by the Court, to be merely a device to prevent further

a your client's proper return to Germany under the terms of the Dublin Convention.

15. In the light of the above, the Secretary of State hereby certifies the allegation of a breach of your client's human rights under the ECHR as being manifestly unfounded. Your client has a right of appeal against this decision under S. 65 of the Immigration and Asylum Act, but under S. 72(2)(a) of the Act this may only be exercised from abroad. Arrangements for your client's removal to Germany on 12 April 2001 therefore remain in place.'

[13] Mr Razgar then initiated the present application to quash the Secretary of State's certification. In the course of those proceedings Mr Razgar relied on two further reports by Dr Sathananthan. The earlier of these, dated 18 July 2001, was to much the same effect as the earlier reports but recorded that Mr Razgar had been living with his family in Greenford and Ealing Broadway, who gave him meals and accommodation. His opinion was:

d 'Incarceration and custody is causing a relapse on the progress Mr [Razgar] had made during treatment. He would be deprived of his support network from family (cousin and friends), when he is removed to Germany. He would not have access to medication or Cognitive Behaviour Therapy as he would only be given temporary immigration status by the authorities. His accommodation in a refugee camp will cause flashbacks of his incarceration in prison in Iraq and worsen his depressive mood and sense of despair. I feel that sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself.'

The later report, dated 24 September 2002, made reference to two abortive attempts by Mr Razgar to kill himself in 2000 and 2001. His opinion was:

f 'Mr Razgar still suffers from Depressive illness, Pain Disorder and Post Traumatic Stress Disorder. He finds himself to be safe living in this country and is afraid of being sent back to either Germany, or even Iraq where he had been harassed. He finds support from his friends who live with him. Whenever the Court case comes up in conversation his whole mood changes, he looks very anxious and quiet. He has decided that he would rather die than go back to Germany or Iraq. He is afraid of being put in detention again, which brings back memories and feelings of hopelessness. He has seen other young men kill themselves, and at times has suicidal ideation himself.'

h Mr Razgar also relied on further letters from Mr Keßler. The Secretary of State did not submit evidence relating to Mr Razgar's mental condition, but did at a later stage submit evidence challenging some aspects of Mr Keßler's account of how Mr Razgar would be treated if returned to Germany. The judge concluded, rightly in my opinion, that in the absence of any contrary opinion the Secretary of State could not discount the professional judgment of Dr Sathananthan. He also concluded that there was a real risk that Mr Razgar, if returned to Germany, would not receive appropriate treatment there, such treatment being assured only if he became a suicide risk, and that he was likely to be placed in an accommodation centre with substantial restrictions on his liberty. On this basis Richards J held ([2003] Imm AR 269 at [51]) that Mr Razgar's case would not clearly fail before an adjudicator, and the Court of Appeal ([2003] Imm AR 529 at

[64]) agreed. The court made no ruling on the effect of art 8(2), which had not featured in the Secretary of State's evidence or in the argument before the judge. At no stage during the correspondence did the Secretary of State accept that art 8 could apply in a case such as this, and in this appeal (as in *Ullah's* case and *Do's* case) the Attorney General argued that it could not.

B—The legislation

[14] Section 65 of the 1999 Act, so far as relevant for present purposes, provided:

'(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision unless he has grounds for bringing an appeal against the decision under the Special Immigration Appeals Commission Act 1997.

(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

(4) The adjudicator, or the Tribunal, has jurisdiction to consider the question.

(5) If the adjudicator, or the Tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground.'

'Authority' was defined in sub-s (7) to include the Secretary of State. Section 72(2)(a) provided:

'(2) A person who ... is to be, sent to a member State ... is not, while he is in the United Kingdom, entitled to appeal—(a) under section 65 if the Secretary of State certifies that his allegation that a person acted in breach of his human rights is manifestly unfounded ...'

Section 77(3)(b) provided:

'(3) In considering ... (b) any question relating to the appellant's rights under Article 3 of the Human Rights Convention, the appellate authority may take into account any evidence which it considers relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken).'

This provision was supplemented, in relation to appeals to an adjudicator, by Pt III of Sch 4 to the Act. Relevant for present purposes is para 21 of the Schedule, which so far as relevant provided:

'(1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers—(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (b) if the decision or action

involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, but otherwise must dismiss the appeal.

(2) Sub-paragraph (1) is subject to paragraph 24 and to any restriction on the grounds of appeal.

(3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based.'

[15] In the ordinary course of review, the reviewer assesses the decision under challenge on the materials available to the decision-maker at the time when the decision was made. In *Sandralingam v Secretary of State for the Home Dept* [1996] Imm AR 97 at 112, however, the Court of Appeal held that in asylum cases the appellate structure under the Asylum and Immigration Appeals Act 1993 was to be regarded as an extension of the decision-making process, with the result that appellate authorities were not restricted to consideration of facts in existence at the time of the original decision. This decision was given statutory effect in s 77(3) of the 1999 Act, and was also extended to human rights cases arising under art 3. The restriction to art 3 may well have reflected parliamentary uncertainty whether articles other than art 3 could be engaged in an expulsion case. But there can be no reason for distinguishing art 3 cases from cases arising under other articles of the convention which (as I have held) are capable of being engaged: see *Macdonald's Immigration Law and Practice* (5th edn, 2001) para 18.150. By s 85(4) of the Nationality, Immigration and Asylum Act 2002 (which did not come into force until 1 April 2003, and does not apply to this case) it is provided that:

'On an appeal under section 82(1) [immigration decisions] or 83(2) [asylum claims] against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.'

C—The scope of review

[16] The parties to this appeal accepted that 'manifestly unfounded' bore the meaning given to it by the House in *R (on the application of Yogathas) v Secretary of State for the Home Dept* [2002] UKHL 36 at [14], [34], [72], [2002] 4 All ER 800 at [14], [34], [72], [2003] 1 AC 920 and accepted the Court of Appeal's opinion ([2003] Imm AR 529 at [30]) that those paragraphs called for no gloss or amplification. It was also, inevitably, accepted that on an application for judicial review of the Secretary of State's decision to certify, the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of fundamental human rights, is in contemplation.

[17] In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on art 8, these questions are likely to be: (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the

operation of art 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

[18] If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the convention: see, for example, *Costello-Roberts v UK* [1994] 1 FCR 65. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

[19] Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah's* case and *Do's* case [2004] 3 All ER 785 at [6]) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

[20] The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Dept v Kacaj* [2002] Imm AR 213 at 228 (para 25), the Immigration Appeal Tribunal (Collins J, Mr CMG Ockelton and Mr J Freeman) observed that—

‘although the [convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate.’

In the present case, the Court of Appeal ([2003] Imm AR 529 at [26]) had no doubt that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.

D—The present case

[21] It remains to apply the questions outlined above to the present case.

[22] In my opinion an adjudicator would, or might properly, answer question (1) in the affirmative. It is quite true, as the Attorney General urged, that Mr Razgar cannot show the long residence and deep social roots found in many of the

- a decided cases. He cannot show 19 years of residence like the applicant in *Moustaquim v Belgium* (1991) 13 EHRR 802, nor 11 years of residence like the applicant in *Bensaid v UK* (2001) 11 BHRC 297. He cannot show a disruption of family life. But he bases his case on the threat to his private life. In this country he is able, with psychiatric help, to enjoy a measure of freedom, independence and autonomy which, arguably, he could not enjoy in Germany, where he knows
b no one, may not receive needed medical help and may be accommodated in a remote refugee centre.

[23] On the facts as presently understood, I consider that an adjudicator would, or might properly, answer question (2) in the affirmative. A decision which, if implemented, might lead to Mr Razgar taking his own life, could scarcely (if that evidence were accepted, and it has not as yet been tested) be
c dismissed as of insufficient gravity.

[24] I have no doubt but that an adjudicator would, and could only, answer questions (3) and (4) in the affirmative. Question (5), being more judgmental, is more difficult and, as already observed, the Secretary of State and the judge did not consider it. The Secretary of State, moreover, failed to direct himself that
d art 8 could in principle apply in a case such as this. Question (5) is a question which, on considering all the evidence before him, an adjudicator might well decide against Mr Razgar. If, however, his phobia of returning to Germany were found to be genuine (whether well-founded or not), and if his account of his previous experience (including his account of the severe brutality he claims to have suffered) were found to be true, I do not think one can rule out in limine
e the possibility of a finding, properly made, that return to Germany would violate Mr Razgar's rights under art 8. It follows that in my opinion, agreeing with both the judge and all three members of the Court of Appeal, the Secretary of State could not properly certify this claim to be manifestly unfounded.

[25] I would dismiss the appeal.

f
LORD STEYN.

[26] My Lords, I have read the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it. I would also dismiss the appeal.

LORD WALKER OF GESTINGTHORPE.

g [27] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I gratefully adopt his statement of the facts and I am very largely in agreement with him as to the principles to be applied. In particular, I am in full agreement with his analysis of the scope for judicial review of a certificate by the Secretary of State for the Home
h Department under s 72(2)(a) of the Immigration and Asylum Act 1999 certifying that an appeal (based on breach of human rights) is manifestly unfounded. I have the misfortune to differ, however, as to the application of the principles to the facts of this case. In the circumstances I shall state my reasons as briefly as possible.

j [28] On the (so far untested) evidence of the respondent Mohammed Ali Razgar and on the medical reports (so far unchallenged) of a distinguished psychiatrist, Dr Sathananthan, the respondent is in a fragile mental state. He claims on grounds which appear credible to have been tortured in Iraq, where his father was hanged. He says that he still suffers pain, insomnia and nightmares when he does sleep. He is described as severely depressed, with feelings of personal worthlessness and hopelessness about the future. He has said that he

will kill himself if returned to Germany. When he saw the psychiatrist on 10 September 2002 he spoke of two suicide attempts which he had made in this country, in 2000 and 2001, although neither seems to have been mentioned during his examination (at the Gatwick Detention Centre) on 7 June 2001. The psychiatrist's opinion on 7 June 2001 was that if sent back to Germany or Iraq the respondent would make a serious attempt to kill himself. On seeing the respondent on 15 April 2002 (after his release from custody) the psychiatrist considered that the respondent 'was not suicidal, but was determined that he would kill himself if he was sent abroad'. After seeing him again on 10 September 2002 the psychiatrist recorded that the respondent had seen other young men kill themselves, and at times had suicidal ideation himself. There is no evidence of his present condition.

[29] The evidence as to the respondent's experiences and their effect on his mental and physical condition, if found to be truthful, must provoke deep concern and sympathy. But such experiences and their effects are unfortunately not exceptional. Man's inhumanity to man is all too common. Torture, ill-treatment and imprisonment without trial often produce severe psychiatric problems which may persist throughout the sufferer's lifetime, even with the best psychiatric care. The fact that the respondent's troubles do not seem to be exceptional, deplorable though it is, lies at the heart of the difficulties which I feel about this appeal.

[30] In his clear and comprehensive opinion in the linked appeals of R (*on the application of Ullah*) v *Special Adjudicator* and *Do v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 WLR 23, Lord Bingham has drawn attention to the wholly exceptional nature of a deporting state's responsibility for ill-treatment or harm subsequently suffered in the receiving state. It is unnecessary to repeat all the citations but it is relevant to note that the Strasbourg court's insistence on the need for 'very exceptional circumstances' continues to be maintained in the most recent jurisprudence: see the admissibility decision in *Henao v Netherlands* App No 13669/03 (24 June 2003, unreported).

[31] In *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369, [2004] 1 WLR 1182 Laws LJ (with whom Dyson LJ agreed, although Carnwath LJ dissented) accepted (at [37]) the submission of counsel for the Secretary of State that the well-known case of *D v UK* (1997) 2 BHRC 273 was an 'extension of an extension'. He concluded (at [40]):

'... that the application of article 3 where the complaint in essence is of want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised state.'

And (at [42]): '... that the position regarding article 8 will want some further scrutiny if my view of this case were to prevail.' In my opinion those conclusions are justified by the Strasbourg jurisprudence.

[32] In his opinion in *Ullah's* case and *Do's* case Lord Bingham approved the formulation of the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Dept* [2002] UKIAT 702 at [111], [2003] Imm AR 1 at [111]:

'The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that

a removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.'

I respectfully agree. I also respectfully agree with Lord Bingham's observation in this appeal (at [10], above) that where the respondent's case is based on his need for medical treatment or on his welfare, he could never hope to resist expulsion without showing 'something very much more extreme than relative disadvantage' (as between the deporting state and the receiving state).

b [33] My problem is with the application of these principles to the facts of this appeal. It is largely attributable to two factors which, although noted in the course of argument, were not to my mind fully explored. That is not a criticism of counsel: it may be that, in the present state of Strasbourg jurisprudence, they cannot be taken much further. There seems to be surprisingly little discussion of the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806) (the Dublin Convention) in judgments of the European Court of Human Rights (the Strasbourg court).

d [34] The first difficulty is the abstract and volatile character of art 8 rights so far as they are not firmly linked either to family life or to other particular values such as respect for an individual's personal privacy, his home or his correspondence. The Strasbourg court has clearly recognised that art 8 rights also extend to an individual's sexuality. *Bensaid v UK* (2001) 11 BHRC 297 at 310 e (para 47) appears to show a further extension (building on rather uncertain footings in earlier cases) in the field of mental health:

f 'Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'

g This language is wide and imprecise and it must in my opinion be treated with some caution. There is no general human right to good physical and mental health any more than there is a human right to expect (rather than to pursue) happiness.

h [35] My second difficulty is in connection with the Dublin Convention. Before he arrived clandestinely in the United Kingdom on 22 February 1999 the respondent had already applied for but been refused asylum in Germany. Under the terms of the Dublin Convention the United Kingdom was at liberty to return the respondent to Germany without examining his asylum application on its merits. Indeed the German authorities accepted their responsibility on 29 April 1999, within a few months of the respondent's arrival in this country, and it is only because of determined activity by the respondent and his solicitors, and j scrupulous observance of his claims by the United Kingdom authorities, that the respondent has had any sort of private life in this country. He has received skilled psychiatric help since November 1999, but his presence in this country has at all times been on a most precarious footing.

[36] The respondent is strongly opposed to being returned to Germany; so strongly that he has threatened suicide if he is returned. But Germany is a full signatory of the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention) and of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171). In *R (on the application of Yogathas) v Secretary of State for the Home Dept* [2002] UKHL 36 at [9], [2002] 4 All ER 800 at [9], [2003] 1 AC 920 Lord Bingham drew attention to two important considerations:

‘The first is that the Home Secretary and the courts should not readily infer that a friendly sovereign state which is party to the Geneva Convention will not perform the obligations it has solemnly undertaken. This consideration does not absolve the Home Secretary from his duty to inform himself of the facts and monitor the decisions made by a third country in order to satisfy himself that the third country will not send the applicant to another country otherwise than in accordance with the convention. Sometimes, as notably in *[R v Secretary of State for the Home Dept, ex p Adan* [2001] 1 All ER 593, [2001] 2 AC 477], he will be unable properly to satisfy himself. But the humane objective of the convention is to establish an orderly and internationally-agreed regime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an applicant to the member state in which asylum was, or could have been, first claimed. The second consideration is that the convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant’s living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it.’

The other members of the House expressed similar views. Lord Hope of Craighead (at [26]–[37]) gave a valuable account of the background to the Dublin Convention. He observed (at [33]):

‘The purpose of the legislation would be frustrated if the asylum seeker could ensure that he remained in this country pending a full review on the merits of an allegation of a breach of his human rights which was clearly without substance.’

[37] In his clear and thorough judgment in this case Richards J referred briefly to this point but was not impressed by it. He said ([2003] EWHC 2554 (Admin) at [55], [2003] Imm AR 269 at [55]):

‘I should also mention that the claimant’s case under article 8 was not, in my view, adequately met by the very general proposition upon which the Secretary of State relied that Germany respects human rights. Although true as a general proposition, it is not a sufficient basis for rejecting a reasoned case supported by evidence of the kind submitted here. The United Kingdom respects human rights, but situations can nonetheless arise in which Convention rights are breached. The same must be capable of happening in Germany.’

These observations are no doubt true, but they cut both ways. Even in the most enlightened host country asylum seekers often have to deal with bleak accommodation or even loss of liberty, public hostility and material deprivation, and these (on top of their earlier, sometimes horrendous, experiences) naturally

a lead to anxiety, depression and feelings of hopelessness. But neither the truism of human imperfection, nor the evidence (taken at its highest) of conditions in Germany, leads to the conclusion that the respondent's treatment in Germany would probably be so much worse than his present condition as to amount to a flagrant infringement of his human rights—an infringement so serious as would (in the language used in *Devaseelan's* case) result in the rights in question being b completely denied or nullified. In my view it would need much clearer and more compelling evidence to lead to that conclusion.

[38] The Court of Appeal ([2003] EWCA Civ 840, [2003] Imm AR 529) referred to the Dublin Convention but did not discuss its significance. It treated this as a 'mixed' case for which it proposed (at [22]) a novel three-stage test requiring the prospect of harm sufficiently serious for art 8 to be engaged, but not (as I read the c judgment) anything wholly exceptional. The relevant paragraph is set out by Lord Bingham in his opinion (at [4], above). Lord Bingham does not consider that the Court of Appeal fell into the error of comparing levels of psychiatric care available in the United Kingdom and Germany respectively. But for my part I cannot avoid the conclusion that that was the Court of Appeal's only or principal d concern, and that it did amount to a mistaken approach. On this point I respectfully prefer the analysis of my noble and learned friend Baroness Hale of Richmond, whose opinion I have also had the advantage of reading in draft.

[39] Had the Court of Appeal not (as I think) erred in its approach, I would not differ from the experienced judges below in their rejection of the Secretary of State's assessment of the facts and his consequent certificate under s 72(2)(a) of the 1999 Act. As it is, I differ from the courts below and from the majority in this e House only with the greatest possible diffidence. I do so because in my opinion (even if it seems callous) this case is simply not exceptional in the way that the Strasbourg court had in mind in *Bensaid v UK* and *Henao v Netherlands*. It is, sadly, all too common.

f [40] I would therefore allow this appeal.

BARONESS HALE OF RICHMOND.

[41] My Lords, in his opinion in the cases of *R (on the application of Ullah) v Special Adjudicator* and *Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23, my noble and learned friend, Lord Bingham g of Cornhill, draws a distinction between 'domestic cases' and 'foreign cases'. He defines (at [7]) the former as cases 'where a state is said to have acted within its own territory in a way which infringes the enjoyment of a convention right by a person within that territory'. He defines (at [9]) the latter as cases 'in which it is claimed that the conduct of the state in removing a person from its territory h (whether by expulsion or extradition) to another territory will lead to a violation of the person's convention rights in that other territory'. Another way of putting this distinction is that in domestic cases the contracting state is directly responsible, because of its own act or omission, for the breach of convention rights. In foreign cases, the contracting state is not directly responsible: its j responsibility is engaged because of the real risk that its conduct in expelling the person will lead to a gross invasion of his most fundamental human rights. *Ullah's* case and *Do's* case were foreign cases which failed to meet that test.

[42] The distinction is vital to the present case. In a domestic case, the state must always act in a way which is compatible with the convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved. Foreign cases, on the other hand, represent an exception to

the general rule that a state is only responsible for what goes on within its own territory or control. The European Court of Human Rights (the Strasbourg court) clearly regards them as exceptional. It has retained the flexibility to consider violations of articles other than arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention) but it has not so far encountered another case which was sufficiently serious to justify imposing upon the contracting state the obligation to retain or make alternative provision for a person who would otherwise have no right to remain within its territory. For the same reason, the Strasbourg court has not yet explored the test for imposing this obligation in any detail. But there clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned. *Ullah's* case and *Do's* case on their facts came nowhere near meeting that test. It is, for the reasons given both by Lord Bingham and Lord Steyn, extremely unlikely that a failure to respect religious freedom which fell short of persecution within the meaning of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) would do so.

[43] This case, however, is concerned with art 8 of the convention. In that context, Lord Bingham ([2004] 3 All ER 785 at [18]) also refers to a third or hybrid category. Here—

‘removal of a person from country A to country B may both violate his right to respect for his private and family life in country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B.’

On analysis, however, such cases remain domestic cases. There is no threshold test of enormity or humanitarian affront. But the right to respect for private and family life, home and correspondence, which is protected by art 8, is a qualified right which may be interfered with if this is necessary in order to pursue a legitimate aim. What may happen in the foreign country is therefore relevant to the proportionality of the proposed expulsion.

[44] Article 8 cases in the immigration and expulsion context tend to be of two different types. Most commonly, the person to be expelled has established a family life in the contracting state. His expulsion will be an interference, not only with his own right to respect for his private and family life, but also with that of the other members of his core family group: his spouse (or perhaps partner) and his children. The Strasbourg court regards its task as to examine whether the contracting state has struck a fair balance between the interference and the legitimate aim pursued by the expulsion. The reason for the expulsion and the degree of interference, including any alternative means of preserving family ties, will be explored and compared.

[45] Sometimes, the reason for expulsion will be immigration control, which is a legitimate aim ‘in the interests of the economic well-being of the country’. In *Berrehab v Netherlands* (1988) 11 EHRR 322 the applicant was a Moroccan who was refused a further residence permit after his divorce from his Dutch wife. This was an interference with his right to respect for his family life with his young daughter, whom he saw four times a week for several hours each day. The interference was disproportionate. The applicant had lived there legitimately for several years, had a home and a job there, and very close ties with his daughter which his expulsion threatened to break. A similar case was *Ciliz v Netherlands*

a [2000] 2 FLR 469; the applicant was a Turk who was refused a further residence permit after separating from his Dutch wife, despite the fact that he was still pursuing an application for contact with his son; the expulsion thus interfered with the process which was designed to fulfil the state's positive obligation to enable family ties to develop between father and son. In neither case was there an alternative means of preserving or establishing family ties between father and child.

b [46] Sometimes, the legitimate aim will be 'the prevention of disorder or crime'. This has arisen in a long line of cases concerning people who have lived in the contracting state since childhood but remain liable to expulsion if they commit serious crimes. *Moustaquim v Belgium* (1991) 13 EHRR 802 concerned a Moroccan who had lived with or near his family in Liège since he was one year old. *Beldjoudi v France* (1992) 14 EHRR 801 concerned an Algerian born in France before independence who lost his French nationality because his parents failed to make the required declaration but who wanted to resume it, and had married a Frenchwoman; uprooting her would cause her great difficulty so that interference might imperil the unity or even the existence of the marriage. *Nasri v France* (1995) 21 EHRR 458 concerned an Algerian who had lived virtually all his life in France with his parents and siblings, and was deaf and dumb, so that his family was especially important to him. In *Jakupovic v Austria* [2003] 2 FCR 361 the applicant was a Bosnian who had come to Austria to join his mother and siblings when aged 11 but was only 16 when a residence prohibition was imposed as a result of criminal offences. The Strasbourg court observed that very weighty reasons would be needed to justify sending a 16-year-old alone to a country which had recently experienced armed conflict and where he had no close relatives. In all these cases the interference was found disproportionate.

f [47] In contrast, in *Boughanemi v France* (1996) 22 EHRR 228, the applicant was a Tunisian who had lived in France since the age of eight, was deported for serious crimes, but returned illegally and formed a relationship with a French woman by whom he had a child; the majority did not find his further expulsion disproportionate because of the seriousness of the offences and it was not suggested that he had cut all ties with Tunisia. Judge Martens dissented: he attacked the Strasbourg court's traditional approach that an integrated alien was not protected from expulsion unless there would be a disproportionate interference with his family life. This had two obvious disadvantages: that not all such aliens had a family life; and it led to uncertainty in assessing and comparing the merits of the individual cases. He thought the time had come to recognise that expulsion of integrated aliens was an interference with their private life, and that it would almost always be disproportionate to expel those who had lived g virtually all their lives within the contracting state.

j [48] These two types of case come together when an adult immigrant establishes family ties in the contracting state and then commits crimes which make him liable to deportation. In *Boultif v Switzerland* (2001) 33 EHRR 1179, an Algerian entered Switzerland as a tourist, married a Swiss the following year, was convicted of serious offences but did not serve his sentence until he had been blamelessly at large for some time. The Strasbourg court listed the criteria to be taken into account—the nature and seriousness of the offence, his length of stay, the time since the offence and his conduct during that time, his family situation including the length of the marriage, the effectiveness of their family life, whether the spouse knew of the offence when entering a family relationship, whether they had children, and 'not least' the seriousness of the difficulties the spouse was

likely to encounter in the country of origin or elsewhere. These criteria were repeated in *Amrollahi v Denmark* [2002] ECHR 56811/00, where once again the main obstacle to deporting an Iranian who had committed drugs offences was that his wife could not be expected to follow him to Iran or elsewhere.

[49] The recent Grand Chamber case of *Slivenko v Latvia* (2003) 15 BHRC 660 is also a domestic case although on its unusual facts it concerned private rather than family life. The applicants were ethnic Russians, the wife and daughter of a former Soviet army officer. The wife, herself the daughter of a Soviet army officer, had lived in Latvia since she was one month old and the daughter had been born there. Following independence in 1991, a treaty between Russia and Latvia provided for Russian officers and their families to leave Latvia. The family was provided with a flat in Russia and the husband went. The wife and daughter resisted joining him as long as they could but eventually did so when the daughter had finished school. This was not an interference with their family life, as the whole family had been deported, but the expulsion of long time residents could also be an interference with their private life, depending upon the degree of social integration. Normally the interests of 'national security' in the removal of active foreign servicemen would outweigh this, but the wife's parents remained in Latvia, the husband had retired and so there was no danger to national security in their remaining in Latvia.

[50] These were all cases in which deportation would be an interference with the right to respect for the private or family life which the applicant had established in the expelling state. Conditions in the receiving state were relevant only for the purpose of assessing proportionality. Could that family life be established or continue elsewhere? The effect upon the spouse or child left behind had to be considered and might well be determinative. The Strasbourg court is unsympathetic to actions which will have the effect of breaking up marriages or separating children from their parents.

[51] The other type of 'domestic' art 8 case arises where there is no question of expulsion but immigration control prevents other close family members joining a spouse or parents living in the contracting state. The first was *Abdulaziz v UK* (1985) 7 EHRR 471, in which the argument that convention rights were not engaged at all in immigration cases was roundly rejected. Husbands and wives have the right to respect for their family life even if they have not yet established a home together. But the convention does not give them the right to choose where that home shall be. There were no obstacles to these couples establishing their family life in their husbands' countries of origin rather than in the United Kingdom. They knew that the husbands had no right of entry when they married. There was thus no breach of art 8. But there was a breach of art 14. If the sexes had been reversed, the wives would have been allowed to join their husbands here. The different treatment of husbands and wives could not be justified by the differential impact upon the labour market.

[52] Other cases have concerned parents who want the children whom they have left behind in their country of origin to join them in the contracting state. Once again, there is no general obligation to authorise family reunion in the contracting state. But the obstacles to developing family life back in the country of origin will be relevant. In *Gul v Switzerland* (1996) 22 EHRR 93, this would not be easy but there were no obstacles to prevent this, whereas in *Sen v Netherlands* (2003) 36 EHRR 81, the Strasbourg court found that there were major obstacles to doing so.

a [53] These, too, are 'domestic' cases. There is a technical difference from the expulsion cases, in that the people living in the contracting state are relying on the state's obligation to take positive steps to enable family life to develop between parent and child (an obligation recognised since the ground-breaking case of *Marckx v Belgium* (1979) 2 EHRR 330). But, as Judge Martens observed in his dissenting opinion in *Gul v Switzerland* (1996) 22 EHRR 93 at 120 (para 12), the difference is hardly more than one of semantics—it has no bearing on the burden of proof or the standards of assessing a fair balance, in this case between the right to control immigration and 'a fundamental element of an elementary human right, the right to care for your own children'. Once again, the possibilities of doing so in another country are relevant to that balance, but the conduct being assessed is still that of the contracting state in relation to a right being claimed in that state.

d [54] How then should the health cases be regarded? By a 'health case', I mean one in which the applicant's health needs are being properly or at least adequately met in this country and the complaint is that they will not be adequately met in the country to which he is to be expelled. Thus far, in my view, these have all been regarded as 'foreign' cases. They date back to *D v UK* (1997) 2 BHRC 273, in which the proposed expulsion of a drug smuggler apprehended on arrival but in the terminal stages of AIDS after serving his sentence was found in breach of art 3 (at 285 (para 54)):

e '... aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of art 3.'

g [55] This principle was repeated in the very similar case of *Henao v Netherlands* App No 13669/03 (24 June 2003, unreported), where there was no breach because the humanitarian considerations were not as strong. It has also been applied in cases where the applicant has been properly resident for some time but remains subject to expulsion, either because of criminal offences, as in *BB v France* (1998) Reports of Judgments and Decisions 1998-VI, p 2595 or because of immigration control, as in *SCC v Sweden* (2000) 29 EHRR CD 245. In all of these the health complaint depended upon art 3, although in *BB v France*, there was also a complaint of potential deprivation of moral support of family and friends.

h [56] This brings us to *Bensaid v UK* (2001) 11 BHRC 297. As with the HIV/AIDS cases, this was a case based upon the risk of injury to health in removing someone from a place where his health needs were being adequately addressed to a place where it was alleged that they would not be. As with the HIV/AIDS cases, the main complaint was raised under art 3. The applicant was a schizophrenic who required medication. Without it, there was a risk of relapse into hallucinations and delusions involving a risk of self harm and harm to others both here and in Algeria. The fact that his circumstances in Algeria would be less favourable than here was not decisive. The risks were speculative. There was a high threshold, especially when the case did not concern the direct responsibility of the state for inflicting harm. It did not fall into the exceptional category covered by *D v UK*.

[57] The court's case law did 'not exclude that treatment which does not reach the severity of art 3 treatment may nonetheless breach art 8 in its private life aspect where there are sufficiently adverse effects upon physical and moral integrity' (at 309–310 (para 46)).

'Mental health must ... be regarded as a crucial part of private life associated with the aspect of moral integrity ... The preservation of mental stability is ... an indispensable precondition to effective enjoyment of the right to respect for private life [protected by art 8].' (See para 47.)

But it had not been established that the risk of damage to his health from returning him to his country of origin would substantially affect his moral integrity to a degree falling within the scope of art 8. Even assuming the dislocation caused by his removal could be regarded as affecting his private life—the relationships and support established here—it was justified under art 8(2) (see para 48).

[58] In my view, the court was here drawing a distinction between the 'foreign' and 'domestic' aspects of the case. The 'foreign' aspect was the difficulty in accessing appropriate psychiatric treatment in Algeria. This fell mainly to be dealt with under art 3, although the court did not rule out that it might be dealt with under art 8 if the threat to moral integrity was sufficiently severe. The court did not in so many words repeat the 'high threshold' point made in relation to art 3 but if it applies to art 3 it ought logically to apply to art 8, unless this is thought unnecessary because the interference will always be justified under art 8(2) unless the high threshold is reached. The 'domestic' aspect might have been the dislocation in his private life here caused by removing him, but that was clearly justified under art 8(2).

[59] Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under art 3 but succeed under art 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under art 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain.

[60] I agree that the Secretary of State had to ask himself how an appeal might fare before an adjudicator. He also had to bear in mind that the adjudicator is an integral part of the decision-making process and thus would have to consider the issue of proportionality on the evidence before him. The Secretary of State had to assume that the evidence put forward on the claimant's behalf might be accepted by an adjudicator. In those circumstances, was he entitled to certify that Mr Razgar's human rights claim was manifestly unfounded? In my view, he was.

[61] Mr Razgar's degree of social integration into this country (to adopt the language used in *Slivenko v Latvia* (2003) 15 BHRC 660) is nowhere near strong enough to make this a 'domestic' case. This is a 'foreign' case in which the United Kingdom's responsibility is only indirectly engaged as a result of what might

a happen to him if removed. The meat of his case, as summed up by Richards J ([2002] EWHC 2554 (Admin) at [51], [2003] Imm AR 269 at [51])—

b ‘was that the claimant’s mental health would suffer a serious decline in Germany by reason, in particular, of the lack of appropriate treatment; it would have to deteriorate to the point where his condition was acute, that is to say where he became a suicide risk, before treatment could be assured. By contrast, if he stayed in the United Kingdom he could expect to receive appropriate treatment and to make progress.’

c [62] Dr Sathananthan had diagnosed post traumatic stress disorder and depression, for which the appropriate treatment was medication and cognitive behavioural therapy. The claimant had been receiving medication and some counselling but not the cognitive behavioural therapy, apparently because his English was not yet good enough. Such therapy is in any event in short supply, so that whether it would actually become available is a matter of speculation. But clearly, he was currently managing without it. Its aim would be to make him better, not to prevent a serious deterioration in his mental state. The fact that it d might not be available to him in Germany does not engage his convention rights under either art 3 or art 8. Nor does the evidence suggest that the medication is essential to prevent a serious deterioration: this is not a case of psychosis in which there is a very real risk of a return to hallucinations if medication is not available.

e [63] Similarly, the complaints he makes about life in Germany compared with life here cannot be sufficient to engage his convention rights. The situation he would face in Germany may compare unfavourably with his present life here, although everything of which he complains in Germany could also happen to him here. Regrettably, there is racism here as well as in Germany. People liable to expulsion may be dispersed to remote areas where they would prefer not to f be. They may even be held in centres where their liberty is restricted. They are not allowed to work. His status as ‘duldung’ in Germany is not to be compared with the situation of someone who has been given the long-term right to live and work in this country. That is not the issue. The issue is whether his situation in Germany would raise the serious humanitarian concerns raised in *D v UK* (1997) 2 BHRC 273 or otherwise constitute such a serious threat to his physical and g moral integrity as to be disproportionate to the legitimate aim which his removal would serve.

[64] Dr Sathananthan was of the opinion that ‘sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself’. I accept entirely that the h risk of suicide is capable of engaging the claimant’s rights under arts 2, 3 and 8 and must be given very serious consideration by the decision makers. There is a positive obligation under the convention to take reasonable steps to prevent a vulnerable person in custody from committing suicide: see *Keenan v UK* (2001) 10 BHRC 319. If there were substantial grounds to believe that the authorities j responsible for him in Germany would not take such steps, then I would accept that his convention rights were engaged and that the Secretary of State could not properly certify that his claim was manifestly unfounded, at least without making further enquiries or seeking further assurances from the German authorities. But this is not the case. Mr Keßler’s report specifically states that ‘your client will only receive medical treatment in case of actual danger to himself or to others’. The Secretary of State is entitled to assume that the German authorities will observe

their convention obligations to the claimant unless there is better evidence than this that they will not. a

[65] For those reasons, I would hold that the Secretary of State was entitled to reach the conclusion he did on the material before him and would therefore allow this appeal. I appreciate that this may seem a harsh conclusion to draw. But this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go. In my view, those obligations are not such as to require the United Kingdom to refrain from returning Mr Razgar to Germany in accordance with the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806). b c

LORD CARSWELL.

[66] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and I am in agreement with him that the appeal should be dismissed. d

[67] By the letter of 9 April 2001 from the United Kingdom Immigration Service to the respondent's solicitors the Secretary of State for the Home Department certified, pursuant to s 72(2)(a) of the Immigration and Asylum Act 1999, that the respondent's allegation that a person acted in breach of his human rights was manifestly unfounded. In consequence the respondent was barred while in the United Kingdom from appealing under s 65 against the Secretary of State's decision to remove him to Germany under the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806). The effect of the certificate accordingly is that he could only appeal after his removal to Germany. e f

[68] The appeal before your Lordships' House has been brought against the dismissal by the Court of Appeal of an appeal from the decision of Richards J on an application for judicial review, whereby he quashed the decision of the Secretary of State to certify in this manner that the respondent's case was manifestly unfounded. g

[69] Your Lordships dealt comprehensively in *R (on the application of Yogathas) v Secretary of State for the Home Dept* [2002] UKHL 36, [2002] 4 All ER 800, [2003] 1 AC 920 with the test which should be applied by the Secretary of State when considering whether an allegation of breach of human rights is manifestly unfounded. It is unnecessary now to say more than that before certifying he must be reasonably and conscientiously satisfied that the application must fail. As Lord Bingham stated at [16], above, in this appeal, in considering an application for judicial review of the decision to certify the court is exercising a supervisory jurisdiction, although one calling for the degree of careful scrutiny appropriate to the seriousness of the subject matter. As he also stated, the reviewing court must consider how an appeal would be likely to fare before an adjudicator. h j

[70] The Secretary of State had before him the opinions expressed by Dr Sathananthan in his several reports, and in the absence of any other medical knowledge he was obliged for the purposes of considering the issue of a certificate to accept their correctness. It is common case that the adjudicator, if hearing an

a appeal now, would be entitled and bound to have regard to any further material evidence produced. Further reports given after the date of the certificate, in July 2001 and September 2002, were before your Lordships. The high water mark of the medical evidence in the respondent's favour was the opinion expressed by Dr Sathananthan in his report of 18 July 2001, based on an examination of the respondent on 7 June 2001, that:

b 'I feel that sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself.'

c The picture painted of the respondent in his report of 24 September 2002 appeared somewhat less sombre, but Dr Sathananthan expressed concern that if he were returned to Germany his mental state would drastically deteriorate. We did not have the benefit of any more up-to-date psychiatric evidence.

[71] In para 4 of the decision letter of 9 April 2001 it was stated that the Secretary of State was—

d 'satisfied that your client's human rights would be fully respected in Germany and that your client would not be subjected to inhuman or degrading treatment or punishment if removed there.'

e The reference is clearly to the requirements of art 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention) and there is no indication in the letter that the Secretary of State had regard to the possibility that art 8 might be engaged. Indeed, the Attorney General argued on his behalf at the hearing of this appeal that as a matter of law art 8 could not be engaged in any circumstances. It might be said that this alone constitutes a misdirection of himself by the Secretary of State which is sufficient to vitiate his decision. It was clear, however, from the application for judicial review brought in May 2000 and subsequent correspondence that the applicant's solicitors were relying on art 8 as well as art 3 and a reference to both articles is contained in the letter of 4 July 2000 from the United Kingdom Immigration Service. I would therefore be willing to assume for the purposes of this appeal that the Attorney General's argument had its roots in the decision of the Court of Appeal in *R (on the application of Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770 and that the Secretary of State did take art 8 into account as well as art 3.

g [72] For the reasons given by your Lordships in the appeals of *R (on the application of Ullah) v Special Adjudicator*, *Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23, it must now be accepted
h that in principle art 8 could exceptionally be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even though they do not amount to a violation of art 3. In order to bring himself within such an exceptional engagement of art 8 the applicant has to establish a very grave state of affairs, amounting to a flagrant or
j fundamental breach of the article, which in effect constitutes a complete denial of his rights. It is necessary accordingly to consider the present case in order to determine whether an adjudicator could arguable find that the removal decision is a breach of art 8.

[73] I would not regard the conditions in which the respondent may be detained in Germany, taking the case at its height in his favour, as capable in themselves of constituting such a flagrant breach. They may be regarded as

somewhat spartan and it would be legitimate to argue that they are repressive, but in my judgment they fall a long way short of a flagrant violation of the respondent's art 8 rights. If he is to make out any case under art 8, I consider that it must be founded on the possible effects on his mental health.

[74] The precise extent of the interests which art 8 is capable of protecting still remains to some degree uncertain and, as my noble and learned friend Lord Walker of Gestingthorpe pointed out in his opinion in the present appeal, the language of some of the statements in the Strasbourg jurisprudence must be treated with some caution. It does appear to be clear enough, however, from the judgment in *Bensaid v UK* (2001) 11 BHRC 297 at 310 (para 47) that the preservation of mental stability can be regarded as a right protected by art 8. The issue therefore is whether the removal of the respondent to a third country Germany could arguably be said to amount to a flagrant denial of his art 8 right to the preservation of his mental stability.

[75] It is, I think, important to note that the deleterious effects on the respondent's mental health described by Dr Sathananthan appear to stem from his fear that Germany will decide to return him to Iraq. It is to be assumed that Germany will observe its obligations under the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) and the convention and will properly and conscientiously apply their provisions. If that be so, then the respondent's fears should be regarded as lacking in rational foundation. If they nevertheless exist in an extreme form, sufficient to make him suicidal at the prospect of removal to Germany, even if unjustified or irrationally held, the question has to be considered whether that may arguably be sufficient to found an allegation that his art 8 rights have been violated.

[76] In my opinion it could in principle be sufficient on a tenable view of the facts placed before us. It seems to me that the decider, whether it be the Secretary of State, an adjudicator or the court, should base a decision on the actual state in which the respondent may find himself, whether or not it is rationally justifiable. This appears to be consistent with the emphasis in the judgment of the European Court of Human Rights (the Strasbourg court) in *Tomic v UK* App No 17837/03 (14 October 2003, unreported) upon the risk of harm capable of engaging the responsibility of the respondent government. That decision concerned the admissibility of an application founded on a claim that art 3 was engaged, but the principle seems to me to be the same, founded upon the effect of powerful humanitarian considerations. Similarly, in *D v UK* (1997) 2 BHRC 273 the Strasbourg court, in admitting a claim under art 3, was concerned with the effects upon the applicant and the certainty that he would suffer severely in the absence of suitable medical facilities in St Kitts to treat his condition. I would mention also that this should not entail the adoption of a process of comparing levels of care in the expelling country and the receiving country, and I fully agree with the observations of my noble and learned friend Baroness Hale of Richmond in that respect in [63], above.

[77] On the facts which were before your Lordships—which I would emphasise are far from up to date—I am compelled to conclude that an adjudicator might arguably hold that a sufficiently fundamental breach of the respondent's art 8 right to the preservation of his mental stability had been established to engage that article. The adjudicator would then have to consider the effect of art 8(2), which will require the striking of a fair balance, in the manner referred to by Lord Bingham in [20], above. This has not received consideration by the Secretary of State or the judge. The factors which would have to be assessed on the application

a of art 8(2) are potent indicators in favour of upholding the operation of immigration control and affirming decisions to refuse entry to persons such as the respondent. I could not be fully satisfied, however, that the case is so clear in favour of upholding the decision to remove the respondent that no reasonable adjudicator could hold otherwise.

b [78] I accordingly conclude, not without very considerable hesitation, that for the reasons which I have given the decision of the Secretary of State must be set aside. In so holding, however, I have to emphasise that the decision of the House goes no further than to determine the question of law submitted to it whether the Secretary of State was justified in ruling out an appeal in limine on the ground that the respondent's allegation was manifestly unfounded. We cannot attempt to say how the case will appear before an adjudicator who has full information of the current state of the respondent's mental health and the facilities which will be available to him in Germany and is in a position to test the evidence of the respondent and the reliability of any medical opinions adduced. Still less can we give any indication how we think the adjudicator is likely to decide the substantive issue if an appeal is brought from the decision to remove the respondent.

d [79] I would accordingly dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Horton v Higham

[2004] EWCA Civ 941

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, JONATHAN PARKER LJJ AND LADDIE J

5, 15 JULY 2004

Barrister – Pupillage – Application for pupillage – Statutory provision rendering it unlawful for trade organisation to discriminate against disabled person in respect of application for ‘membership’ of organisation – Whether application for pupillage with barristers’ chambers an application for ‘membership’ of chambers for purposes of disability discrimination legislation – Disability Discrimination Act 1995, s 13.

The respondent set of barristers’ chambers offered the complainant a 12-month pupillage. Under the chambers’ constitution, pupils could not be members of the chambers. That provision was in accord with the Code of Conduct of the Bar which prohibited a pupil, so long as he was such, from holding himself out as, or becoming, a member of chambers. Shortly before the commencement of the pupillage, the complainant informed the chambers that he could not take up the pupillage because of ill-health, and asked for it to be postponed for one year. The chambers refused a deferral, thereby effectively preventing the complainant from taking a pupillage with them. He brought a claim for disability discrimination before an employment tribunal, relying on s 13^a of the Disability Discrimination Act 1995 which made it unlawful for a trade organisation to discriminate against a disabled person in the terms on which it was prepared to admit him to ‘membership’ of the organisation, or by refusing to accept, or deliberately not accepting, his application for ‘membership’. The definition of ‘trade organisation’ included an organisation whose members carried on a particular profession. On a challenge by the chambers to its jurisdiction, the tribunal held that the complainant could pursue his claim because his application for pupillage was an application for ‘membership’ of a trade organisation for the purposes of s 13 of the 1995 Act. That decision was reversed by the Employment Appeal Tribunal, which held that a person applying to a set of chambers for pupillage was not applying to become a member of those chambers. The complainant applied to the Court of Appeal for permission to appeal, contending that in social legislation, such as the discrimination legislation, a purposive approach should be adopted, so as to give an inclusive meaning to ‘member’ and ‘membership’. Alternatively, he contended that an application for a pupillage which covered the second six months of pupillage, when the pupil might appear in court on his own, was an application for membership of a trade organisation because in such a case the pupil was carrying on the profession of barrister.

Held – (Laddie J dissenting) An application for pupillage was not an application for ‘membership’ of a trade organisation for the purposes of s 13 of the 1995 Act. In the discrimination legislation, Parliament had not proscribed all discrimination, but had made unlawful discrimination in certain fields only, and in those fields, by the statutory language, it had limited the circumstances

^a Section 13, so far as material, is set out at [1], below

a where discrimination was unlawful. Whilst it was right to give the statutory language determining those circumstances as broad a construction as it could reasonably bear, it would be wrong to give the ordinary and readily understandable words in s 13 some artificially extended meaning. As a matter of ordinary language, a pupil in a set of chambers was not a member of that set, either in the first or second six months of pupillage. The distinction between applications for a first six-months' pupillage and those for a period which was confined to, or covered, the second six months was highly artificial, given that both periods were part of the year's training which the Bar Council required to be undergone before the trainee obtained a practising certificate and could call himself a barrister. Further, a pupil did not have an absolute or unconditional right to appear in court in the second six months of his pupillage. Moreover, the sum of the rights and duties of a pupil was not such as to bring the pupil within the concept of a member of chambers. Finally, the limiting by the chambers' constitution of membership of the chambers so as to exclude pupils was not contrived or artificial. It accorded with the ordinary usage and understanding of 'member' and 'membership' when applied to a set of barristers' chambers. More importantly, it accorded with the Code of Conduct of the Bar. It followed in the instant case that the complainant had not been applying for membership of the chambers when applying for pupillage. Accordingly, while his application for permission to appeal would be granted, the appeal itself would be dismissed (see [16], [19]–[23], [25], [26], [32], below).

Notes

f For applications for pupillage and for applicants to and members of trade organisations, see respectively 3(1) *Halsbury's Laws* (4th edn reissue) para 386 and 13 *Halsbury's Laws* (4th edn reissue) para 494.

For the Disability Discrimination Act 1995, s 13, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 308.

g Cases referred to in judgments

Edmonds v Lawson [2000] IRLR 391, [2000] QB 501, [2000] 2 WLR 1091, CA.

Jones v Secretary of State for Social Services, *Hudson v Secretary of State for Social Services* [1972] 1 All ER 145, [1972] AC 944, [1972] 2 WLR 210, HL.

h Application for permission to appeal

j Meurig Iestyn Horton applied for permission to appeal from the order of the Employment Appeal Tribunal (Burton J (President), A Gallico and Sir William Morris) on 2 December 2003 allowing an appeal by the respondent, Paul Higham (on behalf of himself and all other members of 1 Pump Court Chambers (the chambers)), from the decision of an employment tribunal at London Central, sent to the parties on 7 August 2003, that Mr Horton could pursue his claim for disability discrimination against the chambers under s 13 of the Disability Discrimination Act 1995. The facts are set out in the judgment of Peter Gibson LJ.

Declan O'Dempsey (instructed by the *Free Representation Unit*) for Mr Horton.
Brian Napier and *Michael Paget* (instructed by *Field Fisher Waterhouse*) for the chambers.

Cur adv vult

15 July 2004. The following judgments were delivered.

PETER GIBSON LJ.

[1] Section 13 of the Disability Discrimination Act 1995 provides (so far as material):

‘(1) It is unlawful for a trade organisation to discriminate against a disabled person—(a) in the terms on which it is prepared to admit him to membership of the organisation; or (b) by refusing to accept, or deliberately not accepting, his application for membership ...

(4) In this section “trade organisation” means an organisation of workers, an organisation of employers or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.’

[2] The issue on this appeal is whether a pupil barrister has ‘membership’ of a trade organisation. It is not in dispute on this appeal that the barristers’ chambers where the pupil is doing his pupillage with a pupil master who is a member of those chambers is a trade organisation within s 13(4) of the 1995 Act.

[3] It is an appeal by *Meurig Iestyn Horton* from the order made by the Employment Appeal Tribunal (EAT), the President, *Burton J*, presiding, whereby it allowed the appeal of the respondent, *Paul Higham* on behalf of himself and each of the other members of *1 Pump Court Chambers* (the chambers) from the decision of an employment tribunal (ET) sitting at London Central. By that decision sent to the parties on 7 August 2003 the ET held that Mr Horton might pursue his claim of disability discrimination against the chambers pursuant to s 13. In reaching that decision the ET decided two contested issues: (1) that the chambers were a trade organisation within s 13(4); and (2) that Mr Horton by applying for a pupillage in the chambers was applying for membership of that organisation within s 13(1). The EAT, on the appeal to it, agreed with the ET on the first issue but disagreed with the ET on the second. Mr Horton applied to this court for permission to appeal. *Mummery LJ* said that Mr Horton did not have a real prospect of success on the appeal but adjourned the application to the full court on the footing that the appeal raised an important point on the construction of the 1995 Act.

THE FACTS

[4] I can summarise the facts shortly. Mr Horton was born on 24 March 1961. As a mature student he applied for pupillage with the chambers and was offered one of two available places for a year commencing October 2001. In September 2001 Mr Horton informed the chambers that he could not take up the pupillage because of ill-health. He applied to the chambers for a postponement of his pupillage so that it would begin in October 2002, by which time he hoped to be fit enough to take it up. The chambers decided not to grant him a deferral.

a Effectively, as the ET found, that decision prevented him from taking a pupillage with the chambers.

THE PROCEEDINGS

b [5] On 1 March 2002 Mr Horton presented an originating application to the ET, claiming disability discrimination by the chambers in contravention of ss 5(2) and 6(1) of the 1995 Act. That was later amended to a claim based on s 13. It was not in dispute that Mr Horton is disabled for the purposes of the 1995 Act but the chambers took the point that as he could not bring himself within s 13 the ET had no jurisdiction to hear his complaint.

[6] I need say nothing further on the ET's and the EAT's decisions on the trade organisation point.

c [7] On the issue of membership, the ET referred to the definitions in the *Shorter Oxford English Dictionary* of 'member' and 'membership'. It said that there were various definitions of 'member' but that the only one relevant for its purposes was: 'Each individual belonging to a society or assembly ... one who takes part in anything.' It referred to 'membership' being defined as: 'The condition or status of being a member of a society etc.' It looked at what it called
d 'the components of a set of chambers' and referred to five categories: (1) barristers who are the members of chambers as defined in the chambers' constitution, (2) the senior and deputy clerk who have under that constitution the status of members, (3) barristers who are not members of the chambers under the constitution but practise from the chambers as 'door tenants' or 'squatters',
e (4) pupils, (5) staff. Of pupils, the ET said:

'Then we have the pupils, who spend a fixed term of one year in chambers. During the first six months they are not allowed to undertake any court work, although they do assist the other members of chambers in connection with research and general preparation. They receive a modest regular
f payment during their pupillage and in the second six months they are able to undertake court work, and when they do so they go to court as representatives of the chambers.'

[8] The ET asked itself which of those categories were members of the trade organisation under s 13. It considered that a purposive construction
g should be applied and the ordinary dictionary meaning of the term used rather than the specified definition in the chambers' constitution. It accepted that pupils could not be members of the chambers under their constitution nor under Bar Council regulations, but it said that that did not mean that pupils could not qualify for protection under s 13 and it said that it was
h persuaded that 'the pupils are at least members of the chambers in the sense that they have the statutory protection accorded to such persons'. It referred to the fact that the Sex Discrimination Act 1975 and the Race Relations Act 1976 have sections which are the equivalent of s 13 and that in 1990 by
j amending legislation a new s 35A was introduced into the 1975 Act and a new s 26A was introduced into the 1976 Act to deal with discrimination by barristers against applicants for pupillage or tenancy. It noted that the 1995 Act contained no provision equivalent to s 35A and s 26A, but that it is to be amended from October 2004 to contain such a provision. However, the EAT thought it purposeless to speculate on the reasons for such omission in the 1995 Act and for the intended inclusion later this year. It looked at the chambers' constitution and drew a distinction between a trainee, which is

what a pupil is, and a tenant in the chambers. It expressed its conclusions thus: a

'34 On any sensible analysis of what occurred when Mr Horton applied for a pupillage, that is to become a trainee barrister attached to these chambers, he was not applying to become a member of the chambers. None of the incidents of membership, by way of rights or obligations, would have applied to him. We accept that it is not for the body in question to write its own constitution so as to exclude itself from the ambit of the discrimination legislation, but that is not what was here happening; there is nothing unusual in this case, and there is nothing, for example, which was not positively accepted as anomalous or different by the very provision in s 26A and s 35A of the special legislation to which we have referred, as applying to the Bar. What appears to us to be conclusive that this is not something which has been specially orchestrated by this or other chambers is the provision of the code of practice of the profession. By para 803 of the Code of Conduct of the Bar, it is provided at 803.1 that: "So long as he is a pupil a barrister in independent practice may not become or hold himself out as a member of chambers or permit his name to appear anywhere as such a member." That prevents a pupil not only from holding himself out as a member, but from becoming a member, even if the chambers in question were prepared to allow for that possibility. b
c
d

35 Mr O'Dempsey [appearing for Mr Horton] has not been able to draw our attention to any other situation analogous to the barristers' profession which might be affected by the conclusion to which we are coming, or to any trade organisation which is anywhere near similar to a barristers' chambers. Nothing we say would affect any different set of facts relevant to some other profession; but we are entirely clear, so far as these facts are concerned, and so far as the operation of barristers' chambers is concerned, that when somebody applies to become a pupil, that is to do his or her training at a set of chambers, he is not within s 13 of the Act, applying to become a member of that chambers, on the basis, as we have now concluded, that that chambers is a trade organisation. He is not applying to become a member of [a] trade organisation within s 13(4). e
f
g

36 This is an appeal on a point of law; we are entitled, as Mr O'Dempsey has accepted, to reconsider the question of law; we are satisfied that the tribunal in this case came to the wrong decision on the question of construction, and although we accept that "member" can, in the English dictionary, mean many things, where the question is whether someone is applying to be a member of a trade organisation in s 13(4), where the trade organisation is, as we have concluded it is, a set of barristers' chambers, we are driven to conclude that this was not such an application. In those circumstances, we allow the appeal.' h
j

THE APPEAL TO THIS COURT

[9] On this appeal Mr O'Dempsey repeats the submission he made to the ET and the EAT that the concept of 'membership' of a trade organisation, on a true construction of s 13, includes a pupil barrister. He contends that the ET's approach was correct. Whilst he argues that the membership of a trade

a organisation for the purposes of s 13 cannot be determined by the organisation's own definition of who are its members in its constitution as that would permit abuses to arise, he took us through the chambers' constitution for the role and duties of pupils. These include a requirement that the pupil be present in chambers each working day between specified hours which can be extended if the pupil's supervisor so required; and in relation to pupils in the second six months of pupillage when they have a right of audience in court, duties are imposed by the chambers in relation to attendance in court. Another paragraph of the constitution refers to 'the recruitment of pupils ... to chambers'. There is a specified process for selecting pupils and pupils have the right to use the chambers' library and are provided with keys and security codes. Fees earned by the pupil in his second six months are free of clerks' fees unless those fees are received after the end of the pupillage. Pupils are allowed to receive remuneration for work done for members of the chambers other than their pupillage supervisor. The constitution provides for a pupil's forum to implement the policies determined by the chambers for the training of pupils. Provision is made for complaints by tenants or door tenants against pupils with the possible sanction, if a complaint of serious misconduct is upheld, of the pupil being required to leave the chambers. Provision is also made for dealing with complaints by applicants for pupillage and for tenancy.

[10] Mr O'Dempsey submits that the concept of a member of a trade organisation is intended to extend, in accordance with the social policy governing the 1995 Act, to include all levels of membership of the organisation. He includes as members of a set of barristers' chambers even those doing a 'mini-pupillage'. He points out that once the chambers' offer of pupillage is accepted, the person accepting the offer has a different status from that of a mere visitor to the chambers. He submits that the pupil has a limited form of membership of the chambers for a determined period. He argues that the section is designed to be comprehensive in its coverage of the whole process whereby a person has a relationship other than that of a member of the public with the organisation. Another way he puts it is in ground 5 of the grounds of appeal, viz:

'a person is a member of an organisation if (a) they are selected from the general public or a section thereof, (b) they have rights and obligations within the organisation which are greater than those expected of a member of the general public, or the section from which they were selected.'

[11] Mr O'Dempsey referred to the two aspects of what constitutes disability discrimination in relation to a trade organisation, that is to say, for a reason relating to a disabled person's disability, treating him less favourably and failing to comply with a duty to make adjustments (see s 14(1) and (2) of the 1995 Act), and submitted that, in the light of those duties and the social purpose of the legislation, the concept of 'membership' of a trade organisation should be construed widely. He prayed in aid the remarks of Lord Diplock in *Jones v Secretary of State for Social Services*, *Hudson v Secretary of State for Social Services* [1972] 1 All ER 145 at 181, [1972] AC 944 at 1005, where it was said of one of the Acts which introduced the welfare state, the National Insurance (Industrial Injuries) Act 1946, that to find the meaning of particular provisions in such social legislation called for a purposive approach

to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was intended to achieve them, and that meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to the purposive approach.

[12] Mr O'Dempsey sought to derive assistance from the provisions in the Code of Conduct of the Bar (the code) relating to insurance of barristers and submits that they necessarily recognise that pupils practising from chambers in the second six months of pupillage are members of chambers. If wrong on the scope of the meaning of membership, he submits that applicants for a year's pupillage like Mr Horton are applicants for membership of chambers because such pupils in the second six months would be able to appear in court and thereby would be carrying on the profession of a barrister from the pupillage chambers.

[13] Mr Napier for the chambers supports in general the reasoning and conclusion of the EAT. He relies in particular on the assistance given by s 13(4) to ascertaining the meaning of 'membership of a trade organisation', pointing out that the organisation, when not of workers or employees, is one whose members carry on a profession or trade for the purposes of which the organisation exists. He says that on that test a mini-pupil in chambers is not a member because he does not carry on a profession. Nor, he argues, is a pupil, because in the first six months he cannot appear in court, and even in the second six months, the pupil, if he obtains the permission of his pupil master or head of chambers, appears in court, he does not do so as a barrister, as that requires a practising certificate which is only obtainable on the successful completion of pupillage. The pupil is not deemed competent to offer legal services on his own account. Mr Napier further submits that membership of a trade organisation connotes having rights and obligations fundamental to the management and governance of the organisation. Thus members of the chambers under the constitution have voting rights and may be appointed to chambers' committees, unlike pupils.

[14] Mr Napier further submits that the omission from the 1995 Act of the specific provisions dealing with applications for pupillage which were introduced in 1990 into the 1975 Act and the 1976 Act support the view that Parliament thought that such applications were not covered by s 13. He also seeks to rely on the express adoption by Parliament in s 35A(4) of the 1975 Act and in s 26A(4) of the 1976 Act of the meaning of the terms 'pupil', 'pupillage', 'tenancy' and 'tenant' as that commonly associated with their use in the context of a set of barristers' chambers. He argues that it is probable that Parliament likewise would adopt that meaning of membership of a trade organisation when the organisation is a set of barristers' chambers, which is commonly associated with the use of 'membership' in the context of such a set.

DISCUSSION

[15] The issue before us is one of statutory construction. The terms 'member' and 'membership' are not defined and accordingly they must be given their ordinary meaning in the context in which they are used. That does not mean that one out of a number of dictionary meanings should be adopted as the ET did, particularly when the dictionary meanings it selected were those for membership of a society or assembly. The context of 'member' and 'membership' which is relevant is that of being a member or membership of a trade organisation, and by

a s 13(4) the definition includes an organisation whose members carry on a particular profession or trade. That in itself is sufficient to invalidate Mr O'Dempsey's impossibly wide definitions of all who, he says, fall within the concept of membership of a trade organisation. If he is right on his test of not being a mere visitor to the organisation or having a relationship other than that of a member of the public with the organisation or his ground 5 definition, b included within the membership of a trade organisation would be persons who in ordinary parlance would never be called members of it, for example the cleaning lady engaged to dust and clean the premises, or the junior clerk in a set of barristers' chambers, or the mini-pupil still at school or university, wanting to see what life was like at the Bar and obtaining some work experience. None of them carries on the profession of a barrister.

c [16] Mr O'Dempsey's invocation of a purposive approach in social legislation such as the discrimination legislation so as to give an inclusive meaning to 'membership' and 'member' is one that I view with caution. The 1995 Act is not like the Act referred to in *Jones*' case by Lord Diplock in his dissenting speech. There, as Lord Diplock pointed out ([1972] 1 All ER 145 at d 181, [1972] AC 944 at 1005), the social purpose of injury benefit was to provide the claimant with an income for a period not exceeding six months from the date of the accident while he was incapable of work. The benefit would fail in its social purpose unless it was allowed quickly, and Parliament, Lord Diplock said, must have contemplated a simple and speedy procedure in the majority of cases. In the discrimination legislation, Parliament has not e proscribed all discrimination but has made unlawful discrimination in certain fields only and in those fields by the statutory language it has limited the circumstances where discrimination is unlawful. Of course it is right to give the statutory language determining those circumstances as broad a construction as the language can reasonably bear, but it would be wrong to f give the ordinary and readily understandable words in s 13 some artificially extended meaning, and in my judgment that is what Mr O'Dempsey is asking us to do.

[17] However, I would also reject Mr Napier's submission that assistance on the meaning of 'membership' in s 13, applying as it does to trade organisations and not making specific references to the Bar, can be obtained g from the meaning given in s 35A of the 1975 Act and s 26A of the 1976 Act to terms other than 'member' or 'membership' in a section confined to the Bar.

[18] I turn to Mr O'Dempsey's alternative submission, made in the course of his reply, that an applicant for a pupillage which covers the second six months of pupillage when the pupil may appear in court on his own, is an applicant for h membership of the trade organisation which is the set of barristers' chambers where he is doing his pupillage. Mr O'Dempsey submitted that in such a case the pupil does carry on the profession of a barrister. Mr Horton's pupillage was for a whole year.

[19] I am not able to accept this alternative submission for the following j reasons.

[20] First, the submission distinguishes between an applicant for the first six-months' pupillage (and the necessary year's pupillage is very frequently divided into two periods of six months spent in different chambers) who is accepted by Mr O'Dempsey not to be an applicant for membership, and an applicant for pupillage for a period which is confined to, or covers, the second six months, who is said to be such an applicant. Such a distinction seems to

me highly artificial, given that both periods are part of the year's training which the Bar Council requires to be undergone before the trainee obtains a practising certificate and can call himself a barrister. Further, the pupil has no absolute or unconditional right to appear in court in the second six months of his pupillage. His pupil master can refuse to certify that he has completed pupillage satisfactorily. In my opinion, to say of an applicant for pupillage covering the second six months that he is applying for membership of a set of barristers' chambers because of the possibility that he will be allowed to appear in court in those six months and to that extent to practise the profession of barrister, even though in fact not a barrister with a practising certificate, is a strange use of language.

[21] Second, to determine whether or not a person is a member of a trade organisation necessitates a consideration of the rights and duties of that person in relation to that organisation. In the present case that requires an assessment of whether the sum of the rights and duties of the pupil is such as to bring the pupil within the concept of member. One must look in the first place at what the chambers' constitution provides, though I of course accept that a set of barristers' chambers cannot, by narrowly defining membership of that set, thereby confine the meaning of membership for the purposes of the 1995 Act. It is clear from the constitution, as is only common sense, that an applicant for pupillage is seen as distinct from an applicant for a tenancy. Pupils are trainees, in receipt of a form of bursary from the chambers, and are being trained by their pupillage supervisors. Further, a pupil is different from a tenant who is required to pay rent and other chambers' expenses and who participates in the management of the chambers. The constitution provides for the chambers to be governed by the members in chambers' meetings. Members make up subcommittees and are appointed as officers, to whom are delegated specific chambers' functions. No pupil has the right to attend a chambers' meeting nor can he be a member of a subcommittee or an officer. The responsibilities and liabilities of members are set out in detail and do not apply to pupils. In contrast there are special provisions for pupils, to which I have already referred when summarising Mr O'Dempsey's submissions. The pupil has a contract with the chambers, as has been held by this court in *Edmonds v Lawson* [2000] IRLR 391, [2000] QB 501, and no doubt the taking of pupils is to the benefit of a set of barristers' chambers in providing a pool of candidates from whom future members might be recruited, but that does not entail that pupils are members of that set for the purposes of s 13 nor that an applicant for pupillage is an applicant for membership.

[22] Third, the limiting by the chambers' constitution of membership of the chambers so as to exclude pupils is not contrived or artificial. Not only is it matched by the substantive difference between the rights and duties of pupils and those of tenants of the chambers but it also accords with the ordinary usage and understanding of 'member' and 'membership' when applied to a set of barristers' chambers. It is only in recent times that barristers' chambers have adopted written constitutions. Even without a constitution I do not think that a pupil would be regarded as a member of the barristers' chambers where he was doing his pupillage. More importantly that accords with the code. The EAT rightly drew attention to para 803 of the code in para 34 of its judgment which prohibits a pupil, so long as he is such, from holding himself out as or becoming a member of chambers. The ET, in describing pupils in the second six months of pupillage as going to court 'as representatives of the chambers', cannot be understood as overriding para 803 of the code. I do not accept that Mr O'Dempsey can obtain any real assistance from

a the provisions of the code relating to insurance. He referred to para 404.2(d) which provides:

b 'all barristers practising from [the head of chambers'] chambers whether they are members of the chambers or not are entered as members with [the Bar Mutual Indemnity Fund] and have effected insurance in accordance with paragraph 402 (other than any pupil who is covered under his pupil-master's insurance) ...'

c The reference in parenthesis to a pupil suggests that a pupil might for the purpose of insurance be thought to be a barrister practising from chambers, but the pupil does not take out insurance himself and there is nothing in that special provision to treat the pupil as a member of chambers.

d [23] I conclude that as a matter of ordinary language a pupil in a set of barristers' chambers is not a member of that set and that Mr Horton in applying for pupillage with the chambers was not applying for membership of the chambers. We have not been referred to the position in respect of other trade organisations. I do not doubt that there could be situations analogous to that of pupillage at the Bar, to which the same approach should apply.

e [24] In reaching this conclusion, I obtain some, if only limited, comfort from the fact that the 1995 Act contained no provisions comparing to s 35A of the 1975 Act and s 26A of the 1976 Act. Section 13 of the 1995 Act is plainly derived from s 12 of the 1975 Act and s 11 of the 1976 Act, which use identical language in all material respects, and yet the amendment of the 1975 Act by s 64(1) of the Courts and Legal Services Act 1990 and of the 1976 Act by s 64(2) to include specific provision making unlawful discrimination on the grounds of sex and race in relation to offers of pupillages in barristers' chambers was not matched by the inclusion of any such provision in the 1995 Act. On the footing that Parliament cannot be assumed to legislate in vain, it is natural to infer that in 1990 Parliament thought that applications for pupillage in barristers' chambers were not caught by language in the terms of s 13. f However, as s 35A and s 26A apply to applications for a tenancy as well as to applications for a pupillage, it is possible that Parliament in 1990 thought that a set of barristers' chambers was not within the definition of a trade organisation. The EAT's decision in the present case is the first authoritative decision on that point. On the basis that the decision is correct, it is apparent g that the inclusion in s 35A and s 26A of applications for a tenancy was unnecessary, as no one could argue that a tenant in a set of barristers' chambers was not a member of that organisation. However that still leaves the question of whether an applicant for a pupillage comes within the wording such as is found in s 13 of the 1995 Act, and the enactment of s 35A h and s 26A might suggest that such wording did not, in the view of Parliament, cover such an applicant. Mr O'Dempsey said that that enactment may have j been no more than for the avoidance of doubt. I agree that no firm conclusion can be reached on this point but my decision is at least consistent with what would appear to have been Parliament's view that an amendment in 1990 was necessary. If Mr O'Dempsey is right, it was not necessary and Parliament achieved nothing by s 35A and s 26A.

CONCLUSION

[25] For these reasons I think that the EAT reached the right conclusion. I would give permission to appeal but I would dismiss this appeal. a

JONATHAN PARKER LJ.

[26] I have had the advantage of reading in draft the judgments of Peter Gibson LJ and Laddie J. I agree with Peter Gibson LJ that, for the reasons he gives, this appeal should be dismissed. b

[27] The single issue on this appeal is whether Mr Horton's application for a pupillage at 1 Pump Court Chambers (the chambers) was an 'application for membership' of a 'trade organisation', for the purposes of s 13 of the Disability Discrimination Act 1995. The expression 'trade organisation' is defined in s 13(4) of the 1995 Act as being (relevantly): 'any ... organisation whose members carry on a particular profession ... for the purposes of which the organisation exists'. c

[28] The words 'members' and 'membership' are ordinary English words, and (absent any statutory definition) must be given their natural meaning. In common with many ordinary English words, however, their natural meaning will take its colour from the particular context in which the words are used. The particular context in the instant case is that of a 'trade organisation' as defined (see above), and the particular trade organisation in question is a set of barristers' chambers. Giving the words 'members' and 'membership' their natural meaning in that context must necessarily involve a consideration of the general nature and structure of the profession of barrister and of the particular structure and constitution of the chambers. d

[29] Mr O'Dempsey urges us to apply a purposive approach to construction in the instant case, citing the well-known passage from the speech of Lord Diplock in *Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services* [1972] 1 All ER 145 at 181, [1972] AC 944 at 1005. He submits that, adopting such an approach, we should give the words 'members', 'membership' and 'trade organisation' their widest meaning. I have no difficulty in accepting that, given that the social purpose of the 1995 Act (as set out in its long title) is to make it unlawful to discriminate against disabled people in connection with employment or with the provision of goods and services, the question of construction which arises in the instant case is not to be resolved by the application of (to use Lord Diplock's expression) meticulous linguistic analysis. At the same time, the adoption of a purposive approach to the construction of a statute is not to be equated with a licence to rewrite the statute by (in the instant case) construing 'members' as including non-members, and 'trade organisation' as including persons who do not 'carry on' the profession of barrister. e

[30] I turn, then, to the issue whether Mr Horton's application for a pupillage at the chambers was an 'application for membership' of a 'trade organisation' for the purposes of s 13. f

[31] It is not in issue on this appeal that the chambers is a 'trade organisation' within the definition of that expression in s 13(4). However, Mr O'Dempsey submits that that definition is wide enough to include non-lawyers such as mini-pupils and members of staff: indeed, his submission (as I understand it) is that virtually anyone who has some association with the work of the chambers is to be regarded for the purposes of the 1995 Act as a 'member' of the 'trade organisation' constituted by the chambers. I have no g

- a hesitation in rejecting that submission. As pointed out earlier, the definition of the expression 'trade organisation' in s 13(4) refers to an organisation 'whose members carry on' (in this case) the profession of barrister. That cannot include mini-pupils or members of staff in the chambers, let alone members of the public who happen to have some connection with the chambers.
- b [32] On the question whether a pupil in the chambers is a member of the chambers, so that an application for a pupillage in the chambers is an application for 'membership' of the chambers, the answer must in my judgment be, No, for the reasons which Peter Gibson LJ has given. A contrary conclusion would in my judgment run counter both to the generally accepted meaning of membership of chambers, based upon the structure and
- c rules of the profession, and to the particular constitution of the chambers.

LADDIE J.

- d [33] Mr Horton, the appellant, is a mature student. He applied for pupillage with 1 Pump Court Chambers (the chambers) which is, in effect, the respondent to this appeal. He was offered a place to commence in October 2001. In September 2001 he informed the chambers that he would not be able to take up the pupillage post offered to him because of ill-health. He asked for a postponement to October 2002, by which time he hoped to be sufficiently recovered. For reasons which are irrelevant for present purposes,
- e the chambers refused that request. As a result Mr Horton commenced proceedings in the employment tribunal (ET) claiming disability discrimination contrary to the provisions of ss 5(2) and 6(1) of the Disability Discrimination Act 1995. There is now no dispute that Mr Horton has a disability and is a disabled person within the meaning of s 1 of the 1995 Act.
- f [34] Mr Horton alleges that the refusal of deferral was an unlawful discrimination against him contrary to s 13 of the 1995 Act which, in so far as material, reads as follows:

'(1) It is unlawful for a trade organisation to discriminate against a disabled person—(a) in the terms on which it is prepared to admit him to membership of the organisation; or (b) by refusing to accept, or deliberately not accepting, his application for membership ...

(4) In this section "trade organisation" means an organisation of workers, an organisation of employers or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.'

- h [35] Before the ET the chambers unsuccessfully argued that barristers' chambers were not trade organisations. That argument is not pursued on this appeal. The other point at issue was whether or not an application for pupillage was an 'application for membership' of the relevant trade organisation, namely chambers. The ET held unanimously that it was. The
- j Employment Appeal Tribunal (EAT) held unanimously that it was not. It said:

'On any sensible analysis of what occurred when Mr Horton applied for pupillage, that is to become a trainee barrister attached to these chambers, he was not applying to become a member of the chambers. None of the

incidents of membership, by way of rights or obligations, would have applied to him. We accept that it is not for the body in question to write its own constitution so as to exclude itself from the ambit of the discrimination legislation, but that is not what was here happening ... What appears to us to be conclusive that this is not something which has been specially orchestrated by this or other chambers is the provision of the code of practice of the profession. By para 803 of the Code of Conduct of the Bar, it is provided at 803.1 that: "So long as he is a pupil a barrister in independent practice may not become or hold himself out as a member of chambers or permit his name to appear anywhere as such a member." That prevents a pupil not only from holding himself out as a member, but from becoming a member, even if the chambers in question were prepared to allow for that possibility.'

[36] Mr O'Dempsey, who appears for Mr Horton, argues that whether a pupil is a member of chambers and applying for pupillage is applying for membership is to be assessed by reference to the social objectives underpinning the 1995 Act. It is not for individual chambers or the General Council of the Bar (the Bar Council) to define membership so as to limit the scope of the legislation. Mr Napier, who appears for the chambers, agrees that, within limits, one is entitled to look at the social purpose of the legislation and he also agrees that no set of chambers can be allowed to draft its constitution so as to avoid the protection afforded by the 1995 Act but, he adds, there is no material here to suggest that the chambers or the Bar Council deliberately structured respectively the 1 Pump Court constitution and the Code of Conduct (the code) to limit the application of the Act.

[37] It appears to me that the intentions of the chambers and the Bar Council are irrelevant to the issues this court has to decide. The relationship between an individual and a trade organisation has to be assessed objectively. The words 'member' and 'membership' are used in s 13 to cover all trade organisations. There is no reason to believe that they were used with the particular circumstances of the Bar in mind. The fact that the same words are used in a particular way by the chambers and the Bar Council throws little light on the issue here. They may be using them in the same sense as they are used in the 1995 Act or they may not. The provisions of s 13 apply to the relationship between individuals and all trade organisations, no matter what terminology is used by the latter.

[38] Mr O'Dempsey's main argument is wide. He says that 'membership' should be construed so as to ensure that the social policy behind the 1995 Act extends to as wide a constituency as possible. He says that a person is a member of an organisation if (a) he is selected by it from the general public or a section of it and (b) he has rights and obligations within the organisation which are greater than those expected of a member of the general public, or the section from which they were selected. It covers anyone who has a selected working relationship with that trade organisation. He points out that this is wide enough to cover employees, but that is of little consequence since there are specific statutory provisions covering them.

[39] Applied to the world of barristers, Mr O'Dempsey says that his definition would mean that mini-pupils, pupils, members, door tenants and squatters are members for the purpose of s 13. The only exceptions would be visitors, clients (because they select chambers or a member of chambers, not

a the other way round) and employees (because they are covered by bespoke legislation).

b [40] Mr Napier argues that this cannot be right. He says that s 13 must be construed as a whole. The word 'membership' in s 13(1) takes colour from, and must be consistent with, the last part of s 13(4) namely 'whose *members carry on a particular profession or trade* for the purposes of which the organisation exists' (my emphasis). Someone who does not carry on the trade or profession in which the organisation is involved cannot be a member of it. Applying for membership must be construed in the same way. Mr Napier says that the fallacy of Mr O'Dempsey's construction is illustrated by the fact that it results in mini-pupils—that is to say young students, sometimes still at school, who come to chambers for work experience lasting a few days or weeks—being treated as members.

d [41] I agree with Mr Napier on this issue. It seems to me that s 13(1) must be read consistently with s 13(4). Mr O'Dempsey's construction would deprive the word 'membership' in the former of any meaning. It would have the same effect as if the legislature had replaced the words 'admit him to membership of' in s 13(1)(a) with 'allow him any form of association with'. In my view the use of the words 'membership' and 'member' in the section point to a much closer working relationship than Mr O'Dempsey's construction would require. A mini-pupil, who may know no law and carries on no trade or profession as a barrister and may not even know whether he wants to be a lawyer, cannot be a member of the relevant trade organisation, ie chambers, and any construction of the statute which comes to the opposite conclusion is flawed.

f [42] It seems to me that, consistent with s 13(4), a person can only be a member of a trade organisation if he carries on (or, in the case of an applicant, wishes to carry on) the profession or trade of that organisation. But it involves more than that. It must involve becoming, in a real sense, part of the team, bound by at least some significant parts of the rules of the organisation and benefiting in at least some significant ways from the privileges and benefits enjoyed by close association with others in the organisation.

g [43] How does this relate to the position of pupils? In these proceedings, evidence was given by Mr Mark Stobbs, Head of the Professional Standards and Legal Services Department of the Bar Council. Among other things he said:

h 'A barrister who is a pupil is permitted only to offer legal services with the permission of his or her pupil master or head of chambers. This is because a barrister who has not completed pupillage is not deemed to be competent to offer legal services on his or her own account. Indeed, it is open to a pupil master to refuse to certify that a pupil has completed pupillage satisfactorily. It is clearly inappropriate for an individual with only a temporary and conditional right to practise to have, in effect, full membership of chambers which implies equal status to other members. To permit this would be potentially misleading for clients. It would also cause difficulties within chambers if a pupil were found to be unsatisfactory.'

[44] This evidence that a pupil is a barrister who can, subject to restrictions, practice is consistent with para 802 of the code: a

‘A barrister who is a pupil may supply legal services as a barrister and exercise a right of audience which he has by reason of being a barrister provided that: (a) he has completed or been exempted from the non-practising six months of pupillage; and (b) he has the permission of his pupil-master or head of chambers; provided that such a barrister may during the non-practising six months of pupillage with the permission of his pupil-master or head of chambers accept a noting brief.’ b

[45] Mr Napier accepts that, at least in his second six months, a pupil barrister can practice in what he called an ‘attenuated form’. He says he has a right to practice but not as a ‘fully qualified barrister’. Mr Napier’s qualifications are accurate but, in my view, beside the point. A pupil is a barrister. He works in chambers. During his second six months he can, and frequently will, appear in court on behalf of clients who will regard him as ‘their’ barrister. He will be paid for this. Whether one refers to this as a conditional right to practice, as Mr Stobbs does, or an attenuated form of practice, as Mr Napier does, it is the supply of legal services as confirmed by the code. c

[46] In my view the same analysis applies to the first six months of pupillage. During that period the pupil will be working in chambers and, hopefully, making some contribution to its output. If, during that period or in the second six months, he receives a noting brief it is work which requires legal knowledge and involves a degree of responsibility. He will be paid for this as well (although whether he is paid or not does not determine whether he is supplying legal services (cf *pro bono* work)). In the words of the code, this amounts to providing legal services. It is the same sort of work which is undertaken by members of the Bar in full-time practice. Indeed, it is the kind of work which, very occasionally, senior juniors do. In my view a pupil is to be regarded as carrying on the profession of barrister throughout his pupillage, at least for the purposes of the 1995 Act. d

[47] In addition to this, such services are provided by the pupil from, and by making use of the support facilities of, chambers. Such briefs as he gets will be provided to him by the clerks. He will use chambers’ telephone, post, computer and library facilities. Sometimes he may have to pay clerk’s fees or a contribution to chambers expenses, even if that is only levied on fees received after his pupillage ends. To the outside world he is part of the chambers team. He will see his pupil master’s clients in conference, as time passes his views will be canvassed more often, he will see all the clients’ papers, including confidential and privileged ones. He will be insured against professional negligence for work done on behalf of clients under his pupil master’s insurance policy (see the code, para 404.2(d)). It is no doubt partly because he is seen to be part of the chambers team that chambers go to such trouble to select only what they regard as good candidates for pupillage, why para 802 of the code gives his pupil master the power to prevent him from accepting briefs and that he is insured through his pupil master. He will be bound by the same rules of confidentiality and good behaviour as bind all the tenants in the set. e

[48] In my view, this is enough to make a pupil a member of chambers for the purpose of s 13. The fact that, as Mr Stobbs puts it, the pupil does not have ‘full’ membership of chambers and ‘equal status’ with tenants, does not mean he is not f

a a member. On the contrary, there is no reason why there cannot be different levels of membership of a trade organisation. Mr Napier does not argue otherwise. There is no requirement in the 1995 Act that trade organisations be entirely democratic or democratic at all. By the same token, in my view, whether or not a person has the same voting rights as others in the organisation or, indeed, whether he has any voting rights cannot be determinative of whether he is a member of it.

b There is no reason on policy grounds why the 1995 Act should be construed so as to exclude from protection junior or affiliate members of an organisation. They are likely to be the persons most in need of protection.

[49] Mr O'Dempsey goes further than this and argues that, since pupillage is the gateway through which barristers must pass in order to achieve full practising rights, it is all the more necessary to ensure that the anti-discrimination legislation covers them as much as it covers full members of chambers. I do not think it necessary to pray this in aid. For the reasons set out above, I have come to the conclusion that a pupil is a member of a trade organisation for the purpose of s 13. I would allow the appeal.

d *Application for permission to appeal granted, but appeal dismissed. Permission to appeal to the House of Lords refused.*

Kate O'Hanlon Barrister.

**Haringey London Borough Council v
Marks & Spencer plc**
Liverpool City Council v Somerfield Stores plc
[2004] EWHC 1141 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

MAURICE KAY LJ AND RAFFERTY J

5 MAY 2004

Licensing – Sale of intoxicating liquor to person under 18 – Statutory provision rendering it an offence for a ‘person’ in licensed premises to sell intoxicating liquor to person under 18 – Whether ‘person’ including owner of business or employer who was not licensee and/or individual involved in sale – Licensing Act 1964, ss 3, 160, 169A.

In two cases raising essentially the same point of law, the respondents were companies which operated supermarkets. They were prosecuted by the appellant local authorities for offences contrary to s 169A^a of the Licensing Act 1964. That provision, which had been inserted into the 1964 Act by the Licensing (Young Persons) Act 2000, made it an offence for a ‘person’ in licensed premises to sell intoxicating liquor to a person under 18. In contrast, only the licensee and his employees had been capable of committing the equivalent offence under the predecessor provision to s 169A. In both cases the sales had taken place on licensed premises, the licensees being named employees of the companies, and had been carried out by employees of the companies. The summonses against both companies were dismissed, a district judge holding in each case that the company was not a ‘person’ within the meaning of s 169A. The authorities appealed by way of case stated, contending that the word ‘person’ in that provision meant ‘any person’, whether natural or corporate, employer or employee, and whether or not the licensee. In dealing with that submission, the Divisional Court considered two other provisions of the 1964 Act—section 3^b, which empowered licensing justices to grant a licence to any such ‘person’ as they thought fit and proper, and s 160^c, which made it an offence for a ‘person’ to sell or expose for sale any intoxicating liquor without holding a justices’ licence.

Held – On the true construction of s 169A of the 1964 Act, the word ‘person’ did not include the owner of the business or employer where that person was not the licence holder and/or the actual individual involved in the sale of intoxicating liquor. It was essential to read s 169A in the context into which it had been inserted, and that included ss 3 and 160. The reference to a fit and proper ‘person’ in s 3 had always been understood to be limited to natural persons. A ‘person’ in s 160 could not refer to persons in the position of the respondent companies

^a Section 169A is set out at [8], below

^b Section 3, so far as material, provides: ‘(1) Licensing justices may grant a justices’ licence to any such person ... as they think fit and proper ...’

^c Section 160, so far as material, provides: ‘(1) ... if any person—(a) sells or exposes for sale by retail any intoxicating liquor without holding a justices’ licence ... he shall be guilty of an offence ...’

- a because, if it did, they would commit the offence under that provision every time intoxicating liquor was sold in their shops. Given that context, the results which would follow from differential meanings being accorded to a 'person' in ss 160 and 169A could properly be described as absurd. When considered in that context, it could also be said that s 169A was inherently ambiguous because a 'person' who sold might refer to one or more of the contractual seller (in the sense of the person with title to the goods), the licensee or the sales assistant or check-out operator. On that basis, it was proper to consider what had been said in Parliament during the passage of the bill which had inserted s 169A into the 1964 Act. That made it abundantly clear that the legislation had a narrow remit, namely ending the distinction which the 1964 Act had drawn between employees of a licensee and employees of a proprietor, whether incorporated or not, who was not the licensee. There was nothing to support the proposition that the employer/proprietor, who was not the licence holder, was within the contemplation of the promoter of the bill or his Parliamentary colleagues. The proprietor, whether incorporated or not, was beyond the reach of the statutory offences. Accordingly, the appeals would be dismissed (see [11]–[14], [16], [17], [22], [24], [27], below).

Nottingham City Council v Wolverhampton & Dudley Breweries plc [2004] 1 All ER 1352 distinguished.

Notes

- e For sale of intoxicating liquor on licensed premises to persons under 18, see 26 *Halsbury's Laws* (4th edn reissue) para 295.

For the Licensing Act 1964, ss 3, 160, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 355, 481.

Cases referred to in judgments

- f *Allied Domecq Leisure Ltd v Cooper* (1998) 163 JP 1, DC.
Boucher v DPP (1996) 160 JP 650, DC.
Brandish v Poole [1968] 2 All ER 31, [1968] 1 WLR 544, DC.
Nottingham City Council v Wolverhampton & Dudley Breweries plc [2003] EWHC 2847 (Admin), [2004] 1 All ER 1352, [2004] 2 WLR 820, DC.
- g *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
Russell v DPP (1996) 161 JP 185, DC.

Cases stated

- h *Haringey London BC v Marks & Spencer plc*
Haringey London Borough Council appealed by way of case stated from the decision of District Judge Wiles at Haringey Magistrates' Court on 5 August 2003 dismissing a summons brought by it against the respondent, Marks & Spencer plc, for an offence contrary to s 169A of the Licensing Act 1964. The question for the opinion of the High Court is set out at [24], below. The facts are set out in the judgment of Maurice Kay LJ.

Liverpool City Council v Somerfield Stores Ltd

Liverpool City Council appealed by way of case stated from the decision of District Judge Lomax on 27 November 2003 dismissing a summons brought by

it against the respondent, Somerfield Stores Ltd, for an offence contrary to s 169A of the Licensing Act 1964. The question for the opinion of the High Court is set out at [25], below. The facts are set out in the judgment of Maurice Kay LJ.

Simon Butler (instructed by *Davina Fiore*) for Haringey.

Nicholas Haggan QC (instructed by *Robert Ivens*) for Marks & Spencer.

Stephen Knapp (instructed by *Graham Creer*, Liverpool) for Liverpool.

Roy Light (instructed by *Meade King*, Bristol) for Somerfield.

MAURICE KAY LJ.

[1] There are before the court two appeals by case stated, each raising essentially the same point of law. In each case the appellant is a local authority acting as prosecutor and the respondent is a company which operates supermarkets. The appeals are not fact sensitive.

[2] In each case the prosecution related to the sale of alcohol to a person under the age of 18. The premises were licensed under the Licensing Act 1964, the licensees being named employees of the respondent companies, Marks & Spencer and Somerfield. The sales were carried out by employees of the respondent companies—in the Marks & Spencer case by a check-out operator, and in the Somerfield case by a manager who was also one of the licensees.

[3] On 5 August 2003 a district judge sitting at Haringey Magistrates' Court considered a summons against Marks & Spencer plc, and on 27 November 2003 a district judge in Liverpool considered a summons against Somerfield Stores Ltd. In both cases the summonses were dismissed on the ground that the defendant was not a 'person' within the meaning of s 169A of the 1964 Act.

[4] In the Somerfield case the employee in question was also prosecuted. He pleaded guilty and was dealt with appropriately. In the Marks & Spencer case no individual employee was prosecuted. Moreover the district judge made it clear that even if he had been satisfied that Marks & Spencer was a 'person' for the purpose of s 169A, the company would have been acquitted because it had established the due diligence defence.

[5] Section 169A was inserted into the 1964 Act by the Licensing (Young Persons) Act 2000. In its previous form s 169(1) of the 1964 Act provided:

'Subject to subsection (4) of this section, in licensed premises the holder of the licence or his servant shall not ... sell intoxicating liquor to a person under eighteen or knowingly allow a person under eighteen to consume intoxicating liquor in a bar nor shall the holder of the licence knowingly allow any person to sell intoxicating liquor to a person under eighteen.'

[6] It was clear that the offences under s 169 could only be committed by the licensee or his employees. There was clear authority to that effect in *Brandish v Poole* [1968] 2 All ER 31, [1968] 1 WLR 544, *Boucher v DPP* (1996) 160 JP 650 and *Russell v DPP* (1996) 161 JP 185.

[7] It was also common knowledge that in practice licences are customarily granted to named employees of off-licence and supermarket companies, not as a result of any desire on the part of the companies to avoid the responsibilities of a licensee, but because justices insist on those responsibilities being vested

a in named individuals. Although the business is that of the ultimate employer the licence relates to specific premises and is issued locally to one or more named employees. Experienced counsel in this case know of no example of a licence of this kind having been granted to a corporate body. Indeed the editors of *Paterson's Licensing Acts* (112th edn, 2004) vol 1, p 398 (para 2.464) state:

b '... the correct view may be that having regard to the provisions of the [Licensing Act] 1964 generally, and in particular those imposing duties or responsibilities which must be discharged or borne by individuals, licensing justices ought to take the view that a company is not a "fit and proper person" as required by [s 3(1)]. The affairs of a company are
c conducted by individuals; if the licence is held by the company individuals in charge of the premises may change without the transfer procedure which enables the justices to scrutinise a change in management where licences are held by the individuals concerned.'

d That then is the historical picture.

[8] By s 1 of the 2000 Act it is provided:

'For section 169 of the Licensing Act 1964 ... there shall be substituted the following sections—

e **169A. Sale of intoxicating liquor to a person under 18.**—(1) A person shall be guilty of an offence if, in licensed premises, he sells intoxicating liquor to a person under eighteen.

(2) It is a defence for a person charged with an offence under subsection (1) of this section, where he is charged by reason of his own act, to prove that he had no reason to suspect that the person was under
f eighteen.

(3) It is a defence for a person charged with an offence under subsection (1) of this section, where he is charged by reason of the act or default of some other person, to prove that he exercised all due diligence to avoid the commission of an offence under that subsection.'

g [9] This gives rise to the question at the heart of these appeals. Is Marks & Spencer or Somerfield Stores '[a] person' for the purposes of s 169A? On behalf of the appellant prosecuting authorities, it is submitted by Mr Butler and Mr Knapp that the answer is clear: 'a person' means 'any person', whether natural or corporate, whether employer or employee, and whether
h or not he, she or it is the licensee. Where the consequences would otherwise be unfair, a person charged by reason of the act or default of some other person may avail himself of the due diligence defence referred to in sub-s (3).

j [10] It is suggested that that conclusion flows from the language of the new provision, assisted, if necessary, by s 5 of the Interpretation Act 1978 which provides that in any Act, unless the contrary intention appears, words and expressions listed in Sch 1 are to be construed in accordance with that schedule. Schedule 1 defines a 'person' as including a body of persons corporate or unincorporated.

[11] Mr Haggan QC, on behalf of Marks & Spencer, and Mr Light on behalf of Somerfield, submit that the new statutory provision lacks clarity. They say it is ambiguous. If construed as the appellant suggests it would lead to absurd

results. They refer to s 160(1) whereby it is an offence for a 'person' to sell or expose for sale any intoxicating liquor without holding a justices' licence. They submit that a 'person' in s 160 cannot refer to persons in the position of Marks & Spencer and Somerfield because, if it did, they would commit the offence under s 160 every time intoxicating liquor is sold in their shops. It would be absurd if a 'person' were given different meanings in s 160 and the new s 169A. Indeed they make a similar point by reference to s 3, the basic licensing provision, which refers to a 'fit and proper' person, but in a context which has always been understood to be limited to natural persons.

[12] In my judgment these submissions of Mr Haggan QC and Mr Light are correct. It is essential to read s 169A in the context into which it has been inserted. That context certainly includes s 160 and for that matter s 3. Given that context, the results which would follow from differential meanings being accorded to 'a person' in ss 160 and 169A can properly be described as absurd.

[13] It can also be said that when considered in that context s 169A is inherently ambiguous because '[a] person [who] sells' may refer to one or more of the contractual seller (in the sense of the person with title to the goods), the licensee or the sales assistant or check-out operator.

[14] On this basis I consider that the threshold delineated in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 has been crossed and it is appropriate for us to consider what was said in Parliament during the passage of the Bill in 1999 and 2000. It is necessary to approach that task in a disciplined way, focusing on what was said by the promoter of what was a Private Member's Bill and on clear and unequivocal statements. The Bill was introduced by Mr Paul Truswell, MP for Pudsey, following a tragic incident in his constituency. A 14-year-old boy had paid two visits to an off-licence which was part of a national chain. He bought alcohol on both occasions and proceeded to drink much of what he had bought on the second visit. Not longer after so doing he ran across a dual carriageway and was struck by a passing vehicle, receiving injuries from which he sadly died.

[15] Following public concern about the apparent ease with which he had bought the alcohol, an attempt was made to prosecute the two sales assistants who had sold the alcohol. Neither was the licensee, nor were they employed by the licensee, who was a managerial employee of the national chain. They were employed by the national chain too. In the event the prosecution did not proceed to trial in the light of the decision in *Russell v DPP* (1996) 161 JP 185 to which I have already referred.

[16] It is abundantly clear from the many extracts from *Hansard* to which we have been referred, that the Bill had 'a narrow remit'. That quotation is from the debate on 12 May 2000 (see 349 HC Official Report (6th series) col 1141). The 'narrow remit' was to end the distinction which the 1964 Act had been found to draw between employees of a licensee and employees of a proprietor, whether incorporated or not, who was not the licensee.

[17] The passages to which we have been referred show unequivocally that the target was previously omitted employees, without, of course, removing responsibility from the licensee. There is nothing to support the proposition that the proprietor/employer, who is not a licence-holder, was within the contemplation of the promoter of the Bill or indeed his Parliamentary colleagues. Availing myself of this material I conclude that the purpose of s 169A was the limited one contended for by Mr Haggan and

a Mr Light, and that the provision can and should be construed so as to give effect to that purpose.

[18] There is nothing in the authorities which requires this court to take a different view. Our attention has been drawn to *Nottingham City Council v Wolverhampton & Dudley Breweries plc* [2003] EWHC 2847 (Admin), [2004] 1 All ER 1352, [2004] 2 WLR 820. That case was concerned with the sale of alcohol, 'which was not of the substance demanded'. The offence charged b was under s 14 of the Food Safety Act 1990 which is drafted in terms of '[a]ny person who sells ...'. The Divisional Court held that the brewery, which was the corporate proprietor of the public house in question and the employer of the licensee, could itself commit the offence under the 1990 Act.

c [19] However, in my judgment, the decision does not help the appellants in the present case. Kennedy LJ expressly referred to the difference between the 1990 and the 1964 Act in this passage (at [19]):

d 'I accept that the licensing legislation is organised on the basis that the licensee is the person primarily responsible and answerable to the licensing justices for all that happens in the licensed premises, but I do not see why that responsibility cast upon the licensee should, in relation to legislation not confined to licensing, relieve product vendors of responsibilities which in relation to every product other than alcohol they are required to bear.'

e [20] He later added (at [26]): 'It seems to me that the statutory changes made in 2001 were ... for a limited purpose ...'

[21] It is true that in *Allied Domecq Leisure Ltd v Cooper* (1998) 163 JP 1, which concerned a prosecution under the Weights and Measures Act 1985, Sedley J expressed obiter reservations about the position under the Licensing f Act in its unamended form. But that, with respect, takes the present case no further.

[22] The striking thing about the present case is that the new provision has been slotted into the traditional regime of the licensing legislation which has for centuries concentrated its control on the licence-holder and those under his direction. The amendment provides a limited extension to that structure. g However, Parliament has yet to put the legislation on a footing which truly reflects modern patterns of retailing. Rightly or wrongly, and the policy arguments are not all one way, the proprietor, whether incorporated or not, is beyond the reach of the statutory offences.

[23] Mr Butler and Mr Knapp have referred to other consumer protection h legislation and its ambit, but the simple fact is that in every case the context is not one which focuses on the licensing of suitable premises and fit and proper persons. I gain no assistance from it.

[24] For my part I would dismiss both appeals. In so doing I would answer the questions possessed by the stated cases as follows. In the Marks & j Spencer case the question is: 'Does '[a] person' in s 169A(1) of the 1964 Act include the owner of the business or employer where that person is not the licence holder and/or the actual individual involved in the sale?' The answer is 'No'.

[25] In the *Somerfield* case the question is: 'Whether a sale of alcohol for the purpose of s 169A(1) of the 1964 Act can be made by a non-licensed owner of the alcohol, where that person (whether an individual, corporate or

unincorporated body) owns the premises from which the alcohol was sold and employs the licensee of those premises?' Again I would answer in the negative. a

[26] Finally, before leaving the case, I wish to pay tribute to the decisions and cases stated by both district judges: District Judge Wiles in the Marks & Spencer case and District Judge Lomax in the Somerfield case. b

RAFFERTY J.

[27] I agree.

Appeals dismissed.

Dilys Tausz Barrister.

Pelling v Bruce-Williams

[2004] EWCA Civ 845

COURT OF APPEAL, CIVIL DIVISION

THORPE, SEDLEY AND ARDEN LJJ

29 MARCH, 1 JULY 2004

Children – Court proceedings in relation to child – Proceedings in private – Publication of information – Statutory provisions prohibiting identification of child in children proceedings and requiring such proceedings to be heard in private – Whether provisions compatible with convention rights to public hearing and freedom of expression – Children Act 1989, s 97(2) – Human Rights Act 1998, Sch 1, Pt I, arts 6, 10 – Family Proceedings Rules 1991, SI 1991/1247, rr 4.16(7), 4.23(1), 10.20(3).

The procedure ordained by (i) s 97(2)^a of the Children Act 1989, which prohibits the publication of material which is intended, or likely, to identify any child involved in any proceedings in the High Court, a county court or a magistrates' court in which any power under that Act may be exercised with respect to a child, (ii) r 4.16(7)^b of the Family Proceedings Rules 1991, SI 1991/1247, which requires the hearing of proceedings under the 1989 Act to be in chambers unless the court otherwise directs, and (iii) rr 4.23(1)^c and 10.20(3)^d of the 1991 rules, which impose restrictions on the disclosure and inspection of documents in such proceedings, is essentially compliant with the right to a public hearing under art 6^e of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and with the right to freedom of expression under art 10^f of the convention (see [35], [36], [38], [50], below); *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58 applied; *B v UK* [2001] 2 FCR 221 adopted.

Per curiam. It is desirable for the Master of the Rolls and the President of the Family Division to review the Court of Appeal's standard practice of restricting the identification of children in appeals, heard in open court, from decisions made in proceedings under the 1989 Act. That reconsideration should perhaps extend to applications for permission to appeal listed for oral hearing. Although s 97(2) of the 1989 Act does not extend to appellate proceedings in the Court of Appeal, both the inherent jurisdiction and s 39^g of the Children and Young Persons Act 1933 clearly empower the Court of Appeal to impose restrictions in an individual case in the exercise of the court's discretion. It is not so evident, however, that

^a Section 97, so far as material, is set out at [16], below

^b Rule 4.16(7) is set out at [17], below

^c Rule 4.23(1) is set out at [18], below

^d Rule 10.20(3) is set out at [19], below

^e Article 6, so far as material, provides: '(1) In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the protection of the private life of the parties so require ...'

^f Article 10, so far as material, provides: '(1) Everyone has the right to freedom of expression. This right shall include freedom ... to receive and impart information ... without interference by public authority ...'

(2) The exercise of these freedoms ... may be subject to such ... restrictions ... as are prescribed by law and are necessary in a democratic society ... for the protection of the ... rights of others ...'

^g Section 39, so far as material, is set out at [53], below

either the inherent or the statutory jurisdiction justifies the imposition of an automatic restriction without the exercise of a specific discretion in an individual case. The time has come for the court to consider in each case whether a proper balance of competing rights requires the anonymisation of any report of the proceedings and judgment following a hearing that was conducted in public and therefore open to all who cared to attend (see [49], [54], below); *Re R (Court of Appeal: order against identification)* [1999] 3 FCR 213 considered.

Decision of Bennett J [2003] 4 All ER 1074 affirmed.

Notes

For privacy for children in proceedings, see 5(2) *Halsbury's Laws* (4th edn reissue) para 836, for the general power of the court to restrict reporting in cases involving children, see 5(3) *Halsbury's Laws* (4th edn reissue) para 1628 and for the convention rights to a public hearing and freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 138, 158.

For the Children and Young Persons Act 1933, s 39, see 6 *Halsbury's Statutes* (4th edn) (2003 reissue) 61.

For the Children Act 1989, s 97, see 6 *Halsbury's Statutes* (4th edn) (2003 reissue) 558.

For the Human Rights Act 1998, Sch 1, Pt I, arts 6, 10, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554, 555.

For the Family Proceedings Rules 1991, SI 1991/1247, rr 4.16, 4.23, 10.20, see 12 *Halsbury's Statutory Instruments* (2002 issue) 154, 158, 195.

Cases referred to in judgment

A-G v Levenson Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.

B (a child) (disclosure), *Re* [2004] EWHC 411 (Fam), [2004] 2 FLR 142.

B v UK [2001] 2 FCR 221, ECt HR.

Child, Re a [2003] EWCA Civ 210.

Clibbery v Allan [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, [2002] 2 WLR 1511.

G (celebrities: publicity), *Re* [1999] 3 FCR 181, CA.

P-B (a minor) (child cases: hearings in open court), *Re* [1997] 1 All ER 58, CA.

R (Court of Appeal: order against identification), *Re* [1999] 3 FCR 213, CA.

R v Cannings [2004] EWCA Crim 1, [2004] 1 All ER 725.

R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.

S (a child) (identification: restrictions on publication), *Re* [2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43, [2003] 3 WLR 1425.

Scott v Scott [1913] AC 417, [1911–13] All ER Rep 1, HL.

X v Dempster [1999] 3 FCR 757.

Z (a minor) (freedom of publication), *Re* [1995] 4 All ER 961, [1997] Fam 1, [1996] 2 WLR 88, CA.

Application for permission to appeal

Dr Michael John Pelling applied for permission to appeal from the decision of Bennett J on 2 July 2003 ([2003] EWHC 1541 (Fam), [2003] 4 All ER 1074)—made on an application by Dr Pelling, to which his former wife, Veronica Nana Bruce-Williams, was respondent, for a joint residence order in respect of their son—that s 97(2) of the Children Act 1989 and r 4.16(7) of the Family Proceedings

a Rules 1991 were compatible with arts 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Secretary of State for Constitutional Affairs, acting on behalf of the Crown, had made submissions, at the invitation of the court, in the proceedings below, and also participated in the proceedings before the Court of Appeal. The facts are set out in the judgment of the court.

b Dr Pelling in person.
Stephen Cobb QC (instructed by the *Treasury Solicitor*) for the Crown.
The respondent did not appear.

Cur adv vult

c 1 July 2004. The following judgment of the court was delivered.

THORPE LJ.

[1] This is the judgment of the court.

d [2] Dr Pelling, the appellant, has acquired a considerable command of the law and the practice of the courts in which applications under the Children Act 1989 are listed. He has also acquired considerable experience of the work of this court. This has been acquired in the course of his appearances either as a litigant in person or as a McKenzie friend appearing with other litigants in person.

e [3] Issues in relation to the appellant's son, Michael Alexander Pelling-Bruce, resulted in cross-applications in the Bow County Court for a residence order fixed to commence on 14 March 1996. The appellant, who has consistently campaigned on family justice issues, sought an order from Judge Goldstein that the whole case, including judgment, should be heard in open court with full access to the public at large. Judge Goldstein refused that application but granted
f Dr Pelling leave to appeal. His appeal failed in this court on 20 June 1996. The case is reported as *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58. During the course of his submissions Dr Pelling asserted that the denial of a public hearing breached his rights under arts 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as now set out in Sch 1 to the Human Rights Act 1998). Butler-Sloss LJ, giving the leading judgment, noted
g that the convention had not yet been incorporated within the law of England. However she continued (at 61):

h 'Article 6(1) provides for the public hearing and the public pronouncement of judgment of cases, but with the proviso of exclusion of the press and the public from all or part of the trial "in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require". The right of freedom of expression contained in art 10(1) is subject to formalities, conditions, restrictions or penalties which may be imposed by the member
j state under art 10(2). It would seem to me that the present procedures in family proceedings are in accordance with the spirit of the convention.'

[4] Dr Pelling was dissatisfied with the judgments of this court and accordingly, together with Mr B, took the point to the European Court of Human Rights (the European Court). On 24 April 2001 the European Court rejected both cases, holding, by a majority of five to two, that there had been no

violation of the art 6 rights of either applicant and that it was not necessary to consider separately their complaints under art 10: for that decision see *B v UK* [2001] 2 FCR 221. a

[5] Although thereafter Dr Pelling continued to be active both as a campaigner and as a McKenzie friend, proceedings in relation to his own child remained dormant between the 1996 adjudication and Dr Pelling's application in the High Court of 15 January 2003 for a joint residence order. b

[6] The resumption of proceedings to which Dr Pelling was a party presented him with an opportunity to revive in a direct way his campaign for open court hearings. Accordingly Dr Pelling included in his joint residence application on form C2 an application for:

- '3. Trial in open Court with public pronouncement of judgment. c
4. Declaration of incompatibility of section 97(2) Children Act 1989 with Articles 6 and 10 ECHR.'

By a supplementary application dated 17 March 2003 Dr Pelling moved for an order of certiorari to quash r 4.16(7) of the Family Proceedings Rules 1991, SI 1991/1247, and rr 4.23(1) and 10.20(3) so far as they prevent disclosure or inspection respectively of 1989 Act judgments without leave of the judge. It was said that those rules are incompatible with arts 6(1) and 10(1) of the convention. d

[7] During the course of the preparation of her case the respondent sought an order under s 91(14) of the 1989 Act restraining Dr Pelling from issuing further applications without permission of the court. Shortly before the hearing Hughes J, in the course of giving directions, invited the Secretary of State to attend the hearing and adjourned to the trial judge all procedural issues flowing from Dr Pelling's applications for a declaration of incompatibility and certiorari. e

[8] The trial took place on 5 and 6 June 2003 when both parents appeared in person and Mr Stephen Cobb QC represented the Crown. On 2 July 2003 Bennett J handed down his reserved judgment in chambers dismissing Dr Pelling's application for a joint residence order. He granted the cross-application for an order under s 91(14). f

[9] On the same day Bennett J handed down his reserved judgment on the issues arising under the convention and the 1998 Act. That judgment was handed down in open court but subject to the restriction that in any report the anonymity of the child and the adult members of the family must be strictly preserved. The case is reported as *P v BW* [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074, [2004] 2 WLR 509. g

[10] Dr Pelling sought permission to appeal all outcomes. His permission application in relation to the refusal of the joint residence order was dismissed by this court on 30 July 2003. On the same day this court granted Dr Pelling permission to appeal the s 91(14) order. That appeal succeeded on 11 November 2003. The application for permission to appeal the convention and 1998 Act points was eventually listed, with appeal to follow if permission granted, to be heard before a specially constituted court on 29 March 2004. The respondent has taken no part and accordingly the court has been entirely dependent on the Crown to advance contrary argument. We express our gratitude to Mr Stephen Cobb QC for his skeleton argument and for the manner in which he has addressed a variety of submissions advanced in Dr Pelling's oral argument not foreshadowed by his written skeleton arguments dated 10 July 2003, 5 November 2003 and 25 March 2004. We invited him to deal with these fresh issues in a subsequent written skeleton argument to which Dr Pelling has filed a subsequent written skeleton h
j

a argument in response. The submission of further written argument was completed on 6 May 2004.

[11] Given the nature of the submissions in Dr Pelling's written skeleton arguments we allowed Dr Pelling to develop his case as though at the hearing of an appeal rather than a bare application for permission.

b [12] Dr Pelling, taking advantage of the opportunity presented by his appearance in this court as a litigant in person, at the outset objected to the notice on the door of the court warning the public against identification of children within the proceedings, submitting that that was an unwarranted and illegal restriction on his and the public's entitlement to open justice. Equally he objected to any blanket imposition of reporting restrictions. This was a point that the court had not anticipated and, in the exercise of our discretion, we imposed the usual restrictions pending delivery of judgment on all issues.

c [13] The judgment of Bennett J is clear and comprehensive. Having regard to the decision of the European Court in *B v UK* he held that r 4.16(7) of the 1991 rules was not inconsistent with Dr Pelling's convention rights. He held that the decisions of this court, not only in *Re P-B* but also in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, were to the same effect. He refused Dr Pelling's applications for a declaration of incompatibility and for certiorari.

[14] Bennett J then proceeded to exercise the discretion which r 4.16(7) vested in him. For six stated reasons he concluded that the hearing of the application for a joint residence order should be in chambers.

e [15] When Bennett J subsequently indicated an intention to pronounce his judgment on the joint residence application in private Dr Pelling objected. He argued that since it was an unexceptional case the judgment should be pronounced in public and should not be anonymised. Bennett J rejected these submissions, stating his reasons for concluding that the judgment should be delivered in private. Finally Bennett J explained his reasons for rejecting Dr Pelling's application, at the opening of the hearing on 5 June, for the evidence and submissions in relation to public hearing to be themselves heard in public.

f [16] Before turning to the submissions it is necessary to record the terms of the statutory material put in issue by Dr Pelling's applications. In so far as material to the present appeal, s 97 of the 1989 Act provides:

g '(2) No person shall publish any material which is intended, or likely, to identify—(a) any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act ... may be exercised by the court with respect to that or any other child; h or (b) an address or school as being that of a child involved in any such proceedings ...

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order ...

i (6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.'

[17] Turning now to the 1991 rules, the heading to r 4.16 is: 'Attendance at directions appointment and hearing'. Paragraph (7) of the rule reads: 'Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this Part applies shall be in chambers.'

[18] Rule 4.23 is headed 'Confidentiality of documents'. Paragraph (1) of the rule provides: a

'Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to—(a) a party, (b) the legal representative of a party, (c) the children's guardian, (d) the Legal Services Commission, or (e) a welfare officer or children and family reporter, (f) an expert whose instruction by a party has been authorised by the court, without leave of the judge or district judge.' b

[19] Rule 10.20 is headed 'Inspection etc of documents retained in court' and para (3) of the rule reads as follows: c

'Except as provided by rules 2.36(4) and 3.16(10) and paragraphs (1) and (2) of this rule, no document filed or lodged in the court office other than a decree or order made in open court shall be open to inspection by any person without the leave of the district judge, and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to any person without such leave.' d

[20] In his able submissions to this court Dr Pelling has emphasised that all the issues which he seeks to argue are at large. He submits, correctly, that this court is not strictly bound by the decision of the European Court and that we must exercise an independent judgment as to whether the statutory provisions of which he complains are in breach of his rights under arts 6 and 10 of the convention. As to the decision of this court in *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58 he states, correctly, that it is not conclusive since it predates the commencement of the 1998 Act. As to the decision of this court in *Clibbery v Allan* Dr Pelling states, correctly, that it is a decision upon proceedings brought under Pt IV of the Family Law Act 1996 and not the 1989 Act. Finally Dr Pelling observes that the decisions of this court in *Re P-B* and of the European Court in *B v UK* [2001] 2 FCR 221 are upon different statutory provisions, in that his incompatibility application is directed to s 97(2) of the 1989 Act, a provision that was inserted by s 72(a) of the Access to Justice Act 1999 with effect from 27 September 1999. e
f
g

[21] Arguing the issue of public versus private hearings under the 1989 Act Dr Pelling makes many forceful points. He prays in aid Judge Goldstein's 1996 characterisation of his own case as 'run of the mill'. Were the proceedings conducted publicly it would be of little or no general interest and would attract little or no reporting. Given the fundamental importance of the open conduct of justice (ringingly declared by the House of Lords in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1) the presumption must be for public hearing unless the exceptional circumstances of the individual case demand a private hearing. Dr Pelling submits, 'relying on [*Re G (celebrities: publicity)*] [1999] 3 FCR 181 at 190–191', that children must inevitably participate in whatever sort of life their parents have chosen for themselves as adults. His choice is the life of a campaigner. His son knows of and understands that choice and its attendant publicity. h
j

[22] Dr Pelling scorns the suggestion that the needs of a democratic society require litigation concerning children to be conducted in private. The United Kingdom offers the example of a state that operates the public model in one

a region and the private model in another: the restrictions uniformly applied in England and Wales are unknown in Scotland.

[23] He submits that there are no convincing rationalisations of the need for private hearings in any of the authorities. The rationalisation of the European Court in *B v UK* [2001] 2 FCR 221 at 233 (para 38) is in these terms:

b "To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment."

c [24] To that Dr Pelling responds that it is pure speculation without any evidential foundation. Where is the research-based evidence to justify that conclusion? In his own case the respondent accepted that she would not have withdrawn her participation had the court ordered a public hearing.

d [25] Dr Pelling refers to the justification of private hearings articulated by Hale LJ in refusing an application for permission to appeal in the case of *Re a Child* [2003] EWCA Civ 210 on 4 February 2003. In the course of the judgment she said (at [5]):

e "On the one hand, there is the need to protect the welfare of children. This can arise in a variety of ways. Children can be directly affected by the publication of material about them. If this comes to the notice of their school friends or others, then they may be the subject of jokes, teasing, bullying, and worse. Children, particularly of primary school age, are greatly susceptible to embarrassments of this sort. The other way in which it can be harmful to children is if it serves to undermine the confidence and the ability to cope of the person who is looking after the child."

f [26] Of that Dr Pelling again submitted that this was no more than general speculation. Any ruling on child welfare had to be case specific. In his case he had called the evidence of a father, Mr Matthew O'Connor, who had established that his two children had thrived despite the fact that the contest between their parents had been fully exposed in the media.

g [27] In relation to the convention Dr Pelling submitted that his rights arising under arts 6(1) and 10(1) were not to be trumped by asserted art 8 rights attributed to the respondent or to his child and imported into arts 6 and 10 respectively. That he described as the great fallacy. Properly construed, Dr Pelling submitted, art 10 was the trump card and in its construction more h weight should be paid to arts 17 and 18. The exception in art 10(2) 'for the protection of the ... rights of others' was not to be construed, in violation of arts 17 and 18, as extending to the convention 'rights and freedoms' of others. If the convention rights themselves had been intended to be included then the phrase 'rights and freedoms' would have been used in art 10(2) as in the other j exceptions in arts 8(2), 9(2) and 11(2). 'Rights' in art 10(2) meant domestic law rights and English law had no such right of privacy. Similarly, none of the exceptions in art 6(1) to public trial incorporated art 8(1) rights as such.

[28] More specifically Dr Pelling submitted that Bennett J erred in his refusal to allow a public trial of his application for a declaration of incompatibility and of his application for certiorari. He pointed out that in 1996 Judge Goldstein had heard his application for public trial in public. Bennett J's refusal had disappointed

a number of members of the public who had made a journey to the court. Their exclusion could only work to erode public confidence in the process. a

[29] Dr Pelling's specific submissions in relation to s 97(2) and (4) of the 1989 Act were that the government had enacted this amendment having been alerted by the progress of the applications of Dr Pelling and Mr B in Europe to the weak statutory foundation for private hearings under the 1989 Act in the county court and in the High Court. Dr Pelling submits that the provisions of s 97(2) are designed to restrict rights of free speech recognised at common law. The decision in *X v Dempster* [1999] 3 FCR 757 establishes that there is no common law restraint on identification of parties to 1989 Act proceedings nor was there any statutory restraint prior to the enactment of s 97(2). The reservation contained in s 97(4) is too narrowly framed to amount to a justification for the restraint. He asks, rhetorically, what sort of freedom is it that requires a court order before it can be exercised? He draws attention to an article by Mr Timothy Scott QC, 'Automatic Prohibitions on Disclosure' [2003] Fam Law 594, in which Mr Scott comments critically upon s 97(2) and (4). b

[30] Dr Pelling is equally trenchant in his criticism of the terms in which Bennett J explained the various exercises of his discretion both in relation to private hearing and the refusal of public judgment. Many of the submissions advanced by Dr Pelling in general are repeated by him in his specific criticisms of the exercise of the judicial discretion. c

[31] Mr Cobb presents the rival arguments clearly and succinctly. Whatever may be the legal distinction sought to be drawn by Dr Pelling the present application and appeal offers nothing that was not considered and rejected by this court and by the European Court in relation to the hearing before Judge Goldstein. As to the genesis of s 97(2) Mr Cobb suggests that it may result from the 1993 public consultation. He informs us that the Official Solicitor sought the amendment of s 97 in order to remove the need to apply for an injunction in the higher courts to prevent disclosure of identifying information. As to rr 4.16, 4.23 and 10.20, Mr Cobb emphasises that in each case there is discretion conferred upon the judge to permit publicity. d

[32] In relation to domestic authority, Mr Cobb draws attention to the recent decision of Munby J in the case of *Re B (a child) (disclosure)* [2004] 2 FLR 142. e

[33] In relation to the convention, Mr Cobb accepts that Dr Pelling has established an interference with his rights under art 10(1), but under art 10(2) that is justified since the interference is necessary and proportionate to ensure the protection of the rights of the child arising under arts 6 and 8. f

[34] Whilst the conduct of trials is regulated by statutory provision, Mr Cobb accepts that whether the pronouncement of judgment is to be in public or private is left to be regulated by the judges themselves. g

[35] We have considerable sympathy for Dr Pelling's basic premise that the rationalisation of the current practice is expressed in very general terms that certainly appear to lack evidential foundation. However there can be no escaping the reality that Dr Pelling's current challenge to the English practice of private hearings for 1989 Act litigation is not different in kind or character to his previous challenge. The statutory provisions may have changed but the underlying ground of challenge has not been suggested to be any different. Whilst he has deployed attractive arguments, all those arguments were deployed in Strasbourg. Whilst we may not be strictly bound, we would challenge the fundamental purpose of the convention were we to prefer the conclusions of the minority to h

a those of the majority without any fresh development or argument to justify departure.

[36] Equally the point which this court settled in determining the appeal of *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58 is in reality the very point that we are called upon to decide. Dr Pelling's reliance on rights conferred by arts 6 and 10 were carefully considered. Although not strictly bound by that decision we can see no legitimate ground to depart from it.

b [37] In its decision in *B v UK* [2001] 2 FCR 221 at 236 the European Court concluded:

c '52. The court refers to its above findings in connection with art 6(1) of the Convention that it was justifiable, in order to protect the privacy of the children and parties and to avoid prejudicing the interests of justice, to hold the residence proceedings in chambers and to limit the extent to which the County Courts' judgments were made available to the general public. In the light of these findings the Court does not find it necessary to examine the complaint under art 10 separately.'

d [38] It is perhaps unfortunate that the judgment does not elaborate upon the rejection of Dr Pelling's art 10 complaint. Implicitly the court's findings in relation to art 6 were dispositive of his complaint under art 10. We would accept Mr Cobb's contention that, whilst Dr Pelling's rights under art 10(1) are engaged, the conduct of the proceedings in chambers are properly to be regarded as 'necessary in a democratic society ... for the protection of the rights ... of others', namely the rights of the respondent and the child under art 8 of the convention.

e [39] In relation to Dr Pelling's attack on the specific exercise of Bennett J's discretion we need say no more than that each determination was sufficiently explained and manifestly within the discretionary ambit. We accept that greater justification is required for the refusal of the pronouncement of judgment in public, given the almost universal practice of anonymising public judgments in 1989 Act cases. Here Bennett J allowed publicity for his judgment on the open justice issues, albeit anonymising the judgment.

f [40] Further we concur with Bennett J's characterisation of the application for a declaration of incompatibility and the application for certiorari. These were not free-standing applications capable of severance. They were no more than additional mechanisms used by Dr Pelling in an endeavour to procure public trial and judgment of the 1989 Act proceedings.

g [41] Dr Pelling's attack on the imposition of the standard restriction on the identification of the identity of the child and the parties to the present appeal must be considered in the light of an authority which was not cited in the course of oral submissions by either Dr Pelling or Mr Cobb, although it was analysed critically by Dr Pelling in his written skeleton argument in the court below. It is the case of *Re R (Court of Appeal: order against identification)* [1999] 3 FCR 213. The constitution of the court was Lord Woolf MR sitting with Butler-Sloss and Evans LJ. The applicant before the court was Mr B, subsequently to be j Dr Pelling's co-applicant in Strasbourg. On 1 December 1998 he applied to set aside the standard form of order incorporated into the dismissal on 17 November 1997 of his appeal against the making of a s 91(14) order.

[42] The order which Mr B applied to set aside was in these terms (at 214):

'AND IT IS FURTHER ORDERED THAT no one shall publish or reveal the name or address of the minor child who is the subject of these proceedings

or publish or reveal any particular or particulars or other information which would be likely to lead to the identification of the said minor.' a

[43] In giving the leading judgment, Lord Woolf MR explained that this was a standard and automatic inclusion in any order of the Court of Appeal in any child case and that this practice had originated with the authority and agreement of Lord Bingham when he was Master of the Rolls. b

[44] Lord Woolf MR specifically explained the advantages of anonymity. He said (at 214–215):

'A general direction ... exists because it is appreciated that in the court below the hearing is in chambers (in normal circumstances the public will have no access to those proceedings unless they make special arrangements to hear them; in children proceedings the public do not normally have access; the matter is subject to r 4.16(7) of the Family Proceedings Rules 1991, SI 1991/1247), while in this court the proceedings are in public. It is considered highly desirable that appellate proceedings wherever possible should be in open court, and the judgment which is given should be available to the public and the profession through the normal court reporting procedures. In the great majority of cases, this could have adverse consequences so far as children are concerned. In a case where a child's parents are in dispute as to how the child should be brought up or cared for, to identify the child might subject that child to stress and anxiety. It is important that the child, who cannot be said to be other than entirely innocent, should not be damaged by the fact that his or her parents are not in a position to agree amicably as to the future care for that child, or because there are some other disputes as to the child's upbringing. It is therefore accepted by this court that in general the identity of the child should be protected. That is why the order was made in this case.' c d e f

[45] Later Lord Woolf MR explained the advantage of a standing practice. He said (at 215):

'If there is a standing instruction and there are circumstances (which will be the minority of cases) which make publicity desirable, then the relevant matters can be drawn to the court's attention. There is always a danger in cases of this nature that a court, through oversight, fails to give the direction that the order should be included. There might be cases where if the order was accidentally omitted, great harm could be caused to an individual child.' g

Lord Woolf MR concluded his judgment by saying (at 216): h

'Notwithstanding the arguments which have been advanced by Mr B, I can see no objection to the present practice. The skeleton argument of the applicant refers to authorities which, in my judgment, are not inconsistent with that which I have indicated in this judgment. It is probably fortunate that Mr B felt it right to take this point of principle because it will have the desirable result of enabling the court's judgment to record and give its approval of the practice and in consequence draw it to the attention of those who might not otherwise be aware of it. The court is always particularly anxious that its proceedings should be as open as possible. The practice enables that to happen.' i

a [46] The practice was introduced in March 1995. It was done in the exercise of the court's inherent jurisdiction and was intended to reach wider than the terminology of s 39 of the Children and Young Persons Act 1933 ('particulars calculated to lead to the identification').

b [47] In his written skeleton argument of 4 May Dr Pelling expands his attack on the authority of *Re R*. First he says that it falls within that narrow category of cases that can be rejected as binding precedent on the grounds of manifest error. Second Dr Pelling submits that the case is not to be followed because of inconsistency with earlier decisions of the court, particularly *R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192, *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, [1997] Fam 1 and *Re G (celebrities: publicity)* [1999] 3 FCR 181. Third he submits that the decision predated the advent of the 1998 Act and must yield to art 10 of the convention. The practice would be impossible to justify within the terms of art 10(2). Fourth he submits that the decision is manifestly contrary to the principles stated by the House of Lords in the case of *A-G v Leveiler Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440.

d [48] Mr Cobb in his further written submissions of 6 May notes that the decision in *Re R* not only predates the 1998 Act (which came into force on 2 October 2000) but also the CPR (which came into force on 26 April 1999). Accordingly Mr Cobb puts the Crown's case thus. (i) Prior to any hearing (for permission or otherwise) before the Court of Appeal, it is legitimate for the court to treat the restriction on the publication of information relating to the identity of the child (which will have applied in the court of trial by virtue of s 12 of the Administration of Justice Act 1960 and s 97 of the 1989 Act) as continuing until the commencement of any hearing. (ii) Thereafter any standing restriction to be generally and automatically applied should be the subject of a practice direction in the drafting of which particular attention should be paid to CPR 39.2(4); PD 39A, paras 1.4A, 1.9–1.13; and PD 52, para 2.2. (iii) Nevertheless, even if the issue be made the subject of a practice direction the court should hereafter consider publicity issues at the commencement, and generally at the conclusion, of all appeal hearings relating to children and make a judgment on the balance between the competing rights arising under arts 6, 8 and 10.

f [49] In our judgment the only successful attack directed by Dr Pelling on the judgment of this court in *Re R* is his third. We accept the submissions of the Crown that the time has come for the court to consider in each case whether a proper balance of competing rights requires the anonymisation of any report of the proceedings and judgment following a hearing that was conducted in public and therefore open to all who cared to attend.

g [50] Standing back from Dr Pelling's detailed contentions, it is important to emphasise that the questions which he debates are essentially policy questions. Whilst we have concluded that the procedure ordained by the 1991 rules and 1989 Act are essentially convention compliant, it does not follow that the rival procedures for which Dr Pelling contends would not equally be convention compliant. During the course of his judgment in *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58 at 64 Thorpe LJ drew attention to the opportunity, if not the obligation, of the government to complete the process of public consultation on this debate. More detailed reference to this uncompleted consultation exercise was made during the course of his judgment in *Clibbery v Allan* [2002] 1 All ER 865 at [95]–[97]. This thirst for disclosure of the outcome of the 1993 consultation is only quickened by the Crown's reliance on one response as the genesis of the 1999 amendment of s 97 of the 1989 Act. Given the imminent

creation of the Family Justice Council it would seem to us to be appropriate for questions concerning privacy both of hearings and of judgments in the family justice system to be referred to the council. a

[51] In her recent administrative directions issued following the judgment of the Court of Appeal, Criminal Division, in *R v Cannings* [2004] EWCA Crim 1, [2004] 1 All ER 725 Dame Elizabeth Butler-Sloss P stated:

‘It is also worth giving consideration to increasing the frequency with which anonymised family court judgments in general are made public. According to current convention, judgments are usually made public where they involve some important principle of law which in the opinion of the judge makes the case of interest to the law reporters. In view of the current climate and increasing complaints of “secrecy” in the family justice system, a broader approach to making judgments public may be desirable.’ b
c

[52] It might have been thought that Dr Pelling would welcome this statement as some acknowledgement of the strength of support for his campaign. However in his submissions he was only critical of Dame Elizabeth Butler-Sloss P, submitting that it was not for the judges but for Parliament to determine the extent to which judges are to pronounce judgment in public. Dr Pelling submits that such decisions, whether of a general or of a specific character, must not be taken by judges. In relation to specific cases he submits, and in his third skeleton argument he embroiders the submission with what he says is a specific illustration, judges may use their access to publicity to the disadvantage of the litigant who has no equal right and no opportunity to respond. d
e

[53] We acknowledge that there may be some justification in this submission. Bentham would certainly recognise that judges may prefer to do their work without exposure to what may be critical publicity. Bentham would say that without such exposure an unguarded risk of undesirable practices is created. So it seems to us that, just as the desirability of private trials in child cases is a policy issue, so too is the desirability of private judgments in child cases and also the question of whether such public judgments should be anonymised. The judgment of this court in *Re R (Court of Appeal: order against identification)* [1999] 3 FCR 213 indicates that the automatic application of restrictions in all appeals involving children was developed or confirmed by the court with the approval of the Master of the Rolls nearly ten years ago. The court’s power to impose restrictions has two foundations in law: inherent jurisdiction and s 39 of the 1933 Act. We do not consider that s 97(2) of the 1989 Act extends to appellate proceedings in this court. As to the court’s inherent powers see the recent decision of *Re S (a child) (identification: restrictions on publication)* [2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43. Section 39(1) of the 1933 Act provides: f
g
h

‘In relation to any proceedings in any court ... the court may direct that—(a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein; (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.’ j

a [54] Clearly both the inherent jurisdiction and the statutory provision
empower this court to impose restrictions in an individual case in the exercise of
the court's discretion. But it is not so evident that either the inherent or the
statutory jurisdiction justifies the imposition of an automatic restriction without
the exercise of a specific discretion in the individual case. Indeed in his subsequent
written submission Mr Cobb suggests that for the future the court should both at
b the outset and at the conclusion of each appeal concerning children exercise a
specific discretion either to impose or to refuse prohibition on the identification
of the parties to the appeal. It would therefore seem to us to be desirable for the
Master of the Rolls and the President to review the standard practice of this court
to reflect developments since the decision pronounced in *Re R* in 1998. This
reconsideration should perhaps extend to applications for permission to appeal
c listed for oral hearing. In relation to such hearings Mr Cobb submits that the
need for caution is all the greater given that: (a) permission to appeal is ordinarily
sought in the first instance court where statutory protections apply;
(b) applications for permission to the Court of Appeal are ordinarily considered
by a single Lord Justice on paper which would have the protection of
d confidentiality under CPR 52.3(3)–(4); (c) oral hearings for permission are often
listed without notice at which the respondent is not present to argue against
publicity.

[55] Policy questions do have to be addressed against this background: in
reality although the 1991 rules confer on the judge in any case the discretion to
lift the veil of privacy, there is such a strong inherited convention of privacy that
e the judicial mind is almost never directed to the discretion and in rare cases where
an application is made a fair exercise may be prejudiced by the tradition or an
unconscious preference for the atmosphere created by a hearing in chambers.
Judges need to be aware of this and to be prepared to consider another course
where appropriate.

f [56] The subsequent submissions of Mr Cobb and of Dr Pelling consider in
erudite detail the comparable law and practice in Scotland governing the conduct
of and publicity given to both public law and private law applications both
historically and currently under the Children (Scotland) Act 1995. For the
purposes of the present appeal it is unnecessary to record or analyse those
submissions in any detail. Historically Mr Cobb accepts that the general rule of
g law is that cases are heard in public in Scotland unless there is a good reason for
them to be heard in private. In his subsequent submissions Mr Cobb states:

h 'The application of the general rule to the Court of Session dates back to
an Act of 1693 which provided that the court should sit "with open doors";
the principle, which applies in all courts, is also rooted in the common law,
as is the discretion to depart from it in exceptional cases in the interest of the
administration of justice.'

[57] Dr Pelling, in his subsequent written submissions, fairly summarises the
present practice in Scotland when he states:

j 'It is clear that run of the mill residence and contact cases are routinely
public in access to the court, judgment and reporting, at all levels of the court
and that there is no damage to the administration of justice.'

[58] Dr Pelling in his earlier skeleton arguments offered a comparative
analysis of the practices in a number of other Council of Europe countries. We
do not consider it necessary to consider this material further. Given that the

European Court allows a wide margin of appreciation to individual jurisdictions it is enough to conclude that evidence of disparity does not advance Dr Pelling's case. The tradition for open sittings and the tradition for private sittings are each equally capable of compliance with the convention. In the end the more convincing defence of the practice in our jurisdiction may be the most simple, namely that it is reflective of a long-standing tradition, of general but not universal application, that has been franked by the European Court as convention compliant. a
b

[59] In conclusion therefore we grant Dr Pelling's application for permission but dismiss the appeal.

Application for permission to appeal granted, but appeal dismissed. Permission to appeal to the House of Lords refused. c

Kate O'Hanlon Barrister.

**Norfolk Capital Group Ltd v
Cadogan Estates Ltd**

[2004] EWHC 384 (Ch)

CHANCERY DIVISION

ETHERTON J

22, 23 JANUARY 2004

Landlord and tenant – Improvements – Business premises – Tenant serving notice on landlord of intention to carry out works of improvement – Landlord offering to carry out works in consideration of reasonable increase in rent in accordance with statutory provision – Tenant not accepting offer and withdrawing notice – Whether landlord entitled to carry out works notwithstanding tenant's withdrawal of notice – Landlord and Tenant Act 1927, s 3.

The claimant tenant served a notice on the defendant landlord under s 3(1)^a of the Landlord and Tenant Act 1927, stating its intention to carry out works of improvement to the demised business premises. In the event of the landlord serving notice of objection to the proposed improvement, s 3(1), which fell within Pt I of the 1927 Act, permitted the tenant to apply to the tribunal for a certificate that the proposed improvement was a proper improvement. Section 3(1) contained a proviso precluding the tribunal from granting such a certificate if the landlord proved that he had offered to execute the improvement himself in consideration of a reasonable increase in rent, unless it was subsequently shown to the tribunal's satisfaction that the landlord had failed to carry out his undertaking. Under s 3(4), the tenant was entitled to carry out the improvement if there had been no notice of objection or the tribunal had granted a certificate. In response to the tenant's notice, the landlord stated that it would carry out the improvements itself in return for a reasonable increase in rent. The tenant did not accept the landlord's offer, and eventually formally withdrew its s 3(1) notice. However, the landlord contended that the making of an offer within the proviso to s 3(1) precluded the tenant from withdrawing its notice, and instead entitled the landlord to execute the works. The tenant brought proceedings for a declaration that the landlord was not entitled to enter the demised premises and execute the works.

Held – Where a tenant served, under s 3(1) of the 1927 Act, a notice of intention to make an improvement, and the landlord served notice of objection solely on the ground that he wished to carry out the improvement himself in consideration of a reasonable increase in rent, and the landlord offered to do so, the tenant was permitted to change his mind and decide not to proceed with the improvement, and the landlord was not entitled to execute the improvement. The ordinary meaning of the proviso to s 3(1) was merely to preclude the court being able to give a certificate under that provision, thereby precluding authorisation for the tenant to carry out the work under s 3(4). Nor was there any discernible policy reason for compelling the tenant to accept an improvement by the landlord, with the accompanying increase in rent, even if the tenant no longer wished to proceed with it. A conclusion to the contrary would place a tenant in

^a Section 3, so far as material, is set out at [27], [29], below

a
b
a most difficult practical position. He would have to give notice under s 3(1) in the knowledge that the landlord could make an offer within the proviso, thereby compelling the tenant to accept the improvement and an unascertained increase in rent, even if the tenant wished and indeed needed to change his mind. Far from encouraging and facilitating improvements by tenants in accordance with Pt I of the Act, such a possibility would be a positive disincentive to the tenant ever utilising the s 3 procedure. It followed in the instant case that the tenant was entitled to the declaration sought (see [2], [48]–[51], [54], below).

Notes

For notice of proposed improvement and landlord's objection, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 644–645.

c
For the Landlord and Tenant Act 1927, s 3, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 69.

Case referred to in judgment

Deerfield Travel Services Ltd v Wardens and Society of the Mistery or Art of the Leathersellers of the City of London (1982) 46 P & CR 132, CA.

Claim

e
By claim form issued under CPR Pt 8 on 21 November 2003, the claimant, Norfolk Capital Group Ltd, the tenant of premises known as, and situate at, the Sloane Square Moat House Hotel, 7–14 Sloane Square, Chelsea, London SW1, sought a declaration that the defendant landlord, Cadogan Estates Ltd, was not entitled to enter the demised premises and carry out the works of improvement proposed by Norfolk in a notice served on Cadogan under s 3 of the Landlord and Tenant Act 1927, or any works of improvement. The facts are set out in the judgment.

Derek Wood QC (instructed by *Farrer & Co*) for Norfolk.

Kenneth Monro (instructed by *Pemberton Greenish*) for Cadogan.

ETHERTON J.

INTRODUCTION

g
[1] This case raises a short point on the interpretation and effect of s 3 of the Landlord and Tenant Act 1927.

h
[2] In short, the question is whether, when a tenant serves a notice under s 3 of intention to make an improvement, and the landlord serves a notice of objection solely on the ground that the landlord wishes to carry out the improvement himself in consideration of a reasonable increase of rent, or of such increase of rent as the court may determine, and the landlord offers to do so, the tenant is permitted to change his mind and decide not to proceed with the improvement, or whether, alternatively, the landlord is entitled, notwithstanding the tenant's change of mind, to proceed to execute the improvement.

BACKGROUND FACTS

j
[3] The claimant, Norfolk Capital Group Ltd (Norfolk) is a company within the Queen's Moat Houses plc (Queen's Moat) group of companies, the principal business of which is that of hotelier.

[4] Norfolk is the tenant of the Sloane Square Moat House Hotel at 7–14 Sloane Square, Chelsea, London SW1 (the hotel), which holds under a lease

a made on 22 December 1977 (the lease), the reversion to which is vested in the defendant, Cadogan Estates Ltd (Cadogan).

[5] The lease is for a term of 65 years from 24 June 1977.

[6] Clause IX of the lease contains a covenant by the tenant absolutely prohibiting alterations to the exterior of the hotel. It is in the following terms:

b 'NOT at any time during the said term to cut or injure or permit to be cut or injured any of the walls timbers or roof of the demised premises and not to alter or permit to be altered the plan layout height or elevation of the demised premises or the architectural appearance or the architectural decoration thereof and not to erect or permit to be erected any internal partitions for dividing rooms and not to erect or permit to be erected any additional building upon the site of the demised premises and not at any time during the said term to fix or permit to be fixed any projecting flue, pipe, fan or ventilator on or through the external face of the walls or windows of the demised premises. PROVIDED THAT if such works relate to the interior of the demised premises only they may be carried out with the written consent of the Company which shall not be unreasonably withheld or delayed.'

e [7] In 2001 Norfolk decided that it wished to carry out works of improvements to the hotel, including, in particular, the installation of air conditioning (the works). The works did not relate solely to the interior of the hotel, and so they fell within the absolute prohibition in cl IX of the lease.

[8] By a letter, which the parties agree should be treated as sent on 9 May 2001, Norfolk gave formal notice to Cadogan under s 3 that Norfolk intended to carry out the works.

f [9] By a letter to Norfolk dated 2 August 2001, Mr DJ Ramsell, Cadogan's surveyor, said:

g 'I write now with reference to your letter of 9th May which you referred to as "a formal notice of (our) proposals under Section 3 of the Landlord and Tenant Act 1927" and write now on behalf of the Earl Cadogan and Cadogan Estates Limited to notify you that we will not formally object to the works and will carry out the improvements which are the subject of your notice in return for a reasonable increase of rent.'

h [10] In that letter, Mr Ramsell went on to state that Cadogan considered that an increase in rent of £273,500 p a was a reasonable increase in rent, such rent to be subject to review at the same time and in the same manner as the rent currently payable.

j [11] That offer was never accepted by Norfolk. There were discussions between the parties' representatives. Norfolk's representatives made it clear that Norfolk's preference was for Norfolk itself to carry out the works. Further, the parties were unable to agree on the amount of increased rent to which Cadogan would be entitled if it carried out the works.

[12] Norfolk decided not to proceed with the works. It entered into negotiations with a third party for assignment of the lease.

[13] A draft licence to assign was prepared by Cadogan's solicitors which contained a clause providing that, notwithstanding completion of the licence and execution of the assignment authorised by it, the—

'Improvement Notice and the Counter Notice and all matters arising from each shall remain as existing ... [and] the Assignee shall take the place of the Lessee in all respects relating to the Improvement Notice and the Counter Notice.'

[14] In the event, the proposed assignment to that third party did not proceed.

[15] Norfolk has, however, continued to seek an assignee of the lease.

[16] In view of what was said in the draft licence, Norfolk was, by this stage, concerned about the potential impact of the notices under s 3 on attempts to market the lease. It was concerned that, if the works were carried out by Cadogan, they would have an unsatisfactory impact on the rent. Further, Norfolk considered that it was highly likely that any assignee of the lease would have its own ideas about the improvements which it would wish to carry out to the hotel and would not wish to inherit the works conceived by Norfolk.

[17] Further correspondence between the parties and their solicitors revealed that Cadogan's position was that, in the light of the notices which had been served under s 3 of the 1927 Act and Cadogan's offer to carry out the works in consideration of a reasonable increase in rent, Norfolk was not entitled unilaterally to withdraw its notice under s 3 of its intention to make the improvement constituted by the works, and Cadogan would not agree to such a withdrawal.

[18] Formal withdrawal of Norfolk's notice in the letter of 9 May 2001 was given in a letter from Queen's Moat to Cadogan dated 12 September 2003, which said:

'Please accept this letter as formal notice that Queen's Moat Houses plc and its subsidiary Norfolk Capital Hotels Ltd have abandoned any intention at this stage to have the improvements referred to in the correspondence quoted above carried out.

The notice in Mr Ingleton's letter of 9 May 2001 is consequently withdrawn.'

THE PROCEEDINGS

[19] Norfolk commenced the proceedings by issuing a CPR Pt 8 claim form on 21 November 2003. The only substantive relief specified in the claim form is a declaration that Cadogan is not entitled to enter the hotel and carry out the works or any work of improvement.

[20] A witness statement in support of the claim form was made by Mr Andrew Ingleton, the director of Queen's Moat's Group Property Services, dated 21 November 2003.

[21] On 27 November 2003 Norfolk issued an application under CPR Pt 24 for summary judgment on the claim.

[22] I gave directions on 27 November 2003 with a view to obtaining an early hearing of the Pt 24 application.

[23] Evidence in answer to the witness statement of Mr Ingleton was given by a witness statement of Mr Ramsell dated 4 December 2003.

[24] The Pt 24 application has come on for hearing before me. The parties have agreed that the hearing should be treated as the trial of the claim.

REPRESENTATION

[25] Mr Derek Wood QC represented Norfolk. Mr Kenneth Monro represented Cadogan.

THE STATUTORY FRAMEWORK

a [26] Section 3 falls within Pt I of the 1927 Act. Broadly speaking, that Part is concerned with giving tenants of business premises, other than those held under a mining lease or a lease of an agricultural holding, compensation for certain improvements made by him or his predecessors, and conferring on such tenants power to carry out improvements in certain circumstances, notwithstanding anything in the lease to the contrary.

b [27] Section 3(1) provides as follows:

‘Where a tenant of a holding to which this Part of this Act applies proposes to make an improvement on his holding, he shall serve on his landlord notice of his intention to make such improvement, together with a specification and plan showing the proposed improvement and the part of the existing premises affected thereby, and if the landlord, within three months after the service of the notice, serves on the tenant notice of objection, the tenant may, in the prescribed manner, apply to the tribunal, and the tribunal may, after ascertaining that notice of such intention has been served upon any superior landlords interested and after giving such persons an opportunity of being heard, if satisfied that the improvement—(a) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy; and (b) is reasonable and suitable to the character thereof; and (c) will not diminish the value of any other property belonging to the same landlord, or to any superior landlord from whom the immediate landlord of the tenant directly or indirectly holds; and after making such modifications (if any) in the specification or plan as the tribunal thinks fit, or imposing such other conditions as the tribunal may think reasonable, certify in the prescribed manner that the improvement is a proper improvement: Provided that, if the landlord proves that he has offered to execute the improvement himself in consideration of a reasonable increase of rent, or of such increase of rent as the tribunal may determine, the tribunal shall not give a certificate under this section unless it is subsequently shown to the satisfaction of the tribunal that the landlord has failed to carry out his undertaking.’

g [28] The tribunal mentioned in s 3(1) is now the county court or the High Court.

[29] Section 3(4) of the 1927 Act provides, so far as relevant, as follows:

h ‘Where no such notice of objection as aforesaid to a proposed improvement has been served within the time allowed by this section, or where the tribunal has certified an improvement to be a proper improvement, it shall be lawful for the tenant as against the immediate and any superior landlord to execute the improvement according to the plan and specification served on the landlord, or according to such plan and specification as modified by the tribunal or by agreement between the tenant and the landlord or landlords affected, anything in any lease of the premises to the contrary notwithstanding ...’

j [30] It is not necessary, for the purposes of this judgment, to refer to any other provisions of the 1927 Act.

[31] Accordingly, this case is concerned essentially with the proper interpretation and effect of the proviso to s 3(1) (the proviso).

NORFOLK'S CASE

[32] Norfolk's case is that the proviso is to be interpreted in accordance with the normal meaning of the words used. a

[33] The proviso states that, if the landlord makes an offer within the proviso, the court is precluded from certifying that the improvement is a proper improvement, unless it is subsequently shown that the landlord has failed to carry out his undertaking, that is to say his offer. In the absence of such certification, the effect of s 3(4) is that it is not lawful for the tenant himself to carry out the improvement. b

[34] Accordingly, Mr Wood submitted, the proviso does no more than provide a bar on the tenant carrying out the works pursuant to s 3(4). The proviso does not say, and does not have the effect, that the landlord obtains a right to carry out the work himself, even if the tenant, after the landlord has made his offer, changes his mind about wishing to proceed with the improvement. c

[35] Mr Wood supported this analysis of the natural and ordinary meaning of the proviso by reference to the structure and effect of the legislation in relation to cases outside the proviso. d

[36] He pointed out that, in a case in which no notice of objection is given by the landlord under s 3(1), the tenant is given the right under s 3(4) to execute the improvement, but is not obliged to do so. That subsection merely provides that 'it shall be lawful for the tenant ... to execute the improvement ... anything in the lease of the premises to the contrary notwithstanding ...'. e

[37] The same is the position if the landlord serves a notice of objection under s 3(1) on the ground that the improvement does not satisfy the requirements of (a), (b) and (c) in s 3(1) and, on an application to the court, the court certifies that the improvement is a proper improvement. Section 3(4) then applies in exactly the same way as it applies where the landlord has not served any notice of objection. f

[38] Mr Wood postulated circumstances in which a tenant might not, on reflection, prior to the commencement of works, wish to carry out the works which the tenant had become authorised to carry out under s 3(4). Such works might, on analysis, be likely to be more expensive than originally budgeted for. The tenant might be advised that they are more complicated than had originally been envisaged, involving more far-reaching structural works or greater disruption to the tenant's business, or requiring a longer period of time. The tenant might conceive a better, different scheme. The tenant might decide, as in the present case, to sell its interest in the lease before the works are begun. g

[39] Mr Wood submitted that, where the landlord has made an offer within the proviso, the tenant might equally, for the same and further reasons, want to change his mind. An obvious further reason would be that the tenant might not be happy to proceed in view of the increased rent if the landlord executes the improvement. This would be particularly the case if the tenant believed it would be able to carry out the improvements more cheaply than the landlord. h

[40] Mr Wood submitted that the plain policy behind Pt I of the 1927 Act was to encourage and facilitate the carrying out of improvements by tenants of business premises. There is, he submitted, no discernible policy reason for forcing the tenant to accept the execution of an improvement by his landlord, at an increased rent, when the tenant does not wish to be provided with the improvement. j

CADOGAN'S CASE

a [41] In the course of Mr Monro's submissions, Cadogan's case was reduced to two essential elements.

b [42] Firstly, Mr Monro relied upon the express terms of the proviso that the court cannot give a certificate under s 3(1) unless it is subsequently shown that the landlord has failed to carry out his 'undertaking'. It is common ground that the 'undertaking' mentioned in the proviso is the landlord's offer to execute the improvement himself in consideration of a reasonable increase in rent, or such increase of rent as the court may determine.

c [43] Mr Monro submitted that the use of the word 'undertaking', and the express provision precluding the tenant from obtaining a certificate unless the undertaking has not been satisfied, inevitably involve the notion that a period of time is granted to the landlord in which he is entitled to carry out his undertaking. In his skeleton argument, Mr Monro expressed the point shortly as follows:

d 'The landlord therefore has to be given an opportunity to carry out his undertaking otherwise the situation can never arise where it can subsequently be shown to the satisfaction of the tribunal that the landlord has failed to carry out his undertaking.'

e [44] Secondly, Mr Monro submitted that the policy underscoring Cadogan's case is that Parliament was seeking to balance the interests of the tenant and the landlord. On the one hand, the 1927 Act confers on the tenant, in certain circumstances, a right to carry out works, notwithstanding a prohibition in the tenant's lease or opposition by the landlord; on the other hand, as a balancing measure, he submitted, Parliament has conferred on the landlord the right, in the circumstances specified in the proviso, to insist on carrying out the improvement with an increase in rent.

f [45] Mr Monro also submitted that a further policy reason for conferring on the landlord the right, in the circumstances specified in the proviso, to insist on execution of the improvement, notwithstanding any change of mind by the tenant, is that the tenant's notice under s 3(1) will have involved the landlord in considerable costs in considering the tenant's proposal and its consequences.

g [46] Mr Monro further pointed out that, prior to serving a notice under s 3(1), the tenant will have worked out the scheme in considerable detail: see *Deerfield Travel Services Ltd v Wardens and Society of the Mystery or Art of the Leathersellers of the City of London* (1982) 46 P&CR 132. He submitted that the tenant would have calculated carefully the financial costs of the work and other financial implications. He submitted that the tenant would not, in those circumstances, be likely to be surprised by the increase in rent that would result if the landlord carried out the work on the terms specified in the proviso.

ANALYSIS

j [47] Notwithstanding the attractive way in which Mr Monro presented Cadogan's case, I have no hesitation in rejecting it. I can state my reasons quite shortly.

[48] The starting point must be the ordinary and natural meaning of the proviso in the light of the words used. I agree with Mr Wood that the ordinary meaning is merely to preclude the court being able to give a certificate under s 3(1), thereby precluding the tenant being authorised to carry out the work under s 3(4).

[49] Secondly, there is not, in my judgment, any discernible policy reason for compelling the tenant to accept an improvement by the landlord, even if the tenant no longer wishes to proceed with the improvement. It is common ground that Mr Wood is correct in his analysis of the position where the landlord does not give notice of objection under s 3(1), or he does give notice of objection on the ground that the improvement is not a proper one, but the court certifies to the contrary. In those cases, the tenant is free to change his mind. He may well wish to do so for any of the reasons mentioned by Mr Wood and which I have set out earlier in this judgment.

[50] I can see absolutely no policy reason why, in the sole case of the landlord making an offer within the proviso, the tenant should be compelled to accept the carrying out of the work, with the accompanying increase in rent, notwithstanding a change of mind by the tenant.

[51] Indeed, it seems to me that, if Mr Monro's analysis is correct, it would place a tenant in a most difficult practical position. He would have to give his notice under s 3(1) in the knowledge that the landlord could make an offer within the proviso, thereby compelling the tenant to accept the improvement and an unascertained increase in rent, even if the tenant, for any of the reasons which Mr Wood has mentioned, wished and indeed needed to change his mind. Such a possibility seems to me, far from encouraging and facilitating improvements by tenants in accordance with the policy of Pt I of the 1927 Act, a positive disincentive to the tenant ever utilising the procedure in s 3.

[52] Nor do I accept Mr Monro's analysis that use of the word 'undertaking' in the proviso indicates a right of the landlord to carry out the undertaking, irrespective of any change of mind by the tenant. The landlord's offer, as in the present case, may never have been accepted by the tenant. In such a case there is no question of any contract compelling the tenant to accept the improvement by the landlord. Further, as Mr Wood pointed out, a non-contractual undertaking may usually be waived, if no longer required.

[53] Finally, Mr Monro's reference to wasted costs of the landlord is not, in my judgment, compelling. The landlord will incur time, and may incur cost, in considering a tenant's notice under s 3(1) whether or not the landlord makes an offer within the proviso. I can see no logical or policy reason for singling out the case of a landlord's offer within the proviso as the sole situation in which the tenant is compelled to accept that the improvement must be carried out, notwithstanding the tenant's change of mind, as a counterpart to the landlord's time and expense in considering the tenant's proposals.

DECISION

[54] For these reasons I hold that Norfolk is entitled to the declaration it seeks.

Order accordingly.

Gareth Williams Barrister.

a Adams v Bracknell Forest Borough Council

[2004] UKHL 29

HOUSE OF LORDS

b LORD HOFFMANN, LORD PHILLIPS OF WORTH MATRAVERS, LORD SCOTT OF FOSCOTE,
LORD WALKER OF GESTINGTHORPE AND BARONESS HALE OF RICHMOND
22 APRIL, 17 JUNE 2004

Limitation of action – Period of limitation – When time begins to run – Claim made by claimant relating to failure of defendant to assess and treat him for dyslexia – Whether claim for personal injury – Date of knowledge of claimant that injury significant – Constructive knowledge – Test for constructive knowledge – Whether claim statute-barred – Whether special features justifying court in exercising power to disapply limitation period – Limitation Act 1980, ss 11, 14(3), 33.

d From 1997 to 1988 the claimant was a pupil at schools for which the defendant local education authority was responsible. He became of full age in 1990. On 25 June 2002, he issued proceedings against the authority claiming damages for negligence in failing to provide him with a suitable education. The claim was based upon the alleged neglect of the council properly to assess the education difficulties he was experiencing at its schools and to provide him with proper treatment. He alleged that an assessment would have revealed he suffered from dyslexia and the treatment would have ameliorated the consequences of that condition. The authority pleaded that the action was statute-barred under s 11^a of the Limitation Act 1980, which provided a special three-year time limit for actions which claimed damages for personal injury with time running from the date on which the action accrued or the 'date of knowledge' whichever was the later. By s 38(1) of the 1980 Act personal injuries included 'any disease and any impairment of a person's physical or mental condition'. The judge in the county court tried the question of the date of knowledge as a preliminary issue. He ruled that the date of constructive knowledge as defined in s 14(3)^b, which provided, inter alia, that a person's knowledge included knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him, or from facts ascertainable by him with the help of medical or other appropriate expert advice, was not before 19 November 1999, when the claimant by chance met an educational psychologist who suggested to him that he might be suffering from dyslexia. That decision was upheld by the Court of Appeal. The authority appealed. On appeal issues arose as to (i) whether the action was one to which s 11 applied; (ii) the test for constructive knowledge; (iii) the date of constructive knowledge on the facts of the instant case; and (iv) whether, if the

a Section 11, so far as material, provides: '(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person ... (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below. (4) Except where subsection (5) below applies, the period applicable is three years from—(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured.'

b Section 14, so far as material, is set out at [21], below

action fell outside the limitation period, the court should exercise its discretion under s 33^c of the 1980 Act to allow it to proceed.

Held – (1) Having regard to the definition in s 38(1) of the 1980 Act, the lack of ability to read and write could be a personal injury for the purposes of s 11 of the 1980 Act as an analogy had to be made with negligent failure to treat a physical injury which the defendant did not itself cause. It would be drawing too fine a distinction to say that the neglect caused no injury because nothing could be done to repair the congenital damage in the brain circuitry and the other parts of the brain which would had to be trained to compensate had never been injured. What mattered was whether the ability to read and write had been improved (see [18], [20], [57], [62], [75], [80], below; *Phelps v London Borough of Hillingdon*, *Anderton v Clwyd CC*, *Jarvis v Hampshire CC*, *Re G (a minor)* [2000] 4 All ER 504 and *Robinson v St Helens Metropolitan BC* [2003] PIQR P128 applied).

(2) (Per Lord Hoffman, Lord Phillips of Worth Matravers and Lord Scott of Foscote) Although it was true that the claimant had to be assumed to be a person who had suffered the injury in question and not some other person, his particular character or intelligence could not be relevant. Section 14(3) of the 1980 Act required the court to assume that a person who was aware that he had suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, would be sufficiently curious about the causes of the injury to seek whatever expert advice was appropriate. Since the introduction of the discretion under s 33 of the 1980 Act the postponement of the commencement of the limitation period by reference to the date of knowledge was no longer the sole mechanism for avoiding injustice to a claimant who could not reasonably have been expected to have known that he had a cause of action. It was therefore possible to interpret s 14(3) with a greater regard to the potential injustice to defendants (see [45]–[47], [57]–[58], [71], below); *Robinson v St Helens Metropolitan BC* [2003] PIQR P128 applied; dicta of Lord Reid in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135 at 1139 and of Purchas LJ in *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 398 disapproved.

(3) That the injury itself would reasonably inhibit the claimant from seeking advice was a factor to be taken into account, however, there was no reason why the normal expectation that a person suffering from a significant injury would not be curious about its origins should not also apply to dyslexics. It would need some evidential foundation before the court could assume that a person with dyslexia was likely to be unable to speak about the matter to his doctor. In the instant case, such evidence was entirely lacking and accordingly the date of constructive knowledge was well before three years before the issue of the writ. Furthermore, there were no special features about the reasons why the claimant left his claim so late which tilted the balance in his favour so as to enable the court to exercise its discretion under s 33 of the 1980 Act. Accordingly, the appeal would be allowed and the action dismissed (see [51], [52], [55], [56], [57], [72], [74], [75], [79], [92], below).

^c Section 33, so far as material, provides: '(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—(a) the provisions of section 11 ... of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.'

Notes

a For the limitation period for personal injury actions, for a claimant's knowledge and for the court's power to override time limits, see 24 *Halsbury's Laws* (4th edn reissue) paras 904, 905, 907.

For the Limitation Act 1980, ss 11, 14, 33, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 945, 949, 974.

b**Cases referred to in opinions**

Ali v Courtaulds Textiles Ltd (1999) 52 BMLR 129, CA.

Anderton v Clwyd CC [1999] ELR 1, CA.

Barrett v Enfield London BC [1999] 3 All ER 193, [2001] 2 AC 550, [1999] 3 WLR 79, HL.

c

Cartledge v E Jopling & Sons Ltd [1963] 1 All ER 341, [1963] AC 758, [1963] 2 WLR 210, HL.

Coban v Allen (1997) 8 Med LR 316, CA.

E (a minor) v Dorset CC [1994] 4 All ER 640, [1995] 2 AC 633, [1994] 3 WLR 853, CA; *rvsd in part sub nom X and ors (minors) v Bedfordshire CC, M (a minor) v*

d

Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Fenech v East London and City Health Authority [2000] Lloyd's Rep Med 35, CA.

Forbes v Wandsworth Health Authority [1996] 4 All ER 881, [1997] QB 402, [1996] 3 WLR 1108, CA.

Glaister v Greenwood [2001] PNLR 602.

e

Glasgow Corp v Muir [1943] 2 All ER 44, [1943] AC 448, HL.

Henderson v Merrett Syndicates Ltd [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

KR v Bryn Alyn Community (Holdings) Ltd (in liq) [2003] EWCA Civ 85, [2004] 2 All ER 716, [2003] QB 1441, [2003] 3 WLR 107.

f

Masterman-Lister v Brutton & Co, Masterman-Lister v Jewell [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511.

Mellors v Perry [2003] EWCA Civ 89.

Mortgage Corp v Lambert & Co (a firm) [2000] PNLR 820, CA.

Nash v Eli Lilly & Co [1993] 4 All ER 383, [1993] 1 WLR 782, CA.

Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd [1969] 1 All ER 708, [1969] 1 WLR 415, CA.

g

O'Driscoll v Dudley Health Authority [1998] Lloyd's Rep Med 210, CA.

Parry v Clwyd Health Authority [1997] PIQR P1.

Phelps v Hillingdon London BC [1997] 3 FCR 621; *rvsd* [1999] 1 All ER 421, [1999] 1 WLR 500, CA; *rvsd sub nom Phelps v London Borough of Hillingdon, Anderton v*

h

Clwyd CC, Jarvis v Hampshire CC, Re G (a minor) [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.

Robinson v St Helens Metropolitan BC [2002] EWCA Civ 1099, [2003] PIQR P128.

Smith v Central Asbestos Co Ltd [1971] 3 All ER 204, [1972] 1 QB 244, [1971] 3 WLR 206, CA; *affd sub nom Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135, [1973]

j

AC 518, [1972] 3 WLR 333, HL.

Smith v Leicester Health Authority [1998] Lloyd's Rep Med 77, CA.

Webster v Cooper & Burnett (a firm) [2000] PNLR 240, CA.

Cases referred to in list of authorities

Dobbie v Medway Health Authority [1994] 4 All ER 450, [1994] 1 WLR 1234, CA.

Donovan v Gwentys Ltd [1990] 1 All ER 1018, [1990] 1 WLR 472, HL.

Hallam-Eames v Merrett Syndicates Ltd (1996) 7 Med LR 122, CA.

Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd [2002] UKHL 7, [2002] 2 All ER 565, [2002] 2 AC 628, [2002] 2 WLR 578.

North Essex District Health Authority v Spargo (1997) 8 Med LR 125, CA.

R v Smith (Morgan James) [2000] 4 All ER 289, [2001] 1 AC 146, [2000] 3 WLR 654, HL.

RK and MK v Oldham NHS Trust [2003] Lloyd's Rep Med 1.

Rorrison v West Lothian College 2000 SCLR 245, Ct of Sess (OH).

Rowe v Kingston-upon-Hull City Council [2003] EWCA Civ 1281, [2003] ELR 771.

Skitt v Khan and Wakefield Health Authority (1997) 8 Med LR 105, CA.

Tame v New South Wales, Annetts v Australian Stations Pty Ltd (2002) 191 ALR 449, Aus HC.

Thompson v Brown Construction (Ebbw Vale) Ltd [1981] 2 All ER 296, [1981] 1 WLR 744, HL.

Appeal

Bracknell Forest Borough Council, appealed with permission of the Appeal Committee of the House of Lords given on 31 July 2003 from the decision of the Court of Appeal (Peter Gibson, Tuckey and Keene LJ) on 6 May 2003 ([2003] EWCA Civ 706, [2003] ELR 409) dismissing the council's appeal from the decision of Judge Vincent sitting in the Torquay and Newton Abbot County Court, on 20 November 2002, giving judgment for the claimant, DAVID Peter Adams, on a preliminary issue as to his date of knowledge in his proceedings against the council for damages for personal injury. The facts are set out in the opinion of Lord Hoffmann.

Geoffrey Mercer QC, Michael Melville-Shreeve and Lara Spencer (instructed by Woolcombe Beer Watts) for Mr Adams.

Edward Faulks QC and Andrew Warnock (instructed by Weightmans) for the council.

Their Lordships took time for consideration.

17 June 2004. The following opinions were delivered.

LORD HOFFMANN.

THE CLAIM

[1] My Lords, the plaintiff Mr Adams issued proceedings on 25 June 2002 against Bracknell Forest Borough Council (the council) claiming damages for negligence in failing to provide him with a suitable education. The claim is based upon the alleged neglect of the council properly to assess the educational difficulties he was experiencing at its schools which he attended between 1981 and 1988 and to provide him with appropriate treatment. He alleges that an assessment would have revealed that he suffered from dyslexia and the treatment would have ameliorated the consequences of that condition. As it is, his literacy skills are less than they should have been and he has been disadvantaged in the employment market. He also suffers from disabling psychological syndromes such as depression, panic and lack of self-esteem.

[2] Dyslexia or 'special learning difficulty' is a congenital condition, presumably neurological. As in the case of many brain functions, the mechanism

- a remains unknown. Its distinctive feature is the combination of average or better general mental ability with severe and long-term difficulty in reading, writing and spelling. It is not curable but in some cases suitable teaching can develop techniques to mitigate its effects.

THE LIMITATION PERIOD

- b [3] Mr Adams became of full age on 13 March 1990. The action was commenced more than 12 years later. His educational records at the school were destroyed when he turned 21. One of the teachers thinks that Mr Adams was referred to an educational psychologist but there are no surviving notes. Some of the teachers remember that he had learning difficulties which were addressed by remedial teaching but there is nothing very specific about what form this took.
- c The council would be in very considerable difficulties in defending the claim.

- d [4] The council has pleaded that the claim was statute-barred under s 11 of the Limitation Act 1980 which provides a special three-year time limit for actions which claim damages for personal injury. (The normal time for actions in tort is six years.) Time runs from the date on which the action accrued or the 'date of knowledge', whichever is the later. I shall return later to what is meant by the 'date of knowledge', an expression defined in s 14, because the essence of the council's case is that the action is barred because the date of knowledge was before 25 June 1999.

- e [5] The judge (Judge Vincent, in the Torquay and Newton Abbot County Court) tried the question of the date of knowledge as a preliminary issue. He held that it was not before 19 November 1999. This decision was upheld by the Court of Appeal (Peter Gibson, Tuckey and Keene LJJ) ([2003] EWCA Civ 706, [2003] ELR 409). The council appeals to your Lordships' House.

- f [6] The case was argued before the judge and the Court of Appeal on the basis that the claim was for damages for personal injury and that it therefore came within s 11 of the 1980 Act. That was because the Court of Appeal had so decided in respect of a similar claim in *Robinson v St Helens Metropolitan BC* [2002] EWCA Civ 1099, [2003] PIQR P128. But Mr Faulks QC for the council raised the question of whether *Robinson's* case was rightly decided.

WHAT IS THE CLAIM FOR?

- g [7] An action for negligence against a local education authority for educational neglect is a new development. It was only in a trio of cases (*E (a minor) v Dorset CC*, *Christmas v Hampshire CC* and *Keating v Bromley London BC*) which are reported under the name *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353, [1995] 2 AC 633 (that being the name of another appeal which was heard at the same time) that the possibility of such an action was acknowledged. The appeals were against orders striking out the proceedings as disclosing no cause of action. In the Court of Appeal Sir Thomas Bingham MR said ([1994] 4 All ER 640 at 658, [1995] 2 AC 633 at 703) that although he would not go so far as to hold that the education authorities owed the plaintiffs a duty of care, he was equally not willing to say that the claims were 'unarguable or almost incontestably bad'. The House of Lords agreed: see [1995] 3 All ER 353 at 393–400, [1995] 2 AC 633 at 762–771 per Lord Browne-Wilkinson. The actions were reinstated.

- j [8] Because the question was whether a duty of care could exist at all, neither the Court of Appeal nor the House of Lords gave a great deal of attention to the nature of the injury for which damages might be recoverable. Sir Thomas Bingham MR made brief reference to recoverable damage ([1994] 4 All ER 640 at

658, [1995] 2 AC 633 at 703), saying that certain consequences of a negligent failure to provide suitable educational treatment were not compensatable in damages: for example, distress or feeling shy and diffident. But, he said:

'If ... a plaintiff can show: (1) that the adverse consequences of his congenital defect could have been mitigated by early diagnosis of the defect and appropriate treatment or educational provision; (2) that the adverse consequences of his congenital defect were not mitigated because early diagnosis was not made, or appropriate treatment not given or provision not made, with resulting detriment to his level of educational attainment and employability; and (3) that this damage is not too remote, I do not regard the claim for damage to be necessarily bad.'

[9] Evans LJ likewise rejected an argument that the plaintiffs' learning difficulties and behavioural problems were not injuries for which damages could be awarded. He drew an analogy with a physical injury for which the school was not responsible but which it negligently failed to notice or treat. Damages would be recoverable for 'the consequences of delay in obtaining proper treatment' (see [1994] 4 All ER 640 at 661, [1995] 2 AC 633 at 706). It would not matter that the persistent learning difficulties were the result of an existing condition. The question was whether they could have been ameliorated by earlier diagnosis and treatment.

[10] It seems to me that both Sir Thomas Bingham MR and Evans LJ were treating the claim as being for a mental disability (not being able to read and write properly) which ought to have been ameliorated but was allowed to persist. Such a claim in a post-Cartesian world is for personal injury and gives rise to a claim for general damages and, by way of special damages, any consequent economic loss such as loss of earnings or the need to pay for remedial treatment. Sir Thomas Bingham MR specifically said ([1994] 4 All ER 640 at 658, [1995] 2 AC 633 at 703) that fees paid for remedial teaching were in principle recoverable.

[11] In *Phelps v Hillingdon London BC* [1997] 3 FCR 621 an action for educational neglect went to trial. Garland J held that an educational psychologist employed by the local education authority had been negligent in failing to diagnose the plaintiff's dyslexia. He referred to the passages from the judgments of Sir Thomas Bingham MR and Evans LJ in *E (a minor)* which I have mentioned and awarded general and special damages. The general damages included 'loss of congenial employment' and the special damages were the cost of remedial tuition and an 'extremely modest' (£25,000) award for loss of future earnings.

[12] This decision was however reversed by the Court of Appeal ([1999] 1 All ER 421, [1999] 1 WLR 500). Stuart-Smith LJ ([1999] 1 All ER 421 at 433, [1999] 1 WLR 500 at 513) disagreed with the analogy which, in *E (a minor)*, Evans LJ had drawn with an untreated physical injury: in his view, '[d]yslexia is not itself an injury and I do not see how failure to ameliorate or mitigate its effects can be an injury'. What might be recoverable was economic loss on the basis that the educational psychologist had assumed responsibility to take reasonable care to diagnose the problem: compare *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, [1995] 2 AC 145.

[13] On the same day as the Court of Appeal gave judgment in *Phelps's* case, it decided *Anderton v Clwyd CC* [1999] ELR 1. This raised the question of whether a claim based on failure to diagnose dyslexia was a 'claim in respect of personal injuries' within the meaning of s 33(2) of the Supreme Court Act 1981, so as to give the court jurisdiction to order discovery before the commencement of the

a action. The same constitution of the Court of Appeal held that as failure to diagnose dyslexia did not exacerbate the condition and no recognised psychiatric injury was alleged, there was no claim for personal injury.

b [14] Both *Phelps's* case and *Anderton's* case were appealed to the House of Lords and heard together. In *Phelps's* case Lord Slynn of Hadley said ([2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654) that psychological injury could constitute damage for the purposes of a claim in negligence and—

‘so ... can a failure to diagnose a congenital condition and to take appropriate action as a result of which failure a child’s level of achievement is reduced, which leads to loss of employment and wages.’

c [15] When he came to deal with *Anderton's* case he said ([2000] 4 All ER 504 at 528, [2001] 2 AC 619 at 664):

d ‘For the reasons given in my opinion in *Phelps*, psychological damage and a failure to diagnose a congenital condition and to take appropriate action as a result of which a child’s level of achievement is reduced (which leads to loss of employment and wages) may constitute damage for the purpose of a claim. Accordingly, I consider that Garland J in *Phelps* was right in the passage which I have just quoted and that a failure to mitigate the adverse consequences of a congenital defect [is] capable of being “personal injuries to a person” within the meaning of the rules.’

e [16] On *Phelps's* case, Lord Clyde said ([2000] 4 All ER 504 at 533, [2001] 2 AC 619 at 670):

f ‘... while the injury which is alleged to have occurred is principally a loss or at least a retardation of their educational progress with such consequential financial loss and expense as that may entail, it may also involve some form of mental or psychological injury. The loss claimed may be purely of an economic character. But the mental or psychological effects of negligent advice may in themselves be able to constitute a proper head of damages, such as a post-traumatic stress disorder or a psychological illness. Dyslexia is a condition which may in itself become worse through the absence of an appropriate educational regime, and the frustration of an inappropriate regime may cause psychological stress and injury.’

[17] He also agreed with Lord Slynn on the disposal of *Anderton's* case. The other members of the House agreed with both Lord Slynn and Lord Clyde.

h [18] The outcome of the *Phelps* appeal was that the whole of the order of Garland J, including the awards of special and general damages, was restored. In my opinion the award of general damages can be justified only on the basis that the claim was for a personal injury consisting in the lack of ability to read and write. It also seems to me that although strictly speaking *Anderton's* case decides only that the claim was for personal injury within the meaning of s 33(2) of the Supreme Court Act 1981, the reasoning is equally applicable to s 11 of the 1980 Act, which by s 38(1) defines ‘personal injuries’ as including ‘any disease and any impairment of a person’s physical or mental condition’.

i [19] In *Robinson v St Helens Metropolitan BC* [2003] PIQR P128 Sir Murray Stuart-Smith examined the authorities to which I have referred and drew the following conclusion (at [21]):

'Dyslexia ... may itself be an "impairment of a person's mental condition". It is not of course caused by the defendant; but negligent failure to ameliorate the consequences of dyslexia by appropriate teaching may be said to continue the injury, in the same way that the negligent failure to cure or ameliorate a congenital physical condition so that it continues, could give rise to an action for personal injuries. Although as I understand it dyslexia cannot be cured, a dyslexic person can be trained to overcome the difficulties in reading and writing which he experiences.'

[20] In my opinion this summary of the effect of the cases is correct. But on what basis can the lack of the ability to read and write be a personal injury? We know very little about the way the brain works. Some mental disabilities are caused by congenital and irremediable defects in the brain circuitry. But the brain has the most remarkable capacity to compensate for defects or injuries by calling upon other parts of the circuitry. Compare, for example, the recoveries people make from strokes which have irreversibly damaged parts of the brain. Such people, with the aid of physiotherapy and other treatment, appear to get better. Other parts of the brain acquire the ability to do the work of the damaged tissue. It seems to me that Evans LJ was quite right to draw an analogy with negligent failure to treat a physical injury which the defendant did not itself cause. It would be drawing too fine a distinction to say that the neglect caused no injury because nothing could be done to repair the congenital damage in the brain circuitry and the other parts of the brain which would have to be trained to compensate had never been injured. What matters is whether one has improved one's ability to read and write. Treating the inability to do so as an untreated injury originally proceeding from other causes produces a sensible practical result.

THE DATE OF KNOWLEDGE

[21] We are therefore concerned with the limitation period for a claim for personal injury and principally with the date of knowledge as defined in s 14 of the 1980 Act:

'(1) ... references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—(a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and (c) the identity of the defendant ...

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—(a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.'

[22] The court has in addition a discretion under s 33 to disapply the limitation period if it appears that it would be equitable to do so. As both the judge and the Court of Appeal were of opinion that the action had been commenced within the limitation period, they did not have to consider the discretion, although the Court of Appeal expressed a view on how they would have exercised the discretion if called upon to do so.

THE TRIAL OF THE PRELIMINARY ISSUE

a [23] The judge tried the question of the date of knowledge as a preliminary issue because a decision in favour of the council would (subject to the discretion under s 33) have put an end to the proceedings and saved costs. Allegations of educational neglect are expensive to investigate and in *Phelps's* case [2000] 4 All ER 504 at 530–531, [2001] 2 AC 619 at 667 Lord Nicholls of Birkenhead said:

b '... the courts, with their enhanced powers of case management, must seek to evolve means of weeding out obviously hopeless claims as expeditiously as is consistent with the court having a sufficiently full factual picture of all the circumstances of the case.'

c [24] The trial of the preliminary issue was a response to this exhortation. The parties are to be encouraged to try to shorten the proceedings in this way but they may need to give careful thought to the consequences which the judge's findings may have upon the later stages of the trial. If, as appears to have been the intention here, the parties intend that the only finding which will be *res judicata* is the date of knowledge and that findings of fact incidental to that determination are to be open to reconsideration on further evidence at the merits stage of the trial, that should be made clear: compare the remarks of Brooke LJ in *Robinson's* case [2003] PIQR P128 at [42].

d [25] The judge received witness statements from Mr Adams and his friend Ms Monica Harding, an educational psychologist who had met him through a shared interest in salsa dancing. It was she who first suggested to him on 19 November 1999 that he might be suffering from dyslexia. Both were cross-examined. In addition, there was a statement from the council's solicitor which exhibited a number of statements containing such information as the council had been able to gather about Mr Adams's time at school and a report from Dr Peter Gardner, a well-known expert on dyslexia. He did not give oral
e evidence.

f [26] Mr Adams described how he had spoken to Ms Harding, with whom he had previously been acquainted ('our paths had crossed') at a salsa party on 19 November 1999. He was feeling depressed because he was having difficulty in coping with the paperwork involved with a carpentry course he was doing. 'I then went on to describe all the problems that I had previously experienced during my working life ...' Ms Harding told him that she thought he was
g dyslexic. As a result, he went to see a solicitor on 12 January 2000 and the solicitor obtained legal aid on 15 March. An appointment was arranged with Dr Gardner, who prepared a report.

h [27] Dr Gardner reported that Mr Adams was of average intellectual ability; more intellectually able than 65% of his age group peers. On the other hand, he suffered from severe dyslexia (5 on a scale of 1 to 6). He exhibited significant difficulties with depression, phobic symptoms and, to a lesser extent, obsessional symptoms. The scale of stress which he described himself as suffering was greater than 91% of adults. His personal self-esteem was low. He was prone
j abruptly to develop palpitations, pounding heart or accelerated heart rate, sweating, chest pain or discomfort and chills or hot flushes, which qualified for the diagnosis of liability to panic attacks. He said that he displayed all the symptoms of social phobia: marked or persistent fear of being exposed to unfamiliar people, causing anxiety and panic attacks, which he either avoided or endured with intense anxiety or distress. He also suffered from depression, evidenced by daily psychomotor agitation or retardation, fatigue or loss of

energy, feelings of worthlessness or excessive or inappropriate guilt, diminished ability to think or concentrate or indecisiveness and recurrent thoughts of death or thoughts of suicide, all of which caused clinically significant distress or impairment in social, occupational or other important areas of functioning. Dr Gardner said that these psychological/psychiatric syndromes were a consequence of his undiagnosed and untreated learning difficulties.

[28] Mr Adams said in evidence that he had not sought any advice about the literacy problems which were causing his distress because he wanted to hide them. He did not want people to think he was stupid. He went to the doctor about a variety of complaints over the years but never mentioned it. He said that he had heard of dyslexia and knew that it concerned people who had problems with writing. But he did not investigate his own problem because 'I didn't want to go there'. He spoke to the doctor about feeling unhappy and stressed and other personal problems ('just ended abusive relationship', noted the doctor in 1998) but not that their cause was inability to read and write. Nor did he mention it to anyone else. On the other hand, on a social occasion on 19 November 1999 he spilled out the entire story to Ms Harding, a lady nearly 20 years his senior whom he says he hardly knew and had no reason to believe had any expertise in the matter. After talking to her, the first thing he did was to consult a solicitor.

THE FINDINGS OF FACT

[29] The judge found that although Mr Adams had known since childhood that he had psychological problems and that they were 'linked in some way to his problems with reading and writing', he did not know that they were attributable to the council in the sense that he had a condition which had been capable of being addressed or managed and that the council had not done so. He therefore did not have actual knowledge which satisfied s 14(1)(b) of the 1980 Act—'that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence'. This finding was unsuccessfully challenged in the Court of Appeal but the challenge has not been pursued before your Lordships' House.

[30] The judge then dealt with whether Mr Adams had constructive knowledge under s 14(3). As an adult, he had plenty of time to seek help and investigate the problem but he did not. But the judge held that he did not have constructive knowledge either:

'He gave me a cogent explanation for his failure, namely the fact that people with his disability develop coping strategies to mitigate its effect and find the idea of disclosing the inability to properly read and write humiliating. This is, in my judgment, an entirely natural and reasonable consequence of having this type of learning disability which has not been properly addressed. You do not have to be shy to experience this reluctance to talk to people and disclose your inabilities. So I consider that a reasonable person with his unaddressed dyslexia would be unlikely to have sought help or to have put two and two together and seen the glimmerings of a claim against the defendant. The fact that the claimant could discuss feelings of stress with his GP, as is evidenced by his medical records, is a very different matter. Inability to properly read and write and the emotions that that engenders would not be seen by the reasonable undiagnosed dyslexic as medical concerns for a GP in any event, in my judgment.'

a [31] In the Court of Appeal, Tuckey LJ accepted this opinion of what the reasonable dyslexic would have done. He said ([2003] ELR 409 at [25]):

b 'The judge's essential finding in this case was that a reasonable person with the claimant's unaddressed dyslexia would be unlikely to have sought help or to have put two and two together and seen the glimmerings of a claim against the defendant. So his state of knowledge was not such as to give him an informed choice between accepting things as they were and getting on with his life or seeking advice to give him the required knowledge.'

[32] He went on however to say (at [26]):

c 'It does not, I think, follow that such a conclusion would be reached in every case where, by chance, sometimes many years later, a claimant discovers that he is or may be dyslexic.'

THE TEST FOR CONSTRUCTIVE KNOWLEDGE

d [33] Section 14(3) of the 1980 Act uses the word 'reasonable' three times. The word is generally used in the law to import an objective standard, as in 'the reasonable man'. But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part of someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when the person is assumed to be a normal young child or a person with a more specific set of personal characteristics. The breadth of the appropriate assumptions and the degree to which they reflect the actual situation and characteristics of the person in question will depend upon the reasons why the law imports an objective standard.

e [34] Section 14(3) has something of a history. Until the Limitation Act 1963, time ran from the date on which the cause of action accrued. If it accrued before the injured person knew or could have known about it, that was his hard luck: see *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758. The 1963 Act allowed the limitation period to be extended in claims for damages for personal injury for the period during which the material facts had been outside the actual or constructive knowledge of the plaintiff. Section 7(5) defined what it meant to say that a fact was outside the plaintiff's constructive knowledge:

h '... (b) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken ... for the purpose of ascertaining it; and (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.'

i [35] In *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1969] 1 All ER 708 at 718, [1969] 1 WLR 415 at 419 Lord Denning MR explained how this test should be applied:

'You have to ask yourself: At what date was it reasonable for him—for the sick man himself—to have taken advice and found out that his illness was due to his employer's negligence or breach of duty. You do not ask: At what date would a reasonable person have taken advice? You ask: At what date was

it reasonable *for this man* to take it. In other words, at what date ought he to have taken advice and found out that he had a worthwhile action?' a

[36] Widgery LJ ([1969] 1 All ER 708 at 720, [1969] 1 WLR 415 at 421) expressed a similar view:

'When one has to consider constructive notice under s 7(5)(c) it is necessary to look at all the circumstances of the particular individual concerned to see whether, when all those circumstances are looked at in the round, it can be said that his failure to take advice was reasonable.' b

[37] In *Smith v Central Asbestos Co Ltd* [1971] 3 All ER 204, [1972] 1 QB 244 the Court of Appeal applied this test and in the House of Lords Lord Reid said ([1972] 2 All ER 1135 at 1139, [1973] AC 518 at 530): c

'I agree with the view expressed in the Court of Appeal that this test is subjective. We are not concerned with "the reasonable man". Less is expected of a stupid or uneducated man than of a man of intelligence and wide experience.' d

[38] This was, however, an obiter dictum because the case turned upon the question of whether the plaintiff needed to know that his injury was attributable to the defendant's negligence or fault. On this point the House was divided.

[39] The *Central Asbestos* case revealed some defects in the 1963 Act (Lord Reid said ([1972] 2 All ER 1135 at 1138, [1973] AC 518 at 529) that it had 'a strong claim to the distinction of being the worst drafted Act on the statute book') and the Law Reform Committee was invited to look at it. Its main recommendation in relation to the date of knowledge was that it should not be necessary for the plaintiff to know that he had a cause of action or that the defendant had in some sense been at fault: see pp 20–21 (paras 53–55) of the committee's *Twentieth Report Interim Report on Limitation of Actions: in Personal Injury Claims* (Cmnd 5630). But the committee also considered (p 23 (para 59)) whether 'the definition of constructive knowledge should apply an objective or a subjective test'. It agreed that the definition of constructive knowledge should allow the court to consider all the circumstances of the case, including the fact that most people do not have a legal or businesslike turn of mind and that a plaintiff may, as a result of an accident, 'have been rendered less diligent in the protection of his interests than he would otherwise have been'. They cited with approval, as exemplifying this approach, the passage from the judgment of Widgery LJ in *Newton's* case to which I have already referred. On the other hand, they thought that these matters were already implicit in the concept of the reasonable man. e

[40] Finally, the committee recommended (pp 21–22 (paras 56, 57)) that the court should have a residual discretion to disapply the limitation period after considering the hardship which barring the action would cause to the plaintiff and allowing it to proceed would cause to the defendant. f

[41] The 1963 Act was repealed and the law recast substantially in accordance with the recommendations of the Law Reform Committee by the Limitation Act 1975. These provisions were consolidated in the 1980 Act. g

[42] In recent years the courts have tended to emphasise the objective element in the constructive knowledge test and to reduce what Lord Macmillan in *Glasgow Corp v Muir* [1943] 2 All ER 44 at 48, [1943] AC 448 at 457 called 'the personal equation'. In *Forbes v Wandsworth Health Authority* [1996] 4 All ER 881, [1997] QB 402 the question was whether the plaintiff, who had a history of h

a
b
c
d
e

circulatory problems in his legs, ought to have sought advice as to why an attempted bypass operation had resulted in one leg having to be amputated. When he did inquire, some ten years after the event, he was told that it was because the operation had been unsuccessful and resulted in a loss of blood supply which threatened gangrene. This was not in itself alleged to be negligent, but the surgeon had made a second unsuccessful attempt to operate on the following day and the plaintiff was advised that he would have had a better chance of success if he had tried again earlier.

[43] The judge found that the plaintiff (who had since died) did not have constructive knowledge that the loss of his leg was caused by any act or omission on the part of the surgeon. He trusted the surgeon (who had performed two previous successful operations on his legs) and thought he had simply suffered a misfortune. Stuart-Smith LJ was prepared to accept that one might not be able to say that such an attitude was unreasonable, but thought that s 14(3) would fail in its purpose unless it was assumed that a reasonable victim of an injury such as the loss of a leg will display some curiosity about why it should have happened. He pointed out that otherwise the limitation period could be indefinitely extended. Until three years after the date of knowledge was found to have been passed, the plaintiff had an absolute right to sue. This could be unjust to defendants who, contrary to the policy of the Act, would be vexed with stale claims. On the other hand, tightening up the requirements of constructive knowledge need not involve injustice to a plaintiff because the discretion under s 33 gave the court power to allow him to sue when it was equitable to do so. But s 33, unlike s 14, allowed the court to consider fairness to both sides. So Stuart-Smith LJ said ([1996] 4 All ER 881 at 890, [1997] QB 402 at 413):

f

‘In my judgment, a reasonable man in the position of the deceased, who knew that the operation had been unsuccessful, that he had suffered a major injury which would seriously affect his enjoyment of life in the future, would affect his employability on the labour market, if he had any, and would impose substantial burdens on his wife and family in looking after him, if he is minded to make a claim at any time, should and would take advice reasonably promptly.’

g

[44] Evans LJ ([1996] 4 All ER 881 at 899, [1997] QB 402 at 422) likewise relied upon the policy and scheme of the Act as a whole:

h

‘Since there is a wide discretionary power to extend the period in circumstances which Parliament has defined in s 33, there is no clear requirement to construe the knowledge provisions in s 14 narrowly or in favour of individual plaintiffs. I therefore consider that they should be interpreted neutrally so that in respect of constructive knowledge under s 14(3) an objective standard applies.’

j

[45] I find this reasoning persuasive. The Court of Appeal did not refer to the decisions on the 1963 Act which had taken a more subjective view. While it is true that the language of s 7(5) of the 1963 Act was not materially different from that of s 14(3) of the 1980 Act, I think that the Court of Appeal in *Forbes’s* case was right in saying that the introduction of the discretion under s 33 had altered the balance. As I said earlier, the assumptions which one makes about the hypothetical person to whom a standard of reasonableness is applied will be very much affected by the policy of the law in applying such a standard. Since the 1975 Act, the postponement of the commencement of the limitation period by

reference to the date of knowledge is no longer the sole mechanism for avoiding injustice to a plaintiff who could not reasonably be expected to have known that he had a cause of action. It is therefore possible to interpret s 14(3) with a greater regard to the potential injustice to defendants if the limitation period should be indefinitely extended. a

[46] I therefore think that Lord Reid's dictum in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135 at 1139, [1973] AC 518 at 530 that the 'test is subjective' is not a correct interpretation of s 14(3). The same is true of a dictum of Purchas LJ in *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 399, [1993] 1 WLR 782 at 799: b

'The standard of reasonableness [is] finally objective but must be qualified to take into consideration the position, and circumstances and character of the plaintiff ... In considering whether or not the inquiry is, or is not, reasonable, the situation, character and intelligence of the plaintiff must be relevant.' c

[47] It is true that the plaintiff must be assumed to be a person who has suffered the injury in question and not some other person. But, like Roch LJ in *Forbes's* case [1996] 4 All ER 881 at 901, [1997] QB 402 at 425 I do not see how his particular character or intelligence can be relevant. In my opinion, s 14(3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate. d

CONSTRUCTIVE KNOWLEDGE IN THIS CASE e

[48] The judge held that Mr Adams acted reasonably in making no inquiry into the reasons for his literacy problems. I do not think that he based this finding upon matters of character or intelligence which were peculiar to Mr Adams. If the judge had been relying upon his personal characteristics, he might have been hard put to explain why someone who was willing to confide in a lady he met at a dancing party was unable to confide in his doctor. But the judge appears to have thought that extreme reticence about his problems was the standard behaviour which ought to be expected from anyone suffering from untreated dyslexia and that the conversation with Ms Harding was an aberration. f

[49] In principle, I think that the judge was right in applying the standard of reasonable behaviour to a person assumed to be suffering from untreated dyslexia. If the injury itself would reasonably inhibit him from seeking advice, then that is a factor which must be taken into account. My difficulty is with the basis for the finding that such a person could not reasonably be expected to reveal the source of his difficulties to his medical adviser. In the absence of some special inhibiting factor, I should have thought that Mr Adams could reasonably have been expected to seek expert advice years ago. The congeries of symptoms which he described to Dr Gardner, which he said had been making his life miserable for years, which he knew to be rooted in his inability to read and write and about which he had sought medical advice, would have made it almost irrational not to disclose what he felt to be the root cause. If he had done so, he would no doubt have been referred to someone with expertise in dyslexia and would have discovered that it was something which might have been treated earlier. g

[50] The judge's finding as to the generally inhibiting effect of untreated dyslexia appears to have been based upon judicial notice. There was certainly no h

a basis for such a finding in Dr Gardner's report, which was the only expert evidence before him. What the report did establish was that dyslexics are characteristically normal intelligent people and that Mr Adams was such a person. Although one can easily understand someone wanting to avoid the social embarrassment of revealing his difficulties about reading and writing to colleagues at work and other acquaintances, I think that it would need some
b evidential foundation before one could assume that such a person was likely to be unable to speak about the matter to his doctor. Such evidence was entirely lacking.

[51] In my opinion, there is no reason why the normal expectation that a person suffering from a significant injury will be curious about its origins should not also apply to dyslexics. In the absence of such an expectation, there is no
c reason why the limitation period should not be prevented from running for an indefinite period until some contrary impulse leads to the discovery which brings it to an end. For the reasons given by Stuart-Smith LJ in *Forbes's* case, this could face a defendant with a claim so stale as to be virtually impossible to defend. It also means that although Tuckey LJ said ([2003] ELR 409 at [26]) that the decision
d of the judge and Court of Appeal did not mean that 'such a conclusion would be reached in every case where, by chance, sometimes many years later, a claimant discovers that he is or may be dyslexic', I do not find it easy to see why not.

[52] For these reasons the date of constructive knowledge was in my opinion well before three years before the issue of the writ.

e SECTION 33 OF THE 1980 ACT

[53] That leaves the question of whether the court should exercise its discretion to disapply the limitation period under s 33. Neither party invited your Lordships to remit this matter to the judge but made submissions on the basis that the House would exercise the discretion itself. The Court of Appeal said (at
f [28]) that if it had been necessary to apply s 33, it was 'most unlikely' that it would have allowed the claim to proceed.

[54] In *Robinson v St Helens Metropolitan BC* [2003] PIQR P128 Sir Murray Stuart-Smith said:

'[32] The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims especially when any witnesses the
g defendants might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why. These cases are very time consuming to prepare and try and they inevitably divert resources from the education authority to defending the claim rather than teach. Under s. 33 the onus is
h on the claimant to establish that it would be equitable to allow the claim to proceed having regard to the balance of prejudice.

[33] The question of proportionality is now important in the exercise of any discretion, none more so than under s. 33. Courts should be slow to exercise their discretion in favour of a claimant in the absence of cogent
j medical evidence showing a serious effect on the claimant's health or enjoyment of life and employability. The likely amount of an award is an important factor to consider, especially if, as is usual in these cases, they are likely to take a considerable time to try. A claim that the claimant's dyslexia was not diagnosed or treated many years before at school, brought long after the expiry of the limitation period, extended as it is until after the claimant's majority, will inevitably place the defendants in great difficulty in contesting

it, especially in the absence of relevant witnesses and documents. The contesting of such a claim would be both expensive and likely to divert precious resources. Courts should be slow in such cases to find that the balance of prejudice is in favour of the claimant.’

[55] Peter Gibson and Brooke LJ agreed. Their Lordships think that these observations from judges with considerable experience of exercising and overseeing the s 33 jurisdiction carry great weight. As in *Phelps v Hillingdon London BC* [1997] 3 FCR 621, where the plaintiff recovered £12,500 general damages and about £32,000 special damages (mostly an estimate of loss of earnings), the uncertainties of causation and quantification mean that in the event of success an award is likely to be relatively modest. The council is in a very difficult position and there are no special features about the reasons why Mr Adams left his claim so late which tilt the balance in his favour.

[56] I would therefore allow the appeal and dismiss the action.

LORD PHILLIPS OF WORTH MATRAVERS.

[57] My Lords, I agree, for the reasons given by my noble and learned friend Lord Hoffmann that this appeal should be allowed. I have reached that conclusion regardless of the precise test for ‘constructive knowledge’ laid down by s 14(3) of the Limitation Act 1980. It will be a rare case where the result turns on the true construction of that subsection and this is not such a case. None the less I share the conclusion of Lord Hoffmann as to the correct test for the reasons that he gives.

[58] I would add that the test of what is reasonable is one which is a recurrent motif in the provisions of the 1980 Act and some, at least, of those provisions suggest that the test of what is reasonable is an objective test which applies the standards of the reasonable man. Thus the reference to ‘all reasonable steps’ in s 14(3)(b) itself and, in a similar context, in s 14A(10)(b) suggests an objective standard. The same is true of the provision in s 14A(7) that—

‘the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings ...’

These provisions lend some support to the conclusion that the standard of reasonable behaviour for the purposes of s 14(3) is one which does not have regard to aspects of character or intelligence which are peculiar to the claimant.

LORD SCOTT OF FOSCOTE.

[59] My Lords, there are three issues on this appeal. First, there is the question whether the respondent’s action for damages is one where ‘the damages claimed ... include damages in respect of personal injuries ...’ to the [respondent]. If it is, then it is an action to which s 11 of the Limitation Act 1980 and, consequently, s 14 of that Act apply.

[60] The second issue, assuming that ss 11 and 14 do apply, is how s 14(3) should be applied to the facts of this case. This is the constructive notice issue. What was the respondent’s ‘date of knowledge’ (see s 14(1)) from which the three-year limitation period applicable to his personal injuries action (if that is what it is) runs?

a [61] The third issue, which arises only if s 11 applies and the normal limitation period of three years has expired, is whether it would none the less 'be equitable' to allow the action to proceed (s 33(1)).

b [62] I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Hoffmann and agree with his conclusions on each of these three issues. Since, however, we are disagreeing with the conclusions reached by the trial judge and by a unanimous Court of Appeal, I propose very briefly to explain in my own words my reasons for disagreeing.

THE FIRST ISSUE

c [63] Section 38(1) of the 1980 Act defines 'personal injuries' as including 'any impairment of a person's physical or mental condition'. So, is the respondent claiming damages for the impairment of his physical or mental condition?

d [64] The nature of the respondent's claim must be taken from his pleaded case. From 1977, when he was five years old, to 1988, when he was 16, he was a pupil at schools for which the appellant council, was, or has become, responsible. By 1981 his reading ability had fallen substantially behind the standard to be expected of someone of his age. This retardation persisted so that by the time he left school he was barely literate. His literacy retardation reduced his competence across the entire school curriculum. He had been, from at least 1981, a candidate for specialised educational assessment but he was never referred for such assessment. If he had been so referred a diagnosis of dyslexia might have been made and remedial steps taken.

e [65] The respondent says that the teachers at the schools he attended owed him a duty 'to use reasonable professional skill and care to educate [him] and in doing so to assess and treat his educational needs and problems' (para 2 of the particulars of claim). He says that they were in breach of that duty 'in that they failed to identify [his] special learning difficulty, namely, dyslexia and failed to use appropriate teaching to ameliorate his difficulties' (para 7 of the particulars of claim) and that as a result he has suffered personal injury, loss and damage.

f [66] The 'particulars of injury', given under para 9 of the particulars of claim, bear upon the question whether the damages claimed include damages for personal injuries. The particulars include the following:

g 'The claimant has a pattern of specific learning disabilities of a dyslexic nature. These are considered to be severe in nature. Had the claimant's dyslexia been diagnosed and had he been taught appropriately at school the claimant would have achieved higher examination results and a higher degree of general literacy. The claimant suffers from psychological/psychiatric syndromes, namely panic attacks, social phobia and symptoms of depression that are causally related to the non-diagnosis and non-treatment of his constitutional dyslexic difficulties.'

h The particulars of injury refer also to a lack of future employment prospects and a reduced learning capacity but the passage I have cited is that on which reliance must be placed if the action is to be categorised as one for 'personal injuries'.

j [67] It is important when considering the first issue to keep in mind that the alleged negligence of the educational authorities did not cause the respondent's dyslexia. His complaint is that they failed to take steps to counteract its effect, to 'ameliorate' his difficulties (para 7 of the particulars of claim). He seeks damages for the consequences of that failure. Subject to the Limitation Act point I would be in no doubt but that if the respondent can establish that in failing to teach him

to read the schools were in breach of the duty they owed him he would be entitled at least to general damages. The ability to read is a benefit that nobody who is able to read would dream of undervaluing. It is not simply a benefit of economic value leading to enhanced employment prospects, although it certainly is that. It is a benefit that transforms the whole quality of life of the person who acquires it.

[68] But although the deprivation of the benefit of literacy may, if brought about by a breach of duty, entitle the victim to general damages it does not, to my mind, fit comfortably within the concept of a 'personal injury'. It is not, in my view, in itself an impairment of a physical or mental state. The alleged consequences of the deprivation, however, ie 'panic attacks', 'social phobia' and 'depression', might well be regarded as impairments of the mental state of the sufferer.

[69] There is some authority on this point. In *Anderton v Clwyd CC* (reported as *Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619) this House had to consider whether pre-action discovery could be claimed pursuant to s 33(2) of the Supreme Court Act 1981. The section has since been amended but at that time pre-action discovery could only be sought by a person likely to be a party to proceedings in which 'a claim in respect of personal injuries to a person ... is likely to be made' (s 33(2)). Section 35(5) of the 1981 Act said that 'personal injuries' included 'any impairment of a person's physical or mental condition', a definition identical to that in s 38(1) of the 1980 Act. The potential claimant in *Anderton's* case was dyslexic. Her problem had not been diagnosed while she was at school and consequently no remedial teaching had been provided. She said that this had led to psychological problems. This House, disagreeing with the Court of Appeal, took the view that her proposed claim was a claim for 'personal injuries'. Lord Slynn of Hadley ([2000] 4 All ER 504 at 528, [2001] 2 AC 619 at 664) said that it would be wrong to adopt an over-legalistic view of what were 'personal injuries' and—

'a failure to mitigate the adverse consequences of a congenital defect [is] capable of being "personal injuries to a person" within the meaning of the rules.'

[70] If the proposed claim in *Anderton's* case was a 'personal injuries' claim then so too must the respondent's claim in the present case be, or at least include, a 'personal injuries' claim. The first issue must be decided in favour of the respondent.

THE SECOND ISSUE

[71] As to the second issue, the proper approach to s 14(3) of the 1980 Act, I, like my noble and learned friend Lord Hoffmann, prefer the reasoning of Stuart-Smith and Evans LJ in *Forbes v Wandsworth Health Authority* [1996] 4 All ER 881, [1997] QB 402 to that to be found in *Nash v Eli Lilly & Co* [1993] 4 All ER 383, [1993] 1 WLR 782. The reference in s 14(3) to 'knowledge which he might reasonably have been expected to acquire' should, in my opinion, be taken to be a reference to knowledge which a person in the situation of the claimant, ie an adult who knows he is illiterate, could reasonably be expected to acquire. Personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice about his illiteracy problems but which would not be expected to have inhibited others with a like disability, should be left out of the equation. It is the norms of behaviour of persons in the situation of the claimant that should be the test.

a [72] One of the problems in the present case is that, for entirely understandable reasons, the Limitation Act issue was directed to be dealt with as a preliminary point. As Lord Hoffmann has noted (see para [50] of his opinion), there was no evidence before the court justifying the conclusion that Mr Adams' inhibitions, to which his failure to disclose to his medical adviser his illiteracy problem was attributed, were inhibitions which other people with that problem would be expected to share. My own, non-expert, inclination would be to think that a person of average intelligence (Mr Adams was rated as above average intelligence) who knew himself to be illiterate, knew that his illiteracy was at the back of problems such as stress, depression etc and who consulted a doctor about those problems, could reasonably be expected to inform the doctor about the illiteracy. Expert evidence to the contrary could lead to a different conclusion but in the present case there has been no evidence to the contrary.

b [73] My noble and learned friend Baroness Hale of Richmond has referred in her opinion (see [83], below) to the Law Commission's conclusion in p 269 their consultation paper *Limitation of Actions* (1998) (Law Com Consultation Paper no 151, p 269 (para 12.54)) that it would be 'fairer to plaintiffs ... that the test for constructive knowledge should contain a large subjective element'. My Lords, that might well be so. But it would be fairer to defendants that the test should be mainly objective. Statutory provision for constructive knowledge in the context of limitation of actions must strike a balance between the interests of claimants and those of defendants. There may seem to be an unfairness to claimants in banning them on lapse of time grounds from bringing actions that they did not know they could bring. But there is also an unfairness to defendants in allowing actions to be brought after a lapse of time that has seriously prejudiced their ability to refute the claims made against them and for which they are in no way responsible. In my opinion, the approach to s 14(3) constructive knowledge should be mainly objective. What would a reasonable person placed in the situation in which the claimant was placed have said or done? If the result of applying the mainly objective test would seem unfair to a particular claimant, the issue of fairness, as between claimant and defendant, can be considered under s 33. That is the third issue.

THE THIRD ISSUE

g [74] For the reasons given by Lord Hoffmann in para [55] of his opinion, I, too, conclude that the balance of fairness tilts against allowing this action to proceed. I agree, therefore, that the appeal should be allowed and the action dismissed.

LORD WALKER OF GESTINGTHORPE.

h [75] My Lords, I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Baroness Hale of Richmond. So far as there is no conflict between their opinions, I respectfully agree with both.

j [76] On the point on which Baroness Hale takes a rather different approach, I think that her review of the Law Commission's deliberations in this field, and of the changes made by the Latent Damage Act 1986, shows that the law has still not (despite the best efforts of the Law Commission) achieved a wholly coherent state. I agree with Lord Hoffmann that it is no longer possible to state roundly (as Lord Reid did in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135 at 1139, [1973] AC 518 at 530) that the 'test is subjective'. The courts have moved towards a more objective approach, and in my opinion they are right to have done so.

[77] But it is not contended by either side that the correct test is either wholly subjective or wholly objective. The distinction between circumstances and personal characteristics is intelligible and helpful in many cases, but there are bound to be some in which the distinction is elided (an extreme example being a claimant who has suffered serious head injuries raising an issue as to whether he has legal capacity either to commence or to compromise legal proceedings on his own: see *Masterman-Lister v Brutton & Co*, *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 3 All ER 162, [2003] 1 WLR 1511. Baroness Hale's distinction between personal characteristics which affect a person's ability to acquire information and those which affect a person's reaction to the information once acquired is a distinction which will be useful in some cases. But characteristics such as shyness, embarrassment and lack of assertiveness (which feature in several of the reported cases) may be relevant both to the acquisition of information and to acting (or failing to act) on it.

[78] I would therefore be cautious about any simple formula put forward to cover every case which might occur. On the facts of this case (in agreement with Lord Hoffmann) I consider that s 14(3) of the Limitation Act 1980 required the court to assume that a claimant in the respondent's position, suffering from the disability and the resultant misery which he said he had suffered, would have sought medical advice much sooner.

[79] I would therefore allow the appeal.

BARONESS HALE OF RICHMOND.

[80] My Lords, I entirely agree, for the reasons given by my noble and learned friend, Lord Hoffmann, that this is a 'personal injury' within the meaning of s 38(1) of the Limitation Act 1980. It is an impairment of the claimant's mental condition which may sound in damages for loss of amenity even if the major part of any claim would be for any resulting financial loss. It is, as Mr Faulks QC acknowledged, in everyone's interests that there be clarity about the classification of these claims, even if he would have preferred a different one.

[81] I take a slightly different view, however, on the 'date of knowledge' and in particular the test for imputed or constructive knowledge under s 14(3) of the 1980 Act (the text of which is set out by Lord Hoffmann at [21], above). It is obviously possible to read s 14(3) in two different ways because highly experienced judges sitting in different constitutions of the Court of Appeal have done so. In *Nash v Eli Lilly & Co* [1993] 4 All ER 383, [1993] 1 WLR 782, a court consisting of Purchas, Ralph Gibson and Mann LJ, in a judgment given by Purchas LJ, held that the standard of reasonableness had to take into account, not only the position, situation and circumstances of the claimant, but also her character and intelligence. In *Forbes v Wandsworth Health Authority* [1996] 4 All ER 881, [1997] QB 402, Roch LJ considered himself bound to follow the same approach. Stuart-Smith and Evans LJ applied a more stringent test, in which the personal characteristics of the claimant were to be disregarded, although the question was what he should reasonably have done when placed in the situation in which he found himself. In *Smith v Leicester Health Authority* [1998] Lloyd's Rep Med 77, a court consisting of Roch and Mantell LJ and Sir Patrick Russell, in a judgment given by Roch LJ, resolved the difference in favour of the *Forbes* test: 'What would the reasonable person have done placed in the situation of the plaintiff?' The court (at 86) accepted that her 'individual characteristics which might distinguish her from the reasonable woman should be disregarded'. In *O'Driscoll v Dudley Health Authority* [1998] Lloyd's Rep Med 210, decided three

a months later, Simon Brown LJ and Sir Christopher Slade found it unnecessary to express a view on constructive knowledge, but Otton LJ would have found that the claimant had such knowledge whichever test was applied. And in *Fenech v East London and City Health Authority* [2000] Lloyd's Rep Med 35, Simon Brown LJ, with whom Robert Walker LJ and Wilson J agreed, found it unnecessary to attempt any final reconciliation, because 'on any sort of objective approach' the claimant should have made inquiries long before she did. But he did point out that in *Ali v Courtaulds Textiles Ltd* (1999) 52 BMLR 129 at 135, where Henry LJ had quoted the observation in *Nash's case* ([1993] 4 All ER 383 at 384, [1993] 1 WLR 782 at 796) that the 'span of reasonable inquiry will depend on the factual context of the case and the subjective characteristics of the individual plaintiff involved', the court had not been referred to *Forbes's case*. It has rarely, if ever, been necessary to resolve the difference in order to decide the case.

[82] In addition to the reasons given by Stuart-Smith and Evans LJ for preferring the more objective approach, quoted by Lord Hoffmann in [43] and [44], above, is the reason given by Colman J in *Parry v Clwyd Health Authority* [1997] PIQR P1 at 10:

d 'If the purpose of section 14(3) is to create deemed or constructive knowledge in circumstances where there is no actual knowledge, it is highly improbable that Parliament intended that the application of that subsection should be qualified by taking into account the very characteristic of the plaintiff by reason of which he failed to appreciate the subsection (1) facts known to him and therefore to acquire *actual* knowledge. For these reasons e it would seem that, as a matter of principle, the criteria relevant for the purpose of applying the reasonableness test under subsection (3) should be exclusively objective.'

[83] The Law Commission, in their consultation paper *Limitation of Actions* f (1998) (Law Com Consultation Paper no 151), pointed to the lack of consistency in the courts' interpretation of s 14(3). They cited law reform bodies in New Zealand, Ontario and Western Australia which had favoured the more subjective view. They concluded (pp 269–270 (para 12.54)):

g 'As it is fairer to plaintiffs and would not create significant extra uncertainty, we also consider that the test for constructive knowledge should contain a large subjective element: what ought the plaintiff, in his circumstances and with his abilities, to have known had he acted reasonably? The question should not be what a reasonable person would have discovered, but what the plaintiff himself would have discovered if he had acted reasonably. The personal characteristics of the plaintiff, such as his or h her level of education and intelligence, and the plaintiff's resources, would therefore be relevant to the question whether the plaintiff acted reasonably ... A number of the employment-related personal injuries cases have involved plaintiffs in unskilled manual jobs having little education ... Conversely, in cases where the plaintiff has some degree of expert j knowledge which should have caused him to appreciate facts at an earlier stage than would have been appropriate for the average person, that knowledge should be taken into account to advance the date of discoverability.'

[84] This provisional view should, however, be seen in the context of the core scheme then recommended by the Commission. This would have imposed a

single three-year time limit from the 'date of discoverability', subject to a long-stop deadline from the date on which the cause of action accrued. Crucially, there would have been no equivalent to the discretion currently given by s 33 of the 1980 Act to disapply the limitation period altogether in personal injury cases. The complexities and fine distinctions involved in applying the two different provisions, referred to more recently by the Court of Appeal in *KR v Bryn Alyn Community (Holdings) Ltd (in liq)* [2003] EWCA Civ 85 at [18], [2004] 2 All ER 716 at [18], [2003] QB 1441, would have been avoided. In that context, a more generous approach to discoverability is entirely understandable, perhaps necessary.

[85] In their report *Limitation of Actions* (2001) (Law Com no 270) the Law Commission adhered to their provisional view that the claimant should be considered to have constructive knowledge of the relevant facts when the claimant in his or her circumstances with his or her abilities ought reasonably to have known of them (see p 53 (para 3.50)). This had been supported by the majority of respondents to the consultation paper. However, the Commission had been persuaded both to abandon any long-stop (see p 69 (para 3.107)) and to retain a discretion to disapply the limitation period (see pp 91–92 (para 3.169)) in personal injury cases. Some personal injury cases, in particular those involving childhood abuse, present particular difficulties for any limitation regime. It may be difficult to discover whether or not there were initial actionable injuries, still less whether they were 'significant' for the purpose of s 14(1). The real complaint is about the longer term psychiatric and economic sequelae, which may not emerge until many years later. Even if there was significant injury at the time, the effects of the abuse may be such that the claimant is unable to contemplate taking action until years later. The Commission were concerned that their proposals would not operate fairly for all sexual abuse claimants unless there was a discretion (see pp 89–90 (para 3.162)). They considered, however, that with a more subjective approach to discoverability, it would only be in the most exceptional cases that a court would be justified in allowing the claimant more time. This had been the expectation of the Law Reform Committee when it first recommended the discretion, but it was not borne out by events.

[86] The government has indicated that it accepts the Law Commission's recommendations in principle, although it will give further consideration to some aspects with a view to bringing forward legislation when a suitable opportunity arises (see Law Commission, Annual Report 2002/2003 (Law Com no 280) (Cm 5937) p 13 (para 3.14)). This history does suggest that the policy considerations which weighed with the majority in *Forbes's* case have not weighed so heavily elsewhere.

[87] There is a related difficulty. Wording virtually identical to that in s 14(3) also appears in s 14A(10), dealing with constructive knowledge in negligence claims for latent damage or other economic loss not involving personal injuries. There is no equivalent to the s 33 discretion for such claims, although there is an overriding time limit provided by s 14B. Both features would support the more generous approach to constructive knowledge. In *Coban v Allen* (1997) 8 Med LR 316, the Court of Appeal applied the *Nash* test to s 14A(10). The case involved a personal attribute, in that the claimant's explanation for not pursuing inquiries with his solicitor was that he was an overstayer who feared deportation. The court none the less held that, having good reason to make such inquiries, it was reasonable for him to do so despite his immigration status. Later cases under s 14A(10) have not referred to the *Forbes/Nash* distinction at all but have had little

a difficulty in deciding whether or not the claimant could reasonably have been expected to make earlier inquiries: see e.g. *Webster v Cooper & Burnett (a firm)* [2000] PNLR 240, *Mortgage Corp v Lambert & Co (a firm)* [2000] PNLR 820, *Glaister v Greenwood* [2001] PNLR 602. Clearly, the approach under both provisions should be the same, as should the approach between the two parts of ss 14(3) and 14A(1b)—to what the claimant could have discovered for himself and what he could have discovered with professional help.

b [88] I wonder, therefore, how much difference there is in practice between the two approaches. We are not here concerned with knowledge that the claimant might reasonably have been expected to acquire from facts observable or ascertainable by him. We are concerned with knowledge he might reasonably be expected to acquire with the help of medical or other advice which it is reasonable for him to seek. The question is when is it reasonable to expect a potential claimant to seek such advice? Objectively it will be reasonable to seek such advice when he has good reason to do so. This will depend upon the situation in which the claimant finds himself, which includes the consequences of the accident, illness or other injury which he has suffered. Rarely, if ever, will it depend upon his personal characteristics. If, faced with a situation in which it is reasonable to seek advice, a person fails to do so, then the fact that he was reluctant to make a fuss, or embarrassed to talk to his doctor, while understandable, does not take him outside the subsection.

c [89] Mr Forbes was faced with the amputation of his leg after an unsuccessful bypass operation. This was clearly a significant and unexpected injury connected with the medical treatment he had been receiving. It is not clear why he took no further action at the time, although he only did so reluctantly later. But it was reasonable to expect him to seek a second opinion then and there. Mrs Fenech was faced with years of pain after giving birth to her first child, when she was told that the needle used to stitch up an episiotomy had broken. She was embarrassed to talk about these matters, even to her doctor. But of course it was reasonable to expect her to do so. In contrast, Miss Smith underwent numerous operations during her childhood because of her spina bifida, one of which resulted in her becoming tetraplegic. There was no reason for her to think that this was anything other than the consequence of her disability (another example is *Mellors v Perry* [2003] EWCA Civ 89, where the claimant had endured a childhood of renal problems with three kidney transplants but had no reason to think that this was anything other than the consequence of her congenital disability).

d [90] In cases of educational failure (like the present) or child care failure (as in *Barrett v Enfield London BC* [1999] 3 All ER 193, [2001] 2 AC 550), there may be no dramatic trigger such as an amputation. But there will often be enough in what the claimant does know to make it reasonable for that claimant to make further inquiries. This case is a good example. Mr Adams knew that he was experiencing serious problems in his life as a result of his difficulties with reading and writing. He felt himself to be of normal intelligence. He knew that his education had not equipped him with reading and writing skills commensurate with his intelligence. He was consulting his doctor about his problems, yet he did not tell his doctor about his difficulties with reading and writing. He clearly had good reason to seek such advice yet he failed to do so: he 'did not want to go there'. On the test proposed by the Law Commission, s 14(3) would have applied to him.

e [91] In my view, all the cases to which we have been referred are explicable on the basis that the law expects people to make such inquiries or seek such professional advice as they reasonably can when they have good reason to do so.

Their motive for not doing so will generally be irrelevant. But I would not want to rule out that their personal characteristics may be relevant to what knowledge can be imputed to them under s 14(3). There is a distinction between those personal characteristics which affect the ability to acquire information and those which affect one's reaction to what one does know. A blind man cannot be expected to observe things around him, but he may sometimes be expected to ask questions. It will all depend upon the circumstances in which he finds himself. As McGee and Scanlan have suggested, in an attempt to reconcile the authorities, a factor or attribute which is connected with the ability of a claimant to discover facts which are relevant to an action should be taken into account; but a factor in his make-up which has no discernible effect upon his ability to discover relevant facts should be disregarded: see 'Constructive knowledge within the Limitation Act' (2003) 22 Civil Justice Quarterly 248 p 260. They go on to suggest that qualifications, training and experience may have such an effect, while intelligence may not. It will all depend upon the facts of the case. a

[92] For those reasons, while I take a slightly different approach on the test for imputed knowledge, I reach the same conclusion on the facts. The claimant should have sought professional help long before he did. I also share the view that this is not an appropriate case in which to exercise the s 33 discretion in the claimant's favour, for the reasons given by my noble and learned friend, Lord Hoffmann. Accordingly, I too would allow this appeal. b

Appeal allowed. c

Dilys Tausz Barrister. d

e

McFarlane v McFarlane
Parlour v Parlour
[2004] EWCA (Civ) 872

COURT OF APPEAL, CIVIL DIVISION
THORPE, LATHAM AND WALL LJ
10–11 MAY, 7 JULY 2004

Divorce – Financial provision – Periodical payments – Order for periodical payments where capital insufficient to effect immediate clean break but payer’s income substantially exceeding parties’ needs or reasonable requirements – Approach to be adopted in such cases – Matrimonial Causes Act 1973, s 25A.

In two sets of ancillary relief proceedings, the Court of Appeal considered the approach to be adopted to the making of an order for periodical payments in exceptional cases where there was insufficient capital to effect an immediate clean break between the parties but the payer’s annual income substantially exceeded the needs or reasonable requirements of the parties. In each case, the husband had been the breadwinner of the family; the wife’s principal contribution had been raising the couple’s children, a role that would continue for several years to come; the parties had agreed a distribution of the family’s capital; they had accepted that the capital was insufficient to effect an immediate clean break between them; it had not been disputed in the proceedings below that the wife was entitled to a conventional order for periodical payments for the duration of the parties’ joint lives or until the wife’s remarriage or further order (a joint lives order); and the only major issue in those proceedings had been the size of the payments. In the first case, the income of the husband, a 44-year old partner with a leading firm of accountants, exceeded the parties’ expenditure by about £550,000 a year (excluding the husband’s costs of purchasing a new home which was held to be beyond his reasonable requirements), and his income was likely to ascend steadily until retirement. The wife quantified her spending needs at about £128,000 a year, and the district judge made a joint lives order for periodical payments of £250,000 a year. On appeal, the judge reduced that figure to £180,000. The wife appealed to the Court of Appeal. In the second case, the income of the husband, a 31 year-old professional footballer with a leading club, exceeded the parties’ expenditure by about £900,000 a year, but his income was likely to plummet over the next four or five years as his playing career drew to its close. The wife sought the global figure of £444,000 a year (or 37.5% of the husband’s net income) for herself and the children. After concluding that £150,000 a year was required to meet the needs of the wife and the children, the judge awarded them periodical payments in the global sum of £250,000. The wife appealed. On the appeals, the Court of Appeal considered whether it had been appropriate, in the circumstances, to make conventional joint lives orders. In determining that question, the court focused its attention on a statutory provision which had not featured prominently in the proceedings below or in the submissions of the parties—s 25A^a of the Matrimonial Causes Act 1973. That

^a Section 25A is set out at [57], below

provision imposed a duty on the court, when deciding to exercise certain specified powers, including the making of financial provision orders, to consider whether it would be appropriate to exercise those powers so that the financial obligations of each party towards the other would be terminated as soon after the grant of the decree of divorce as the court considered just and reasonable. Section 25A further required the court, where it decided in such a case to make an order for periodical payments, to consider in particular whether it would be appropriate to require those payments to be made for such term as would, in the opinion of the court, be sufficient to enable the payee to adjust without undue hardship to the termination of his or her dependence on the other party.

Held – In any case in which, despite a substantial capital base available for division, clean break was not presently practicable, the court had a statutory duty under s 25A of the 1973 Act to consider the future possibility, and that duty assumed particular prominence in cases where there was a certain and substantial surplus of future income over future needs. If the surplus would be predictably short-lived, the first option for consideration should be the planned progress to clean break by means of a substantial term order open to a later application for extension. The obligation on the parties to achieve financial independence was mutual. The earner had to give proper priority to making payments on account out of the surplus income. The payee had to invest the surplus sensibly, or risk that her failure to do so might count against her on an application for discharge. Given the mutuality of the obligation, the opportunity and responsibility to invest should be shared. It was discriminatory, and therefore wrong in principle, for the earner to have sole control of the surplus through the years of accumulation. Periodical payments had to be the preferred mechanism by which the surplus was to be divided annually. The practicality of such an order would depend upon many factors. Essentially the completion of the process had to be foreseen within a relatively short span. A term of five years might be towards the limits of the foreseeable. In the instant cases, the terms of s 25A had not been properly considered below, and as a result joint lives orders had been imposed in exceptional circumstances to which they were not fitted. Giving proper emphasis to that provision, the appeal in the first case would be disposed of by restoring the district judge's order but for an extendable term of five years only from the date of the order. The wife's responsibility to contribute to the financing of the clean break required her to put the surplus periodical payments above needs to achieving financial self-sufficiency. In the second case the imperative to achieve finality was even stronger in view of the likely decline in the husband's earnings over the next four or five years. The judge's order would therefore be set aside and replaced with the order sought by the wife, but for an extendable term of four years only from the date of trial, thereby allowing and obliging the wife to lay up £294,000 per annum as a reserve against the discharge of the periodical payments order (see [54], [66], [68], [73], [75], [77], [113], [119], [120], [129], [131]–[133], [135], [140]–[142], [146]–[147], below).

Pearce v Pearce [2003] 3 FCR 178 distinguished.

Minton v Minton [1979] 1 All ER 79 considered.

Per curiam. (1) The practice of substantial earners to decline any statement of their needs, on the grounds that they can afford any order that the court is likely to make, must end (see [83], [117], below).

a (2) In the assessment of periodical payments, as of capital provision, the overriding objective is fairness. The 'reasonable requirements' measure is just as discriminatory when applied to income awards as when applied to capital awards. Discrimination between the sexes must be avoided (see [104]–[106], [117], [146], below); *White v White* [2001] 1 All ER 1 considered.

b Notes

For freedom from further financial liability, see 29(3) *Halsbury's Laws* (4th edn reissue) para 752.

For the Matrimonial Causes Act 1973, s 25A, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 979.

c Cases referred to in judgments

A v A (maintenance pending suit: provision for legal costs) [2001] 1 FCR 226, [2001] 1 WLR 605.

Boylan v Boylan [1988] FCR 689.

Campbell v Campbell [1998] 3 FCR 63, CA.

d *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FCR 97, [2002] 1 WLR 1441.

Cornick v Cornick (No 2) [1996] 1 FCR 179, CA.

Cornick v Cornick (No 3) [2001] 2 FLR 1240.

de Lasala v de Lasala [1979] 2 All ER 1146, [1980] AC 546, [1979] 3 WLR 390, PC.

Doherty v Doherty [1975] 2 All ER 635, [1976] Fam 71, [1975] 3 WLR 1, CA.

e *G v G* (financial provision: equal division) [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143.

G v G (maintenance pending suit: legal costs) [2002] EWHC 306 (Fam), [2002] 3 FCR 339.

Martin v Martin [1977] 3 All ER 762, [1978] Fam 12, [1977] 3 WLR 101, CA.

Minton v Minton [1979] 1 All ER 79, [1979] AC 593, [1979] 2 WLR 31, HL.

f *N v N* (financial provision: sale of company) [2001] 2 FLR 69.

O'Brien v O'Brien (1985) 66 NY 2d 576, NY CA.

Pearce v Pearce [2003] EWCA Civ 1054, [2003] 3 FCR 178, [2004] 1 WLR 68.

Trippas v Trippas [1973] 2 All ER 1, [1973] Fam 134, [1973] 2 WLR 585, CA.

Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72, [1973] 2 WLR 366, CA.

g *White v White* [2001] 1 All ER 1, [2001] 1 AC 596, [2000] 3 WLR 1571, HL.

Appeals and application for permission to cross-appeal

McFarlane v McFarlane

h Julia McFarlane appealed with permission of Thorpe LJ granted on 4 December 2003 from the order of Bennett J on 3 October 2003 whereby, in allowing an appeal by the respondent, Kenneth McFarlane, from the order of District Judge Redgrave, made in ancillary relief proceedings on 19 December 2002, requiring Mr McFarlane to make periodical payments of £250,000 per annum to Mrs McFarlane, he substituted an indefinite order for periodical payments in the sum of £180,000 per annum. The facts are set out in the judgment of Thorpe LJ.

Parlour v Parlour

Karen Jean Parlour appealed with permission of Thorpe LJ granted on 11 February 2004 from the order of Bennett J made in ancillary relief proceedings on 23 January 2004 ([2004] EWHC 53 (Fam), [2004] 1 FCR 709) requiring the

respondent, Raymond Parlour, to pay indefinitely the sum of £212,500 per annum to Mrs Parlour rather than the sum of £444,000 that she had sought for herself and her children. Mr Parlour applied for permission to cross-appeal. The facts are set out in the judgment of Thorpe LJ.

Barry Singleton QC and Deepak Nagpal (instructed by *The Family Law in Partnership*) for Mrs McFarlane.

Nicholas Mostyn QC and Deborah Bangay (instructed by *Clintons*) for Mrs Parlour.

Jeremy Posnansky QC and Stephen Trowell (instructed by *Levison Meltzer Pigott*) for Mr McFarlane.

Nicholas Francis QC and Brenton Molyneux (instructed by *Alexiou Fisher Phillips*) for Mr Parlour.

Cur adv vult

7 July 2004. The following judgments were delivered.

THORPE LJ.

INTRODUCTION

[1] On 3 October 2003 Bennett J gave judgment on an appeal brought by Mr McFarlane, the husband, against a periodical payments order at the rate of £250,000 per annum made by District Judge Redgrave in the Principal Registry on 19 December 2002. For reasons which I will subsequently examine critically, Bennett J allowed the husband's appeal and, in the exercise of his own discretion, substituted the lesser order of £180,000.

[2] On 23 January 2004 Bennett J ([2004] EWHC 53 (Fam), [2004] 1 FCR 709) gave judgment on a contested periodical payments claim brought by Mrs Parlour. He awarded her periodical payments at the rate of £212,500 per annum.

[3] In each case there were three children of the marriage and orders for periodical payments to the children augmented the liability of the husband. There were further orders in each case dealing with ancillary issues that had been contested. However in each case the only fundamental and difficult issue was the quantification of the wife's periodical payments.

[4] The outcome of these two cases has been much debated by specialist practitioners. It has been said that the cases raise a novel point of principle which may be formulated thus: if the decision in *White v White* [2001] 1 All ER 1, [2001] 1 AC 596 introduces the yardstick of equality for measuring a fair division of capital why should the same yardstick not be applied as the measure for the division of income?

[5] Mr Singleton QC's skeleton argument supporting his permission application of 16 October on behalf of Mrs McFarlane resulted in the grant of permission on 4 December 2003. The order was an acknowledgement that the case raised important issues that this court needed to consider, since the permission application fell to be judged by the stricter standards that s 55 of the Access to Justice Act 1999 imposes.

[6] The application for permission on behalf of Mrs Parlour was filed on 6 February 2004. Permission was granted and arrangements made for the two appeals to be heard together. At a later stage Mr Francis QC for Mr Parlour

a sought permission to cross-appeal. That application was adjourned to be heard together with the two appeals.

[7] Subsequently at an informal directions hearing it was agreed that Mr Singleton would present Mrs McFarlane's appeal followed by Mr Mostyn QC for Mrs Parlour. Thereafter Mr Posnansky QC would respond for Mr McFarlane and Mr Francis would then advance his permission application and respond for Mr Parlour. Further agreement was reached for the division of territory between the advocates, particularly foreign authority, to make the best use of the two days allocated to the appeals.

McFARLANE v McFARLANE

c *The facts*

[8] The parties are 44 years of age. They married in September 1984 after two years of co-habitation. Their three children are aged respectively 15, 13 and 8 and are educated at fee-paying schools.

d [9] At the outset of their co-habitation in 1982, the husband was a trainee chartered accountant working for a leading international firm; and the wife was a trainee solicitor with a leading City firm. By the date of their marriage they had both qualified in their respective professions. The husband has throughout remained with the firm with which he trained. In advancing her career the wife moved to work for a large venture capital company and then in due course moved to another leading City firm. She returned to work soon after the birth of her first child but the couple agreed that she should not return to work after the birth of her second child in 1991. The husband had become a partner in 1990 and the understandable agreement was that the wife should abandon her legal career in order to devote all her time and energy to their two babies and the developing family. The husband's prospects would amply provide for the family's financial needs. In one sense this was a substantial sacrifice on the wife's part, since in the years prior to the husband achieving partnership she had earned as much or more than he.

[10] In 1994 the couple bought in the wife's name a house in Barnes which remains the home for the wife and the children to this day. It was purchased with a substantial mortgage which they planned to discharge over five years. Shortly after that was achieved in 1999 the couple purchased in their joint names a holiday home in Salcombe. At the date of the trial before the district judge the house in Barnes was valued at £1.5m and the Salcombe home at about £250,000. In January 2001 the parties separated, the husband having purchased in June 2000 a flat in Clerkenwell for £415,000, financed by a tax-efficient partnership loan paid off over approximately 18 months.

j [11] The husband formed a relationship with one of his partners and in August 2002 they purchased in the ratio of their respective financial contributions a house in Barnes for £2.94m inclusive of costs. The husband sold his flat in Clerkenwell and his new partner sold her flat. Again the purchase was largely financed by a substantial mortgage and by tax-efficient partnership loans. Their anticipation is that the mortgage will be paid off over five years. The husband planned to spend nearly £350,000 from his net income in payment of interest and repayment of capital. This was plainly an achievable target given that the husband's net earned income as a partner had increased over the five years between 31 May 1999 and 31 May 2003 along the following route expressed in thousands: 272-427-579-633-753.

The case before the district judge

[12] Equal division of the family capital of about £3m was agreed. The wife retained the former matrimonial home which represented her half share. Nor was there any disagreement as to the available income. The only question was how the husband's net income of £753,000 per annum should be divided. It was common ground that the husband would pay the school fees and periodical payments fixed at £20,000 per annum per child by the district judge. What should be the wife's share was the question for the court.

[13] The wife in her Form E quantified her spending needs at about £128,000 a year. The husband failed to complete this section of his Form E and declined subsequent requests to do so.

[14] In her Form E the wife sought the payment of instalment lump sums to enable her to accumulate capital in order to fund a clean break. However this approach was soon abandoned.

[15] It was common ground that neither the husband nor the wife had any significant pension provision and that provision had to be made from future income for the years of retirement. It was not disputed that the wife was entitled to a conventional joint lives order.

[16] As to standard of living it was agreed that the family had enjoyed a comparatively modest standard of living, certainly until the mortgage on the matrimonial home had been discharged. In the circumstances the husband was able to contend that the budget sought by the wife was considerably greater than the family's spending during the marriage. Questions directed to the wife's budget were to dominate her cross-examination.

[17] None of the other criteria in s 25(2) of the Matrimonial Causes Act 1973 was of particular application. On those battle lines the wife sought an order of £275,000 per annum and the husband an order of £100,000 per annum.

The judgment of the district judge

[18] Having heard the oral evidence the district judge made some important findings on the disputed areas. These were her findings on contributions:

(a) In terms of contributions, from 1991 to date the husband has been the breadwinner for this family. He has worked extremely hard and has been and continues to be very successful. In 1991 the parties made a joint decision that their children would be brought up by the mother on a day-to-day basis and she would abandon her career. It has been suggested on behalf of the husband that the wife did not enjoy her work and found it stressful; that she willingly gave up her career; implying thereby that it diminished the value of her contribution in running the home and protecting the husband from the day to day stresses of the child rearing. I reject this argument. The value of the wife's contribution is derived from what she did and how well she did it, rather than her motivation for doing it and, in any event, she disputes that she did not enjoy her job. There has not been a scintilla of criticism of the wife, either as a partner or as a mother. The parties' contribution to this long marriage has been different but of equal value.

(b) Part of the overall circumstances of this case is that the joint decision of the parties to concentrate on the husband's career in order to provide the funding of the family's lifestyle has resulted in the greatest fruits of his endeavours being available towards the end of the marriage and after its breakdown. In effect, the spadework for these rewards was carried out over

a a long period and it would be unfair to take the view that recent increases in the husband's earnings since the breakdown of the marriage have not been contributed to by the wife. The wife's contributions enabled the husband to create a working environment which has produced greater rewards, in respect of which she should have her fair share. She also continues to make
b a contribution to the family in her nurturing of the children in a single parent household. That contribution did not come to an end when the parties separated.'

[19] Of the husband's proposed future expenditure the district judge had this to say:

c '(a) The husband has estimated his own financial needs, exclusive of housing costs, at £60,000 to £80,000 per annum, giving no particulars. He plans to pay off his share of the borrowings incurred in the purchase of [his new home] over a five-year period, which will require payments of approximately £347,500 per annum. This is an entirely voluntary responsibility which he is perfectly entitled to take on, but it is not a
d reasonable one ... Doing the best that I can I therefore conclude that he has paid almost half a million pounds more for his housing than in my judgment is reasonable.

(b) This would have resulted in the husband having to service less debt than he has actually incurred and I do not consider that the wife and children should be penalised because of the husband's decision with his partner to buy
e [his new home] which was beyond his reasonable requirements.'

[20] In relation to the wife's earning capacity this was the finding:

f 'In the context of this case, the joint decisions made by the parties about how these children should be brought up and financially supported and the husband's earning capacity, it is in my judgment unreasonable to expect this wife to take steps to acquire or improve her earning capacity in the foreseeable future, and that is, at the very least, until [the youngest child] reaches secondary school age, when the matter might be very different.'

g [21] This is how the district judge dealt with pension provision:

h 'The taxation concessions available to the husband in obtaining partnership loans to finance the purchase of property are very generous. Tax relief is available to him on all interest repayments on these loans at higher rates and this how he has financed part of purchase of [his new home]. I take the view that, after determining what is a fair outcome in respect of the wife's claim for maintenance, taking into account the eight factors specified in s 25(2) of the Matrimonial Causes Act 1973, none of which predominate over the others, and against the background of all these circumstances of the case, that how the parties choose to spend their available income is a matter for them. I am far from satisfied that either of them intends to provide for
j their later years by way of conventional pension fund investments.'

[22] Finally I record the district judge's direction and conclusion:

'(a) The court's fundamental duty is to apply s 25 of the Matrimonial Causes Act 1973 as amended to all the circumstances of the case in order to arrive at a fair outcome, and I remind myself that fairness does not

necessarily mean equality, even where the parties have agreed in principle to an equal division or thereabouts of capital assets.

(b) In my view, the appropriate maintenance award for this wife is £250,000 per annum which equates to 33.18% of the husband's present net income. This reflects her needs, obligations and the contribution that she has made over the years of the marriage. It may well need to be revised in later years for a variety of reasons. It is a matter for her whether she chooses to make pension provision, but she will not be able to avail herself of tax-relief on pension contributions while she is not an income tax payer and it is a matter for her whether she takes out insurance to protect her and the children's position in the event that the husband dies or is ill and unable to work.'

[23] Implicit within the district judge's reasoning is first the conclusion that the wife should have the same opportunity as the husband to make provision for the years of retirement and second the conclusion that she should have the means with which to insure herself and the children against the risk of premature cessation of the husband's high professional earnings.

The judgment of Bennett J

[24] Mr Posnansky advanced his appeal to Bennett J on six grounds. (1) The order was manifestly excessive given that the wife had not put her annual requirements at more than £128,000 per annum. (2) The district judge had wrongly allowed for the wife to build up a retirement fund and/or to insure herself against the husband's incapacity or premature death. (3) The district judge had taken insufficient account of the standard of living during the marriage. (4) The district judge had taken insufficient account of the husband's need to make provision for his retirement out of present income. (5) Fresh evidence as to the husband's income for the year ending 31 May 2004 invalidated the rate of £250,000 a year. (6) The district judge's finding that the husband had unreasonably overspent in housing himself was wrong and miscalculated.

[25] Miss Lucy Stone QC countered all these criticisms to the judge's satisfaction save one, namely Mr Posnansky's second ground, which, during the course of argument, emerged as a submission that the judge had impermissibly subverted a periodical payments order as a mechanism to provide the wife with additional capital.

[26] Furthermore it is important to emphasise that Bennett J adopted all the district judge's findings of fact and did not otherwise criticise her approach or her conclusions. That is plain from the paragraph of his judgement in which he explained his decision not to remit to the district judge but to exercise his discretion afresh. In that paragraph he said:

'In doing so I shall give the same weight to the s 25 factors as did the district judge. She saw and heard the wife and the husband. She has made important findings to which I propose to be completely loyal. It is clear to me, as I have endeavoured to set out in this judgment, that she placed considerable weight on the wife's contribution both past, present and future.'

[27] The judge's reasons for concluding that the district judge had fallen into error of principle are explained succinctly in the following three paragraphs of the judgment:

a [53] The effect of the order of £250,000 per annum by way of periodical payments for the wife is to give her a sum of money which is arithmetically way, way above her needs. I repeat: her budget of £128,000 per annum is not a historical one, but is designed, and has been carefully thought out, for current and future needs. Her needs, of course, are not the be all and end all of her application, for, if they were, that would fly in the face of s 25. The court must apply all the criteria, giving such weight to each factor as the court determines is appropriate in the particular circumstances of the case. However, the fact is that the wife has been awarded a sum so much over her needs that there are only two possible results. Either she spends the difference or she saves the difference. If she saves it, as the thrust of her case suggests she will and she wants to, she is thereby in fact accumulating capital.

b [54] Miss Stone, in her excellent submissions to me, specifically conceded that the size of the award gives the wife the opportunity to save if she so wishes. Thus the reality, in my judgment, is that the husband will be paying over to the wife from his resources moneys which are likely to be directed into financial vehicles for the accumulation of capital. In my judgment, Mr Posnansky has made good his submission that the effect of the order is to subvert the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical payments is maintenance.

c [55] It is my judgment, with all due respects to the district judge, that, having given the wife an award from which she is likely to be able to save large sums of money and thereby accumulate capital, it is no answer to say, as she did, that it is a matter for the wife whether she chooses to make provision for pension and other matters.

d [28] In exercising his discretion afresh Bennett J substituted the figure of £180,000 per annum for the district judge's figure of £250,000 per annum. His reasons are set out in the following five paragraphs of his judgment which I must cite in full:

e [58] I wholly reject Mr Posnansky's submission that the fair award for the wife is £100,000 per annum. To suggest that the wife in all the circumstances of this case should walk away with £100,000 per annum when set against the husband's net income of £753,000 per annum is, in my judgment, thoroughly mean and would be unfair. It goes nowhere near reflecting the s 25 factors as, I repeat, evaluated by the district judge.

f [59] At the end of the marriage the husband's income was rising and rising pretty rapidly. The standard of living was increasing. The husband's income and his standard of living has resulted from what the district judge described in her judgment as a result of the "spadework". The wife's contribution is continuing and will continue in the future vis-à-vis the children, something which, following a divorce, is a contribution that is sometimes overlooked or even played down. The district judge did neither and properly, in my judgment, gave it appropriate weight.

g [60] What figure should then be substituted for 250,000? The quantification of periodical payments is more an art than a science. The parameters of s 25 are so wide that it might be said that it is almost impossible to be "scientific". In my judgment, I would be doing justice to

both parties if I award the wife £180,000 per annum by way of periodical payments.

[61] The husband may say that still exceeds her budget by a significant amount and thereby I am falling into the same error as did the district judge. I agree that the figure I propose to order does exceed her budget and significantly. But if I am right to reject the husband's case, then I ask the rhetorical question; how else are all the s 25 factors, as evaluated by the district judge, to be given full weight other than by making the kind of award that I propose? The more that an award is refined down closer and closer to £100,000, the greater would be the criticism that I would be devaluing the s 25 criteria (other than the wife's needs) as evaluated by the district judge.

[62] I am sure the parties will understand that no family judge in exercising this jurisdiction can achieve perfection given the width of s 25. He or she can only do his best to get as near to it as possible in the circumstances of any particular case.'

[29] Bennett J also removed the order for the index linking of the periodical payments for the wife and the children imposed by the district judge. That point of detail has not been challenged on this appeal.

[30] It is important to bear in mind that the judge exercised powers confined by the decision of this court in *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FCR 97, [2002] 1 WLR 1441. That subsequently found expression in an amendment to r 8.1(3) of the Family Proceedings Rules 1991, SI 1991/1247, which now provides that, on an appeal from a district judge of an order made on an application for ancillary relief, 'The appeal should be limited to a review of the decision or order of the district judge.'

[31] Accordingly once Bennett J concluded that the award was not manifestly excessive and that the judge's findings of fact were not open to criticism, only if he was satisfied that the district judge had erred in law was he entitled to substitute his figure for hers.

[32] The error identified by Bennett J is defined in his judgment at [54], cited above. The district judge had subverted 'the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical payments is maintenance'. Mr Singleton, in arguing the appeal, essentially submits that there is no such principle. Mr Posnansky submits that the principle is elementary and recognised by all ancillary relief lawyers. I will return to this essential question in due course.

PARLOUR v PARLOUR

The facts

[33] The issue in this appeal can be relatively briefly stated. Again the division of capital between the parties had been agreed at the financial dispute resolution appointment. The only issue that went to trial was the quantum of the wife's periodical payments order. That issue was directed to be tried by a judge of the Division and accordingly, in giving judgment on 23 January 2004, Bennett J was exercising his own discretion rather than reviewing the prior discretion of a district judge. The case had much in common with the case of *McFarlane v McFarlane* and by the date of the hearing on 12 January both Mr Mostyn for the wife and Mr Francis for the husband were armed with Bennett J's previous judgment. Since the point at issue could not be distinguished, Mr Mostyn had the

a difficult task of attempting to persuade Bennett J to reconsider and reject his previous statement of principle. Of course he failed, and he then applied to this court for permission to appeal and for the appeal to be heard together with the pending appeal in *McFarlane's* case.

b [34] The case before Bennett J took four days and a number of factual issues were contested. However the judge's findings on those issues (such as whether the husband was a gambler and whether he had conspired to conceal one of his streams of income) are of no relevance to the issue of principle raised by this appeal. In the circumstances the relevant facts can be briefly summarised.

c [35] The parties met in February 1990 when the wife was a 20 year-old employed by a local optician. The husband, three years her junior, was an apprentice footballer, having signed a contract with Arsenal in July 1989. Their relationship developed swiftly and, although they did not co-habit, the wife generally slept with the husband at his parents' home several nights a week. The husband progressed with Arsenal to become a full-time professional in March 1991 and to reach the first team in January 1992. At the end of 1994 the wife gave up her employment with the husband's encouragement and thereafter became financially dependent upon him. They had announced their engagement earlier in the year. However they did not co-habit until May 1995 when they moved into their first home. Their first child was born in October 1995. In October 1997 their second child was born and they upgraded into their final matrimonial home. The marriage was not in fact celebrated until June 1998. In May 1999 their third child was born. In November 2001 the husband left the home. He has since found another partner with whom he has a one year-old child.

f [36] Under the agreement reached at the FDR hearing the wife took the matrimonial home, a property of modest value in Norfolk and a lump sum of £250,000. Her share represented about 37% of the available capital assets. The affluence all results from the husband's success at Arsenal. On 16 August 2001 he signed his current contract which expires on 30 June 2005. His gross earnings at Arsenal for the season 2001/2002 amounted to just over £1.5m. The forensic accountant called by Mr Mostyn estimated the husband to have earned an average of almost £1.2m net for the three years ending 2004/2005. The judge accepted Mr Mostyn's submission that the husband will continue to receive a net income of the order of £1.2m per annum until the expiry of his current contract. The scale of the husband's net income is explained by the fact that such bonuses as he receives in addition to his salary are made available to him through sophisticated and tax-efficient channels.

h *The findings of Bennett J*

[37] I turn now to the judge's findings on the s 25(2) criteria. Bennett J ([2004] 1 FCR 709 at [26]) dealt with the age of each party and duration of marriage. His finding comes in the last sentence of the paragraph:

j '... Accordingly although the marriage only lasted some three and a half years it would not be just, in my judgment, to ignore the fact that their relationship endured for seven or slightly more years.'

[38] Bennett J's assessment of the standard of living during the relationship was as follows (at [29]):

‘... I am satisfied that compared to the lifestyles of other footballers in the same bracket as the husband the wife and husband in this case did lead a comfortable but not an extravagant way of life.’

[39] Of the wife’s contribution he said (at [15]):

‘... She is a full time mother of three children aged eight, six and four. I am satisfied that she bore the brunt of bringing the children up whilst the parties co-habited. Furthermore it is obvious that she will have to bear the burden of bringing them up during their childhood. Thus by the time the youngest child is 16 the wife will have had a further 12 years of caring for the children. If the youngest remains at home until she is 18 then the period would be 14 years. That I recognise at once is, together with her past caring for the children, an enormous contribution. I am satisfied too that she has no earning capacity. She told me in evidence that she made no sacrifices in giving up her work with the opticians in 1994 nor has she been disadvantaged in staying at home. She accepted that she had not given up any career. There is no dispute, as I understand it, that the wife was a marvellous mother and ran the household efficiently and looked after the children and the husband to the very best of her considerable ability.’

[40] In his assessment of the husband’s contribution Bennett J gave further credit to the wife, as appears from the following paragraphs:

[30] ... As to the husband’s contribution he was and is a very talented footballer. That sprang from his natural talent, being a member of the [Arsenal Football Club], and having the good fortune to be coached by [Arsène Wenger], a top class coach. So, strictly speaking, the financial wealth of the family was created by the husband. However, in my judgment, there is a very significant factor in the success of the husband in which the wife played a vital role. The wife has suggested in her evidence that the husband was and is a drinker. From what I have read in the papers and been told by the husband and wife in evidence, I am satisfied that the husband was in an environment where, before the advent of [Arsène Wenger] in 1996, there was very considerable drinking amongst certain players in the [Arsenal Football Club]. In the early days I am satisfied that the husband did participate in some of those drinking sessions. However the wife realised that that was the way to ruin and unhappiness and I am satisfied that in about the mid-1990s or slightly later she took a grip on the situation and encouraged and persuaded her husband to move away from that style of living. That rather bland description of what she did probably understates her contribution in this respect. In the mid-1990s the husband gave interviews to the press in which he publicly praised the wife for all that she did to bring him back from the brink.

[31] Thus the wife did make a contribution to the husband’s success as a footballer for [Arsenal] and also for England (in the late 1990s and in 2000 the husband played for England and was capped ten times).’

[41] Bennett J’s assessment of the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future is crucial. I therefore set out his judgment at [32] in full:

‘The wife has no income or if she can invest what she has not spent of the lump sum, such income would, in the circumstances of this case, be

a insignificant. I am satisfied as I have already said that she has no earning capacity now or in the foreseeable future. Her life is bound up with her children and will be for some considerable time in the future.

b *The husband.* I have already set out his income and other financial resources. He is secure in a very large income until June 2005. What will happen thereafter is unknown. The husband told me in evidence, which I accept, that after a player reaches the age of 31 and his contract expires, he will not be given a contract which lasts for more than a year but it may be renewed for a year at a time. In June 2005 the husband will be 32 years old. So, if [Arsenal] retain his services, he will be given a year's contract, renewable thereafter. The husband has no plans for his future thereafter. However, it may be that any new contract might not contain such high remunerations, and/or discretionary payments under [employee benefit trusts] may decline or possibly cease. After he has ceased to be a professional footballer—at least with [Arsenal]—it is likely that his income will decline very considerably.'

d [42] Of financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future, the judge recorded that the wife's major responsibility now and in the foreseeable future was to look after her children and herself. Having considered the rival submissions as to her requisite budget he concluded (at [36]):

e '... However, I am satisfied, looking at needs alone, generously construed, the figure of £180,000 per annum for the wife and the three children is substantially too high. If I were to allow £30,000 for all of the three children and £120,000 for the wife, in my judgment that would be fair and just.'

f [43] Bennett J's corresponding finding in relation to the husband is to be found at [37]:

g 'So far as the obligations and responsibilities of the husband are concerned he now has two families to maintain. However, in fairness to him, he has not suggested that the wife and children should be in any way disadvantaged by the fact that he has to maintain his partner and their child. In any event I am satisfied that now and for the foreseeable future there will be more than adequate income to properly maintain his partner and child without in any way affecting his primary obligation and responsibility to the wife and the children.'

h [44] For completion Bennett J recorded that none of the other s 25(2) criteria were relevant to his decision.

Bennett J's conclusions

j [45] Bennett J then carefully reviewed Mr Mostyn's extensive submissions, designed to persuade him that his judgment in *McFarlane's* case was erroneous, and Mr Francis's submissions in response. He succinctly stated his conclusions on counsel's submissions in eight numbered paragraphs (at [102]):

'(1) In exercising the powers under s 23(1)(a) and (d) of the 1973 Act the court must have regard to all the circumstances of the case, first consideration given to the welfare of the children.

(2) The court must, in particular, have regard to the matters set out in s 25(2). a

(3) In carrying out that exercise, the court is entitled to place such importance and weight on each matter in s 25(2)(a) as it thinks appropriate in the circumstances of the case (see [*White v White* [2001] 1 All ER 1, [2001] 1 AC 596]).

(4) However, “needs” or “reasonable requirements” is not a determinative or limiting factor in cases where the payor has an ability to pay more than the payee’s needs (see [*Cornick v Cornick* (No 2) [1996] 1 FCR 179], *White’s* case, and [*Cornick v Cornick* (No 3) [2001] 2 FLR 1240]). b

(5) Thus the objective implicit in the exercise of the court’s discretion under s 25 is to achieve a fair outcome in the financial arrangements between the parties (see *White’s* case). c

(6) In seeking to achieve a fair outcome there is no place for discrimination between the spouses and their respective roles. There should be no bias in favour of the money-earner and against the home-maker and child-carer (see *White’s* case).

(7) The English statutory code allows of only one application of capital between spouses. Where, as in this case, capital claims are compromised and receive the court’s approval by way of order, they cannot be revisited or reissued, see [*Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 3 FCR 178, [2004] 1 WLR 68] and the House of Lords and Privy Council cases referred to therein ... at [17]). d

(8) Where there has been or is to be capital provision made in favour of a spouse then, generally speaking, a subsequent or concurrent award of periodical payments ought to be for that spouse’s maintenance, and ought not to be used to further distribute moneys to the payee so as to give her (or him) savings ie capital. But such a factor must yield to a greater or lesser extent to the particular circumstances of the case if fairness so dictates. Thus, with that qualification, I broadly accept the thrust of Mr Francis’s submissions. e

[46] Applying those principles to his earlier findings these then were his reasons for awarding the wife and children periodical payments in the global sum of £250,000, to be split between the wife and the children by the court in default of agreement between the parties: f

[105] In my judgment to confine in this instant case an award of periodical payments for the wife to a ceiling of “needs” or “reasonable requirements” where the husband has the ability to pay more, indeed far more, than the wife’s needs would be a faulty exercise of the court’s discretion. For that could be to determine her application by reference to one only of the matters in s 25(2) and ignore the other matters. I accept that the wife’s contribution (as I have found it to be) made a significant difference to the success of the husband. She was part of the circumstances that persuaded the husband to drop the laddish culture and, as she put it, “grow up”. Her contributions to the home, and the children, both now and in the future must not be underestimated, overlooked, or played down. g

[106] The husband’s open offer of periodical payments is equivalent to about 10% of his net income. To suggest that in the circumstances of this case the wife should walk away with £120,000 (for her and the children) h

a when set against the husband's net income of about £1.2m is thoroughly mean and would be unfair. However, to award her £444,000 because that represents 37.5% of his net income which is the same percentage of the capital she received, would be an unprincipled and unfair award on the facts of this case. She would in one year receive sufficient moneys, which, after making provision for her and the children's needs, would leave her with a sum equivalent to her present lump sum or more. If the award were backdated to March 2003 and were to run to June 2005, a period of two years and three months, she would effectively have acquired further capital to the tune of £500,000 and more. That in my judgment could be seen to be blowing a large hole through the middle of *Pearce's* case ... and in the instant case would be quite unwarranted.

c [107] Thus, in my judgment, the court must seek a way that does justice to the parties and which does not, so far as is possible, impose a glass ceiling on the one hand but which does not hand out capital on the other. It surely must be implicit in the concept of periodical payments when placed next to the concepts of lump sum and property adjustments that where there has been a capital adjustment between spouses in accordance with *White's* case, as it was in the instant case, the function of periodical payments should not then or at some later date be seen to further the claimant spouse's ability to mine the paying spouse's income for further capital. I see the force in Mr Mostyn's submissions that my decision in [*McFarlane v McFarlane*] contains irreconcilable tensions and contradictions. Indeed the decision that I will make in the instant case may be subject to the same criticism. But as I endeavoured to explain in [*McFarlane v McFarlane*], the quantification of periodical payments is more of an art than a science, given the width of the discretion expressly given to the court by Parliament.

f *Counsel's submissions on the appeals*

[47] The skeleton arguments prepared for the appeals demonstrate a great deal of industry, erudition and originality. They address the very general question: what should be the principles governing an award of periodical payments during joint lives or until remarriage in any case where the net income of the payer significantly exceeds what both parties need in order to meet their outgoings at the standard of living which the court has found to be appropriate? Mr Singleton has advanced the arguments unsuccessfully advanced by Miss Stone in the court below. He has reviewed the development of the statute law over the past 150 years and he has analysed the manner in which the judges have interpreted and applied those provisions, particularly in recent years. He submits that academic commentators and judgments in the United States of America support his conclusions.

[48] Mr Mostyn has repeated the submissions that he advanced unsuccessfully in the court below. He advances this cogent criticism of Bennett J's judgment: in *McFarlane v McFarlane*, were the principle asserted by Bennett J sound, then, as he himself partially recognised, his order breached it, albeit to a lesser extent than that of the district judge. What was the rationalisation for the uplift of over £50,000 that Bennett J allowed the wife above her annual need for expenditure? If there were no need that could be categorised as 'income' then the surplusage has to be categorised as capital or as income available for the acquisition of capital. He also relies upon the trend of the authorities in Canada, Australia and

New Zealand, which he submits demonstrate a global shift which Bennett J dismissed out of hand. Mr Mostyn and Mr Singleton each adopted the submissions of the other in areas which, by sensible agreement, only one had tackled. a

[49] Mr Singleton and Mr Mostyn contend for models that emphasise entitlement based on past contribution or continuing compensation for a sacrificed career or for the loss of benefits which the payee would have enjoyed but for the breakdown of the marriage. That last consideration they submit has statutory recognition in s 25(2)(h) of the 1973 Act. b

[50] Mr Posnansky repeated the submissions which succeeded before Bennett J. Although criticising Bennett J's award to Mrs McFarlane above Bennett J's generous assessment of her needs, he did not at any stage seek to cross-appeal. c

[51] Equally Mr Francis repeated the submissions accepted by Bennett J at the trial. In advocating his application for permission to cross-appeal he made it plain that he was no longer contending for orders totalling £120,000 per annum and would accept the judge's quantification of the needs of the wife and children at £150,000 per annum. d

[52] Mr Posnansky and Mr Francis assert that the court's simple task is to order such proportion of the income as will enable the carer to discharge the outgoings on the single parent family home and the other anticipated family expenses. e

CONCLUSIONS

The principle that governed the judgments of Bennett J

[53] In a narrow sense Bennett J's principle that an award of capital can be made once and once only is undoubtedly correct. Capital orders were described as 'once-for-all orders' by Lord Diplock in the case of *de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546. Bennett J quite rightly pointed out that I had emphasised the principle in my judgment in the recent case of *Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 3 FCR 178. However since the decision in *de Lasala's* case we have seen the amendments to the 1973 Act that introduced s 25A and s 31(7A)–(7F). The effect of those amendments, in cases where capital claims have already been dismissed, is first to impose upon the court a duty to terminate the only continuing financial relationship as soon as that can be achieved without undue financial hardship; and second to empower the court to compensate the payee for the discharge of the periodical payments order with additional capital. So the old principle has to be qualified thus: the original once for all capital division that resulted in the dismissal of capital claims may be supplemented by a later transfer of capital, agreed or judged to be the fair consideration for the dismissal of the surviving claim to periodical payments. So much is implicit in the decision in *Pearce's* case and would no doubt have been acknowledged by Bennett J if the cases had not been argued before him primarily as claims for indefinite and continuing periodical payments. f

[54] For reasons which I will develop, in my judgment neither case should have been approached on that basis. In both cases a clean break had been partially achieved and a proper concentration on s 25A both by the parties and by the court would have provided a short answer to the issue of principle so extensively debated. g

[55] The present appeals are far removed from any norm. In one case the single net income probably exceeds the expenditure of the two households (at a h

a very high standard but excluding housing costs for the husband) by about £550,000 per annum. In the other, the single net income probably exceeds the expenditure of the two households by about £900,000 per annum. It is only the huge excess over need that creates the debate as what are the principles governing the quantification of the payee's award. Only that excess allows the advancement of the appellants' ambitious models. Only that excess renders the respondents' contrary propositions unconvincing.

b [56] There is another feature of the present appeals that must be emphasised. In both cases the past surplus which had been converted into capital assets was divided by agreement. In the one case the division was equal, in the other the earner took about 60%. It was the scale of the contemplated future surplus that prevented the complete agreement, namely the clean break dismissing all claims.

c In both cases the agreement was seen, or should have been seen, as but the first stage in the progress to clean break. The future surplus could provide the consideration for the dismissal of the wife's outstanding claims. How many years of garnering of surplus would be necessary could not be calculated but only estimated. All depended on the surplus in each of the future years.

d Section 25A

[57] Of the amendments achieved by the Matrimonial and Proceedings Act 1984 the insertion of s 25A far outweighs in importance the deletion of the cosmetic minimal loss objective. Section 25A provides:

e '*Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage.*—(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

f (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

g (3) Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for a periodical payments or secured periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the court may dismiss the application with a direction that the applicant shall not be entitled to make any future application in relation to that marriage for an order under section 23(1)(a) or (b) above.'

h [58] Its origins can be traced to the case of *Minton v Minton* [1979] 1 All ER 79, [1979] AC 593 where Lord Scarman said in his speech:

j "There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should

provide for themselves and their children. But the other—of equal importance—is the principle of “the clean-break”. The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.’ (See [1979] 1 All ER 79 at 87, [1979] AC 593 at 608.)

[59] The Law Commission in their 1981 report ‘The Financial Consequences of Divorce’ (Law Com No 112) advocated three policy objectives for the reform of the Matrimonial Causes Act 1973 as follows; priority for the needs of the children; greater weight to be given to the divorced wife’s earning capacity and to the desirability of both parties becoming self-sufficient; and imposing a ‘clean break’ where practicable and appropriate.

[60] In relation to the second objective there are in paras 26 and 27 the following passages:

‘There was, however, a wide-spread feeling amongst those who commented on the Discussion Paper that greater weight should be given to the importance of each party doing everything possible to become self-sufficient, so far as this is consistent with the interests of the children; and we believe that the statutory provisions should contain a positive assertion of this principle.

... The court has, under the existing law, power to make orders for a limited term, and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not or should not expect to rely on continuing support from her husband. We think that it would be desirable to require the courts specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, given the increased weight which we believe should be attached to the desirability of the parties becoming self-sufficient.’

[61] In relation to imposing a clean break the report recommended in para 28:

‘Nevertheless, the response to the Discussion Paper showed strong support for the view (with which we agree) that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between a husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division.’

[62] Then there is this conclusion in para 30:

‘The response to the Discussion Paper indicated wide support for the view that the court should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit—as distinct from periodical payments made to her to enable her to care for the children—should be primarily directed to secure wherever possible a smooth transition from

a marriage to the status of independence. We believe that this general objective should be embodied in the legislation.'

[63] In my judgment the underlying policy of the legislature in inserting s 25A into the statutory scheme is not open to doubt.

b [64] The court's duty to seek a clean break was replicated in s 31 to make plain that it applied not only at the stage of making the financial provision orders but equally at any later stage when the court considered their variation.

c [65] The court's powers to bring about the clean-break objective that had not appeared practicable at the first stage were significantly strengthened by the addition to s 31 of sub-ss (7A)–(7F) by the Family Law Act 1996 with effect from 1 November 1998. The additional powers were set out and considered in *Pearce's* case and it is unnecessary to repeat that review here.

d [66] In any case in which, despite a substantial capital base available for division, clean break is not presently practicable, the court has a statutory duty to consider the future possibility. That duty assumes particular prominence in cases where there is a certain and substantial surplus of future income over future needs. If, as in one of the present appeals, the surplus will be predictably short-lived, the first option for consideration should be the planned progress to clean break by means of a substantial term order open to a later application for extension. The obligation on the parties to achieve financial independence is mutual. The earner must give proper priority to making payments on account out of the surplus income. The payee must invest the surplus sensibly, or risk e that her failure so to do might count against her on an application for discharge under s 31(7A) and (7B). Given the mutuality of the obligation, the opportunity and responsibility to invest should, in my judgment, be shared. It strikes me as discriminatory, and therefore wrong in principle, for the earner to have sole control of the surplus through the years of accumulation. The preferred f mechanism by which the surplus is to be divided annually must be periodical payments. They are variable, which lump sum orders are not. They can therefore reflect fluctuations in the payer's income. They are determined by the court in the event of dispute. They terminate on the remarriage of the recipient. The practicality of such an order will depend upon many factors. Essentially the completion of the process must be foreseen within a relatively short span. A term g of five years which these cases illustrate may be towards the limit of the foreseeable.

h [67] I recognise the validity of Mr Posnansky's argument that because orders for periodical payments terminate on the death or remarriage of the payee the payer's future liability is to that extent contingent. Thus it can be said to be unjust to the payer to order the immediate sharing of surplus on account of a liability which may never materialise. That argument however is of little force where the sharing of the surplus is effected by a periodical payments order and where the duration of the scheme for sharing surplus income on account of the capitalisation of a periodical payments claim is relatively short-term. Furthermore there is an element of speculation involved in any scheme for the j capitalisation of periodical payments whether undertaken at the time of divorce or on a subsequent application for variation by discharge.

Outcome in McFarlane's case

[68] How then do these generalisations apply to the facts of these appeals? In my judgment the resolution of the contest in *McFarlane's* case was flawed by a

failure to give sufficient weight to the duties created by s 25A. That is perhaps the result of the way the wife's case was advanced. In her Form E the wife sought 'to achieve a clean-break in retirement' and to that end applied for annual instalment lump sums of £64,000 per annum until the year 2017 (a span of 15 years).

[69] Three months later that part of her case was abandoned in correspondence on the ground that the scheme presented too many potential complications to be viable. At the hearing before the district judge, five months later, what was sought in Miss Stone's skeleton was 'as part of her periodical payments a sum which she too can invest towards her old age'.

[70] It is of course easy to criticise with the advantage of hindsight, but the focus should have been on termination and not on post-retirement provision. The key was the husband's capacity to borrow in a tax-efficient way on the security of his home. Although he had borrowed very substantially to acquire an excessively expensive home, his proposal was to discharge the mortgage over five years by annual instalments of £347,500. Plainly on completion of that exercise he could re-mortgage his interest to finance the clean break. Over the intervening years he could make what would effectively be payments on account. The alternative presentation of a joint lives order adopted by both husband and wife diverted the court's attention from the opportunity to achieve a clean break years before either party approached retirement. Were this an appeal from a first exercise of judicial discretion I would set aside the judgment below and in the exercise of this court's discretion substitute an order for periodical payments at an increased annual rate for an extendable term of five years. Within the life of the order either side would be free to apply for variation dependent on the fluctuation of the husband's earnings. After five years the court could re-assess the prospects of clean break in the light of: (i) the husband's capacity to re-mortgage; (ii) the extent to which the wife had built up a capital reserve from the surplus of income over expenditure in the intervening years; and (iii) the revival of the wife's earning capacity, the youngest child having reached secondary school age.

[71] However this is a second appeal in which we must review the error of principle in the district judge's judgment identified by Bennett J. Accordingly there may be no basis for a fresh exercise of discretion. The discretion exercised by the district judge, if held to be without error of principle, must be restored.

[72] Additionally I would emphasise that the focus on achieving independence without financial hardship at the earliest practicable date is inconsistent with the liberty which the district judge attached to the wife's joint lives order. In her judgment she said: 'How the parties choose to spend their available income is a matter for them.' Later she said:

'It is a matter for her whether she chooses to make pension provision ... and it is a matter for her whether she takes out insurance to protect her and the children's position in the event that the husband dies or is ill and unable to work.'

[73] In my judgment the wife's responsibility to contribute to the financing of the clean break requires her to put the surplus periodical payments above needs (on the district judge's figures £122,000 per annum) to achieving financial self-sufficiency. The evidence advanced was that the premium on a policy to secure her against the husband's death or disability would be £40,000 per annum. Given the reduction of the years of risk, it would not seem to me reasonable for

a the wife to spend surplus on insurance. The greater priority is to achieve financial independence.

[74] It follows from the conclusions which I have already expressed that I am not persuaded that the district judge did fall into error of principle in making the order that she did. I acknowledge that her reasoning created the opportunity for the argument successfully advanced by Mr Posnansky before Bennett J but it is implicit in her reasoning that she recognised the wife's entitlement to a fair share of the husband's surplus income, albeit that she did not correctly identify the overriding purpose to which it had to be put.

Outcome in Parlour's case

c [75] In *Parlour's* case the imperative to achieve finality is even stronger. The husband's income is substantially greater but the graph is likely to plummet within four or five years, in contrast to Mr McFarlane's prospect of steady ascent until retirement.

d [76] Unfortunately the argument at the trial was directed as to the quantum of the joint lives order. The judge was not urged to focus on terminating the wife's financial dependency and it is therefore entirely understandable that he approached the case as he did. However in fairness to Mr Mostyn, in his final written submissions he concluded with these paragraphs:

e '32. The court should have little difficulty in concluding that in about 4 years time H will enter his twilight years and that there is a real risk that he will not have husbanded his income responsibly so as to make proper long-term support for his family.

33. The court should also conclude that the prognosis of net income set out by JW in her second report is reasonable (about £1.2m net per annum until June 2003).

f 34. Thus the court should conclude that to award W £444,000 from March 2003 to June 2004 from this income, which derives in large measure from a contract signed during the marriage, is wholly fair. It is a reasonable sharing of income. If it enables W to make savings then that is right and proper, on the facts of this case.

g 35. W will accept in any future capitalisation that she should bring into account such sum of periodical payments that she is awarded in excess of her aliment. The judgment can make this explicit.'

h [77] Mr Francis in his submissions was at pains to say that his client was approaching the end of his career at its present exalted height; he was prone to injury; his contract might not be renewed at its conclusion when he will be 32 years of age. These considerations only underline the obvious need for a substantial proportion of the income in the present fat years to be stored up against the future famine. Again I conclude that it would be wrong in principle to leave the responsibility and opportunity to the husband alone. The wife's and the children's needs were put at £150,000 by the judge. To award her the global figure of £444,000 per annum sought by Mr Mostyn allows her and obliges her to lay-up £294,000 per annum as a reserve against the discharge of her periodical payments order. I would in this case order a four-year extendable term. Hopefully a clean break will be achievable then on an assessment of the husband's earning capacity at 35 years of age and the wife's independent fortune

derived from the original capital settlement augmented by the substantial annual surplus built into her periodical payments order in the interim.

RECIPROCAL ASSESSMENT OF NEEDS

[78] It is obvious that in cases such as the present the calculation of the amount of surplus income cannot be achieved without first establishing what both the payer and the payee need in order to meet their projected expenditure. In preparation for the trials below both applicants advanced budgets which were generously cast and which at trial were subjected to rigorous cross-examination. In both cases the trial judge then assessed the applicant's needs, endorsing the majority of the total sought.

[79] In both cases the husbands failed to complete the relevant section of the Form E and in one case the husband refused subsequent requests for information.

[80] Mr Posnansky submits that *Campbell v Campbell* [1998] 3 FCR 63 justified that refusal. That is certainly not the effect of the decision. The relevant observation provoked by the facts of the case appears where I said (at 69):

'It has never been the custom in ancillary relief litigation to look with scrupulous care at the budget items of the prospective payer. Of course, it is incumbent on the judge to cross check to ensure that the adjudication that meets the applicant's needs is an adjudication which the respondent can afford. But that essential task the judge specifically performed as is plain from the passage which I have already cited.'

[81] I do not resile from that. It is the converse of passages in other authorities that deplore excessive investigation of the payee's budget.

[82] The cavalier disregard of the obligation to complete that section implies precisely the discriminatory vice identified by the House of Lords in *White's* case in condemning the quantification of a wife's capital share in a big money case solely by reference to her reasonable requirements. More fundamental is the implicit rejection of the application of s 25(2)(b): 'The financial needs ... which each of the parties to the marriage has or is likely to have in the foreseeable future.'

[83] We were told by the Bar that a practice has grown up for substantial earners to decline any statement of their needs on the grounds that they can afford any order that the court is likely to make. These appeals must put an end to that practice.

THE WIDER ISSUES

[84] The disposal of the present appeals which I propose is achieved by giving what I believe to be the proper emphasis to s 25A and the amendments to s 31(7) introduced by the Family Law Act 1996. That route circumvents the arguments developed both before Bennett J and in the written skeletons submitted on these appeals. That wider presentation examines: (a) the evolution of the statutory powers between 1857 and 1970; (b) the definition of periodical payments; (c) the principles governing the assessment of periodical payments; and (d) the guidance to be derived from judgments and academic analysis in other jurisdictions.

[85] I recognise that these areas are of some relevance to the present appeals and are likely to be of greater relevance to a number of other cases, either pending or certain to arise, in which s 25A is, for one reason or another, not prospectively engaged. A relatively benign tax regime has now been in force for many years and there is ample evidence of an increasing band of very high earners who may

a not possess a matching capital base. Accordingly I will express my opinion on each of the above topics briefly, in the context of cases in which the income of the party who earns is significantly greater than the combined outgoings of himself and the payee.

b [86] It is worth re-emphasising that these are exceptional cases. In the majority of cases the income of the earner is insufficient to cover the outgoings of two households. In many others the single income is sufficient only to provide for both households at a standard below that which the family enjoyed before separation. In many others the income will provide for both amply. In many more it will provide for both and a measure of luxury which each contends is not disproportionate to the standard enjoyed before separation. In all the above instances the respondents are correct in their submission that the court's c discretionary judgment will be dominated by an assessment of needs or, for the more affluent families, reasonable requirements.

The evolution of the statutory powers and the definition of periodical payments

d [87] The statutory power to order periodic sums by way of maintenance first appeared in the Matrimonial Causes Act 1866. At that date a wife was incapable of property ownership, the corollary being that her husband was ordinarily liable for her debts, since she contracted as his agent of necessity. Section 1 of the 1866 Act read:

e 'In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable.'

f [88] There can be no doubt that such payments were for the wife's maintenance, that is to say for her necessities, her needs, her aliment. The Married Women's Property Act 1882, which allowed the wife the power to own property independently, did not alter this construction. Nor did the statutory language vary greatly through succeeding reforms. The relevant section of the Matrimonial Causes Act 1965 (s 16(1)(b)) still provided: '... an order requiring the husband to pay to the wife during their joint lives such monthly or weekly sum g for her maintenance as the court thinks reasonable ...'

[89] There is no doubt, in my judgment, that to that date the court's power did not extend beyond ordering maintenance payments to meet the wife's needs.

h [90] The Matrimonial Proceedings and Property Act 1970 was a major reforming statute heralded by the 1969 Law Commission Report (see *Family Law—Report on Financial Provision in Matrimonial Proceedings* (Law Com no 25)). The following paragraphs are of some relevance. (i) Paragraph 17(a) makes plain that the Law Commission advocated new terminology rather than new powers. Financial provision was the generic term for periodical and lump sum payments. (ii) Financial provision was contrasted with provision by property adjustments. j (iii) Whilst the primary objective of financial provision orders was 'to provide income for the maintenance of spouses' the introduction of the lump sum order had 'blurred the line between provision from income and provision by way of adjustments to capital': see para 49 of the report.

[91] Thus I find nothing in the report that suggests the limited role for periodical payments for which the respondents have contended.

[92] Furthermore the statutory language itself clearly demonstrates the limitations of the respondents' submissions. The power to order periodical payments is to be found in s 23. In awarding periodical payments the court has to have regard to the s 25(2) criteria, amongst which the recipient's needs are only one of a multi-factored checklist. a

[93] Furthermore the abolition of the agency of necessity by the 1970 Act supports the view that 'maintenance' was not being used by Parliament in the sense given to it when a wife could take advantage of the agency of necessity. b

[94] The term 'maintenance' survives only in ss 22 and 27. In those contexts the term might be thought to have the traditional meaning. However the judges have rejected that approach.

[95] The argument that the court's power under s 22 to order maintenance pending suit was confined to sums necessary for the recipient's daily support was considered by Charles J in the case of *G v G (maintenance pending suit: legal costs)* [2002] EWHC 306 (Fam), [2002] 3 FCR 339. Charles J said (at [48]): c

'I do not accept that argument, for the following reasons. (1) The purpose of the 1970 Act was to change statutory provisions that were outdated and inadequate and to make a new start. (2) Although the word "maintenance" was used in both ss 1 and 6 of the 1970 Act (now ss 22 and 27 of the [1973 Act] there are changes between s 6 of the 1970 Act (s 27 of the [1973 Act]) and its predecessors and the word "maintenance" is not used in the predecessors to s 1 of the 1970 Act (s 22 of the [1973 Act]). (3) The subsequent amendments to s 27 of the [1973 Act] confirm or clarify that "maintenance" was not used by Parliament to refer to the old common law duty of a husband to maintain his wife. (4) The report (read alone and together with the Working Paper) supports the conclusion that "maintenance" was not used by Parliament to refer to the old common law duty of a husband to maintain his wife.' d
e

[96] Furthermore Charles J in *G v G* followed the earlier decision of Holman J in *A v A (maintenance pending suit: provision for legal costs)* [2001] 1 FCR 226, [2001] 1 WLR 605 establishing that the court had power to provide funds for the wife's contemplated litigation costs by adding substantial monthly instalments to what she needed for her aliment. f

[97] The cases that have considered the boundary of the court's power in ordering periodical payments are to the same effect. In *Cornick v Cornick (No 2)* [1996] 1 FCR 179 Sir Stephen Brown P in upholding the decision of Hale J stated (at 184): g

'I do not believe that Hale J erred in her approach in principle to this case, and I reject the submission which Mr Mostyn has made that there was a delimiting factor (as he termed it) which should have had the effect of restricting a judge hearing an application for variation to what he termed the budgetary or marital standard.' h

[98] In so deciding the court endorsed and followed the earlier decision in *Boylan v Boylan* [1988] FCR 689. In *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 Charles J stated: j

'[106] In my judgment, just as it is on the first application for orders for financial provision, [*White v White* [2001] 1 All ER 1, [2001] 1 AC 596] is clear authority on an application for variation (and for an order for a lump sum on a discharge or variation of a periodical payment) for the following points,

a namely that (a) the court should not rely on the judicial concept of “reasonable requirements” as a determinative or limiting factor in cases when a payor has, or acquires, an ability to pay more than the payee’s financial needs even when they are interpreted generously and called “reasonable requirements”, and (b) the court should exercise its discretion by applying the words of the statute.’

b [99] Thus there can be no doubt of the court’s power to order periodical payments to reflect more than the recipient’s mere aliment, provided that all the s 25(2) criteria, all the circumstances of the case and overall fairness so require.

The principles upon which periodical payments are to be assessed

c [100] This question I have partially addressed in considering the definition of periodical payments. The respondents’ submissions take us back to the 1969 Law Commission report. They cite the following passage from para 83:

d ‘Of the criteria mentioned in Paragraph 82(a), (i) [the respective means, needs, earning capacity and financial responsibilities of each spouse] and (ii) [the standard of living of the parties] will be especially relevant to periodic cash provisions; the others to property adjustments and lump sum awards.’

e [101] The appellants’ submissions point out that the force of that citation is diluted by adding the next following sentence: ‘But, as already emphasized, the two types of financial provision cannot and should not be kept wholly distinct, and all criteria are, or may be, relevant.’

f [102] Thus I do not derive help on this issue from that source. It is almost trite to emphasise that the assessment of periodical payments must be governed by the language of s 25. No one factor in the s 25(2) checklist predominates. The submissions of the respondents seek to elevate the applicant’s needs to a dominant priority. However in deference to authority they accept that it cannot be aliment or bare needs but some form of enhanced needs. That acceptance leads them into a position that is difficult to defend. How is the surplus above needs to be defined or assessed? Bennett J recognised the difficulty in his judgment and met it by saying that the assessment of periodical payments was an art and not a science. However practitioners rightly complain that art depends greatly upon the individual judge and consequently art imports unpredictability of outcome.

g [103] The same difficulty confronted Mr Posnansky. He was fluent in negative statements. He said that there must be no reference to entitlement based on some contribution during marriage without which the payer would not be able to achieve his elevated future earnings graph. Equally proscribed, he submitted, was any reference to compensation for an earning capacity either sacrificed or irretrievably abandoned by agreement during the marriage. The only positive consideration that Mr Posnansky was able to advance as the basis for the assessment of surplus over needs was the planned progress to clean break in implementation of the s 25A duty. Mr Posnansky’s inability to suggest any other positive consideration leads me to understand his concept of ‘needs plus’ as the old concept of reasonable requirements, which was the measure for an applicant’s capital award for about 20 years.

j [104] But why should Lord Nicholls’ demonstration of the discriminatory nature of the reasonable requirements measure in capital awards not apply

equally to income awards? To cite again the familiar paragraph (*White v White* [2001] 1 All ER 1 at 11–12, [2001] 1 AC 596 at 608):

‘But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife’s financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court’s assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division.’

[105] Although this paragraph was not written with periodical payment assessment in mind, why should the principle defined not be of equal application?

[106] My present view is that in this jurisdiction we should not flirt with, still less embrace, any of the categorisations of the defining purposes of periodical payments advanced by academic authors. The judges must remain focused on the statutory language, albeit recognizing the need for evolutionary construction to reflect social and economic change. The statutory checklist and the overall circumstances of the case allow the judge to reflect factors which are said to be inherent in either the entitlement model or the compensation model. But to adopt one model or another or a combination of more than one is to don a strait-jacket and to deflect concentration from the statutory language. Clearly in the assessment of periodical payments, as of capital provision, the overriding objective is fairness. Discrimination between the sexes must be avoided. The crosscheck of equality is not appropriate for a number of reasons. First in many cases the division of income is not just between the parties, since there will be children with a priority claim for the costs of education and upbringing. Second Lord Nicholls suggested the use of the crosscheck in dividing the accumulated fruits of past-shared endeavours. In assessing periodical payments the court considers the division of the fruits of the breadwinner’s future work in a context where he may have left the child-carer in the former matrimonial home, where he may have to meet alternative housing costs and where he may have in fact or in contemplation a second wife and a further child.

[107] Returning to the specific question considered by Bennett J, I doubt the modern relevance of the distinction sought to be drawn between income and capital.

[108] In the twentieth century social and economic shifts broke down the hallowed distinction which our Victorian forbears drew between capital and income. In days of zero inflation, or even deflation, and before the introduction of income tax, capital assets were invested for the steady yield which produced

a the income from which family expenditure was met. The spending or the reduction of capital signalled the road to ruin.

[109] In the aftermath of the Second World War rates of tax upon unearned income approached 100%. The avoidance of such penal rates became for some a paramount objective. In an age when the annual rate of inflation spiralled the acquisition of capital by substantial borrowing, which could often be set-off
b against earned income otherwise liable to tax, became the ordinary means of acquiring substance, particularly as the rise in property values frequently outstripped the rise in inflation. The consequence has been the erosion if not the elimination of the hallowed distinction between capital and income. What people spend is money which is likely to be derived from a variety of sources. Spending needs may well be met from the sale of capital assets or the realisation
c of capital appreciation. Provision for the future may be by investment in an income fund or by the acquisition of capital assets held for subsequent realisation. All these realities are well illustrated by the financial arrangements and choices that the McFarlane family have made.

d *The guidance to be derived from judgments and academic analysis in other jurisdictions*

[110] In my judgment these sources were of only passing relevance to the two appeals presently before us. The respondents stressed that in any event the Australian, New Zealand and Canadian decisions are founded on statutory criteria that differ from the provisions of the 1973 Act. Nevertheless there can be
e no doubt that the trend in these common law jurisdictions is towards the recognition of wider purposes, objectives and factors in the quantification of spousal support orders. Nowhere are the needs of the applicant the dominant consideration. I would therefore mark these common law decisions and guard against any approach that would put this jurisdiction out of step where the application of our statutory provisions is open to more than one interpretation.
f It seems inevitable that a future appeal will require a closer analysis of Commonwealth authority.

[111] The New York case law is in my judgment plainly of lesser relevance. Mr Mostyn sought to persuade us to follow the approach reflected in what he described as the leading and landmark case of *O'Brien v O'Brien* (1985) 66 NY 2d
g 576. There the court assessed the likely excess over average earnings of the husband's future earnings as a medical practitioner. It then capitalised that anticipated achievement and awarded the applicant 40% of the capital sum payable by 11 equal annual instalments. That approach seems to me to be open to obvious criticism in any jurisdiction in which the recipient's entitlement
h terminates on death or remarriage. I share the misgivings expressed by Coleridge J in recent decisions. In *N v N* (*financial provision: sale of company*) [2001] 2 FLR 69 he said (at 75–76):

j 'In the current climate now, where the court is engaged more in dividing up assets than in calculating a party's reasonable needs, there would be logic in trying to calculate and include a figure for any asset which generates a secure income. At its most extreme that might include the valuation of a party's earning capacity. However, in my judgment, the evaluation of such an ephemeral item would be pregnant with problems and lead to endless debate incapable of fair resolution. It would be even more problematic where there was ongoing provision for children.'

[112] In *G v G (financial provision: equal division)* [2002] EWHC 1339 (Fam) at [27], [2002] 2 FLR 1143 at [27] Coleridge J said:

'The valuation of a person's earning capacity by its reduction to a fixed figure is not an exercise that can usefully be embarked upon. There are too many imponderables. However, it seems to me perfectly proper to pray in aid, by way of makeweight to an argument in relation to any particular capital division, an earning capacity available to one party or another over and above income generated from the capital being divided.'

ORDERS

[113] Given the views which I have expressed on the two appeals, Mr Francis's application for permission to appeal is manifestly hopeless. I would dismiss it. In *McFarlane's* case I would set aside the order of Bennett J and restore the order of the district judge without the provision for index linking but for a term of only five years from the date of her order. In *Parlour's* case I would allow the appeal and substitute the order sought by Mr Mostyn for the term of only four years from the date of the trial. Obviously during that term the value of the wife's percentage share will fluctuate, and probably reduce, as the husband's earnings vary from their present level.

LATHAM LJ.

[114] The vast majority of the problems which the courts have to resolve in relation to matrimonial finance involve a difficult exercise in ensuring that limited resources are distributed in such a way as to reduce the financial hardship of divorce as much as possible. But we are dealing in the present appeals with cases where the position is very different. In neither case, however, is there sufficient capital for there to be an immediate solution by way of a clean break. But in both there is, in *Parlour's* case at least at present, annual income far in excess of the needs or reasonable requirements of the parties. As Thorpe LJ has pointed out, that excess amounts in one case to approximately £550,000 per annum and in the other approximately £900,000 per annum.

[115] Counsel for the husbands both accepted that the wives' entitlement was not restricted to their reasonable requirements, accepting as they did that that would be an unwarranted restriction on the court's discretionary powers bearing in mind the matters set out in s 25(2) of the Matrimonial Causes Act 1973. Their submissions however came perilously close to submitting that there is little room for other considerations. That applies in particular to Mr Posnansky QC's argument that a periodical payments order cannot be used as a means to enable a wife to build up capital, as this would cut across the principle established in *de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546.

[116] I have considerable sympathy, in one sense, for the view that the 'reasonable requirements' approach has the merit of being both flexible, in that the word 'reasonable' can take into account a number of the matters set out in s 25(2) and also being capable of pragmatic evaluation. The problem quite simply is that it does not give proper effect to the words of s 25(2). In particular, in the context of Mr Posnansky's argument, it does not give effect in any way to the provisions of s 25(2)(b) and (f) which require the court to look to the future. These not only permit, but in an appropriate case, may require the use of income to generate capital for future eventualities. It is clear that there will be cases where the assessment of the parties' reasonable requirements will be the only

a sensible route to a fair division of limited resources. But where, as here, there is an excess of income, that can only be part of the inquiry.

[117] It is, however, a necessary part of the inquiry. For it is only by examining the reasonable requirements of both parties that the quantum of the excess can be identified so as to enable sensible decisions as to its disposal to be made. That necessarily involves the husband providing the relevant information to the court. The practice which has developed of not providing that information in cases such as these is, in my view, not only discriminatory but also demeaning to the wife. It concentrates the forensic battle on an examination of the wife's claim in a way which is in my view inappropriate. The exercise required by statute is one which is intended to produce a fair result. I consider that *White v White* [2001] 1 All ER 1, [2001] 1 AC 596 applies as much to claims for periodical payments as to capital provision. And an examination of the husbands' reasonable requirements will be part of that exercise.

[118] The problem is that the concept of fairness is elastic and often subjective. Attempts to identify what society would consider to be an appropriate yardstick to use to determine fairness have found the answer elusive. And the material with which we have been provided from other jurisdictions has merely underlined how difficult the search for the answer has proved to be. In the absence of a consensus, decisions will have to continue to be made on a pragmatic, and individual basis, which is inevitably unsettling for litigants and their advisors.

[119] But in the present cases, I agree with Thorpe LJ and Wall LJ, both of whose judgments I have read in draft, that the solution is to be found in s 25A. The duty imposed on the court by that section requires us to consider the extent to which it is possible within the family resources to achieve a clean break. In the present cases, this can only be done by use of periodical payment orders enabling the respective wives to accumulate capital. For the reasons that I have already given, that seems to me to be a perfectly proper use of such an order. Like both Thorpe LJ and Wall LJ, I recognise that this is an approach which was not argued either before Bennett J, or us. I am satisfied, however, that it is the right route to take in order to resolve these appeals. For the reasons that they give, I would allow these appeals in the terms proposed by Thorpe LJ, and dismiss the application for permission to appeal in *Parlour's* case.

WALL LJ.

[120] I agree that these two appeals should be allowed for the reasons given by Thorpe LJ, whose judgment I have had the advantage of reading in draft. I also agree with the orders he proposes. I add a short judgment of my own partly to reflect the interest which the two cases have generated within the profession, but primarily because we are disagreeing with an experienced judge of the Family Division, who conscientiously applied himself to the arguments addressed to him, and decided both cases on the basis of those arguments.

[121] It is a frequent (albeit informally expressed) complaint of judges at first instance that cases argued before them bear little resemblance to the decisions which emerge after the self-same cases have been argued in the Court of Appeal. Bennett J would, I think, be entitled to voice that complaint in relation to these two appeals.

[122] Both decisions, one arising by way of appeal from the district judge and the other by way of the exercise of a first instance discretion, were, it seems to

me, dictated by what appears to have been an analysis agreed at the Bar and then put to the judge. That analysis appears to have been that because there had been in each case (1) a consensual capital distribution by way of lump sum and property adjustment orders and (2) an agreement that the capital distribution was insufficient to bring about a clean break, it therefore followed (3) that there should be indefinite orders for periodical payments expressed to last during joint lives or until the remarriage of the payee or further order of the court.

[123] For ease of reference, although it is not strictly accurate, I will refer to such orders as 'joint lives' orders. In my judgment, proposition (3) in [122], above, is both a non sequitur and contrary to the statutory objective contained in s 25A of the Matrimonial Causes Act 1973.

[124] With the exception of the concluding paragraphs of Mr Mostyn QC's closing submissions on behalf of Mrs Parlour (set out by Thorpe LJ at [76], above, and which go to future capitalisation rather than to s 25A), no consideration appears in either case to have been given to, and no substantive argument addressed to the judge on, s 25A(1) and (2) of the 1973 Act, which Thorpe LJ has set out at [57], above, but which bears repetition:

'Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage.—(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.'

[125] In *McFarlane v McFarlane*, the district judge recorded the parties' agreement that there was insufficient capital to achieve a clean break, and dealt summarily with s 25A(2) simply stating her satisfaction that this was not a case where the wife could adjust, without undue hardship, to the termination of periodical payments in her favour. Although Mrs McFarlane had at one point posited a clean break by lump sum instalments of £65,000 per annum index linked until 2017, she abandoned that approach before the hearing, and her case was put to the district judge on the basis that there was no reason why she should not receive income at the level of £275,000 per annum net index linked on an indefinite basis to enable her to make provision for the future for herself, for as long as such a level of periodical payments was within Mr McFarlane's means. Accepting the district judge's award of £250,000 per annum, her case was advanced both to the judge and to this court on the same basis. Section 25A receives only a passing mention in two and a half lines of Mr Singleton QC's erudite and exhaustive 131 paragraph skeleton argument prepared for this court. It was only in his written submissions in reply that Mr Singleton addressed s 25A directly.

a [126] As Mr Posnansky points out, both his skeleton arguments before the judge in the court below and in this court make reference to s 25A and to the statutory aim of the clean break. But the former does so in the context of it being common ground that *McFarlane v McFarlane* was not a clean break case, and in the context of a submission that joint lives maintenance fixed at a high level was both inimical to the achievement of a clean break and wrong in principle because it b included an element for future long term provision by way of capital accretion or pension fund. The same argument, in a slightly more sophisticated form, appears in his skeleton argument prepared for this court.

c [127] The absence of any reference to s 25A of the 1973 Act in *Parlour v Parlour* is, in my judgment, even more surprising because it was manifest that a substantial question mark hangs over Mr Parlour's future earning capacity. The judge, being invited to make a joint lives order at a fixed percentage of the husband's net income (a global sum of £444,000 per annum for the wife and the three children) declined to do so, as it seems to me, on two bases. Firstly, on the facts, he held ([2004] 1 FCR 709 at [71]) that the husband was likely to put aside significant sums from his income and other interests in the next year and a half, d and there would, accordingly, be a 'greater capital pot of the husband for the support of the wife and children if his income thereafter declines significantly'. Secondly, the judge expressed the view (at [100]) that—

e 'the time for [Mrs Parlour] to seek the court's assistance in mitigating as far as possible risks to her economic livelihood, both present and future, was at any final hearing as to capital. She was not obliged to settle her capital (or any other) claims at the FDR but she did so.'

'Why then', the judge asked rhetorically,

f '... should it be possible for her to seek an award for periodical payments way, way beyond her needs (generously interpreted), the effect of which, from her own evidence ..., would give her substantial savings and thus capital?'

He therefore concluded (at [107]):

g 'It surely must be implicit in the concept of periodical payments when placed next to the concepts of lump sum and property adjustments that where there has been a capital adjustment between spouses in accordance with [*White v White* [2001] 1 All ER 1, [2001] 1 AC 596], as it was in the instant case, the function of periodical payments should not then or at some later date be seen to further the claimant spouse's ability to mine the paying h spouse's income for further capital.'

[128] At the same time, of course, the judge recognised the tension between that statement, and the actual order he made which—almost exclusively because of the size of Mr Parlour's income—substantially exceeded Mrs Parlour's needs.

j [129] In my judgment, Bennett J's approach is a reflection of the manner in which the cases were presented to him. It is an approach which, in the vast majority of modest income cases, is likely to be correct. However, in my judgment, the conventional joint lives order approach to periodical payments does not fit easily with the highly unusual facts of these two cases, and in particular the two critical factors common to each, namely: (1) the absence of sufficient capital to produce an immediate clean break; and (2) the fact that in

each case the payer's income is easily able to accommodate periodical payments to the payee, in the judge's words, 'way, way beyond her needs (generously interpreted)'. In this context, it seems to me that s 25A was of direct application, and it is unfortunate that its proper application did not form part of the argument. a

[130] In his written submissions in reply, Mr Singleton, it seemed to me, was dismissive of s 25A. Although a clean break is a 'desirable objective', s 25A does not, he argued, justify reducing a wife's entitlement in order to effect a clean break. Thus, he submitted, the obligation on the court is only a duty to 'consider' effecting a clean break where 'appropriate' and there is not a presumption that there will be a clean break. The correct approach, therefore, is to establish the wife's entitlement by reference to s 25 and then consider whether or not a clean break is possible. b

[131] I cannot accept this analysis of the role of s 25A. Of course, any order predicated on s 25A must be fair, and by reference to the terms of the section itself will be an exercise of the court's powers which involves the application of the criteria contained in s 25(2). In my judgment, however, the philosophy of the clean break contained within s 25A, clearly identified by Lord Scarman in his speech in *Minton v Minton* [1979] 1 All ER 79 at 87, [1979] AC 593 at 608 (well before the repeal of the s 25 tailpiece) as one of the two principles which inform the modern legislation, is at the heart of the amended statute. c

[132] Section 25A of the 1973 Act was enacted at the same time as the tailpiece to the old s 25 was repealed. It is of course the case, as Lord Nicholls points out in *White v White* [2001] 1 All ER 1 at 9, [2001] 1 AC 596 at 604 that when the tailpiece to s 25 was repealed, nothing was inserted in its place as a mandatory overarching statutory imperative as to the manner in which the court was to exercise its powers under s 25. This does not, however, in my judgment, detract either from the fact that s 25A is a statutory embodiment of the principle enunciated in *Minton's* case or from the fact that the clean break, in Lord Scarman's phrase, represents one of the two principles informing the modern legislation. d

[133] It is, of course, the case that s 25A uses the word 'consider'. The omission of the words 'to consider whether it would be appropriate' in s 25A(1) would be to cause manifest injustice in those many cases where a clean break is not possible. But the statutory obligation in my judgment is clear. The court has a duty, in every case in which it makes orders for ancillary relief, to consider the appropriateness of exercising its powers in order to bring about a clean break within a reasonable time. This includes in s 25A(2) the particular duty to consider fixed term orders for periodical payments. It seems to me, with respect, that this exercise was simply not undertaken in these two cases. e

[134] Mr Singleton and Mr Mostyn are, however, I think, right when they submit that a payee's right to periodical payments is to a share of the payer's income which the payee (in each of the current cases the wife) has, through her domestic contribution, helped the payer develop. I therefore agree that where the payer's income is sufficiently large (as here) a cut-off point for periodical payments based on generously interpreted needs, thereby leaving a large surplus of income for the payer to do with as he pleases, has no foundation in the statute and is discriminatory. But the danger of this approach seems to me to be that it runs the risk of re-introducing the repealed tailpiece of s 25 of the 1973 Act by the back door. If the payee has, in effect, a vested, life-long interest in such an income, is she not being placed in the position in which she would have been if f

a the marriage had not irretrievably broken down? And is the principle contained in s 25A not being simply bypassed?

[135] I am the first to acknowledge that periodical payments based on a proportion of joint incomes (for example, the old 'one-third' rule) was discriminatory and may well have caused injustice to women payees. The balance which, it seems to me, needs to be struck in a case such as the present, is
b the need to achieve fairness to both wives whilst fulfilling the obligation imposed by s 25A. In my judgment, that is not achieved by open-ended orders of the type sought by both Mrs McFarlane and Mrs Parlour. It is achieved by orders which exceed need in amount, and which divide equitably the very large income enjoyed by both husbands. But with that division, in my judgment, comes a responsibility on the payee to use the surplus over needs towards financial
c independence and self-sufficiency.

[136] Thus, in exceptional cases such as the present, and on the basis of term orders, I have no difficulty in contemplating periodical payments being used by the payee as a means of accumulating capital. That is because I perceive Pt II of the 1973 Act (as indeed it has been perceived from its inception as the
d Matrimonial Proceedings and Property Act 1970) as a flexible code designed to ensure that its various components are used imaginatively to produce a fair result. In *Wachtel v Wachtel* [1973] 1 All ER 829 at 836, [1973] Fam 72 at 91, this court described the 1970 Act as—

‘a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages have been dissolved ... We regard the provisions of ss 2, 3, 4 and 5 of the 1970 Act as designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end ...’
e

[137] The theme of flexibility was mirrored in *Trippas v Trippas* [1973] 2 All ER 1, [1973] Fam 134 (see, in particular, the judgment of Scarman LJ (as he then was) ([1973] 2 All ER 1 at 7, [1973] Fam 134 at 144)) and in many of the cases in this court dating from the early days of the statute. Thus in *Doherty v Doherty* [1975] 2 All ER 635, [1976] Fam 71, this court eschewed technicality when considering the distinction between lump sum and property adjustment orders. Ormrod LJ (whose judgments, as Lord Nicholls commented in *White v White* [2001] 1 All ER 1 at 11, [2001] 1 AC 596 at 607 are a valuable source of the jurisprudence of the period) said ([1975] 2 All ER 635 at 640, [1976] Fam 71 at 79):
f
g

‘Whether it is right, or not, to accept counsel for the husband’s submission that a clear distinction should be drawn between notices of application for financial provision under s 23 and notices of application for property adjustment orders under s 24, may be doubted. These two sections are, in effect, a statement by Parliament of the code to be adopted by the court in dealing with ancillary relief after divorce generally. The fact that they are two separate sections seems to me to be much more a matter of convenience and drafting than anything else. There is no reason that I can see why any
h
j distinction should be drawn between those two classes of relief which the court is now empowered to grant. In my view, these two sections should be, as far as possible, regarded as part and parcel of a single code. It may be very important in many cases when the matter comes to be investigated by the court that the court should be free to make either a property adjustment order or a lump sum order, whichever turns out to be the more convenient in the

circumstances. It would be unfortunate, I think, if that degree of elasticity were lost for some technical reason. It is quite plain that the same principles apply in the assessment of claims under each of these two sections. That appears from s 25, and it is equally plain from the judgments in *Trippas v Trippas* of Lord Denning MR and Scarman LJ. Lump sum orders are alternatives to property adjustment orders, and in many cases one order may prove more convenient than another. I do not think there is any greater difference than that. So, in my judgment, the court should keep technical points of the kind with which we are dealing in this case to an absolute minimum.’

[138] Of course it is the case that the statutory imperative which both *Wachtel’s* case and *Doherty’s* case were serving was the now repealed tailpiece to s 25. But in my judgment, the incremental changes to the statute over the years since 1970 which have changed its direction and remedied a number of injustices (notably in the field of pensions) have not altered the fundamental approach. The statute is a flexible code designed to enable the court to achieve a fair outcome. Periodical payments are one part of that code. The principle of the clean break is now, in my judgment, contained in s 25A. If, in exceptional cases such as the present, periodical payments can be used to enable a payee to accumulate capital and thus facilitate a termination of financial obligations within a reasonable time, such a use seems to me fair and square within the statutory objective. What do not, however, seem to me to be within the statutory objective in the present two cases are indeterminate and unfocused joint lives orders very substantially in excess of needs.

[139] Speaking for myself, I do not see this approach as inconsistent with the decision of this court in *Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 3 FCR 178. In that case the court was considering capitalisation of periodical payments under s 31(7B) of the 1973 Act. The judge had construed that section as giving him the power to make an additional capital award over and above that required to capitalise the wife’s order for periodical payments. Such an additional award was in conflict with the principle that the capital distribution ordered or agreed on dissolution was once and for all. The present cases seem to me quite different. An award of periodical payments designed to enable the payee to accumulate capital which can then be taken into account when consideration is being given to the sum required to achieve the termination of the order for periodical payments seems to me wholly consistent with the terms of both s 25A of the 1973 Act (and for that matter, s 31(7B)) and does not conflict with the principle that capital awards are once and for all.

[140] For all these reasons, therefore, I am in agreement with Thorpe LJ that neither order made by the judge can stand. I have found more difficult the question as to what orders this court should put in their place. In *McFarlane’s* case, however, it seems to me that the outcome is effectively dictated by the fact that the case reaches us as a second appeal, and that the appeal from the district judge to Bennett J was governed by *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FCR 97. Since I agree with Thorpe LJ that the judge was wrong to interfere with the order of the district judge on two bases: (a) that her order wrongly required the husband to pay over to the wife ‘moneys which were likely to be directed into financial vehicles for the accumulation of capital’; and (b) that the effect of her order was ‘subvert the principle set out in many cases that an award of capital is made once and once only, and that the purpose of periodical

a payments is maintenance', it follows that the only course properly open to this court is to restore the order of the district judge.

[141] Despite the affluence of the parties, I am very conscious of the high cost of this litigation to them, and in any event, in practical terms I have doubts about the utility of a further hearing designed to identify a proper level of payments designed to fulfil the objectives of s 25A. In the event, therefore, I am persuaded
b by Thorpe LJ's judgment (at [68]–[74], above) that whilst the district judge did not address her mind to s 25A(1) and left to Mrs McFarlane the use to which she put the surplus over needs in the order for periodical payments, that is not an error of principle, and thus the proper course is not to remit the matter but to restore the district judge's figure for periodical payments and to substitute for the joint lives order an extendable term of five years. At the conclusion of that period,
c which should coincide with the elimination of the husband's commitment to repay the mortgage on his property, it will be for the parties to negotiate, or for the courts to determine whether a clean break can then be achieved, and if so on what terms, or whether the term of the order should be extended.

[142] I have found the outcome in *Parlour's* case more difficult. Whilst
d Mr Mostyn's global percentage has the attractive neatness of matching the level of capital distribution, I am less sure that an arbitrary figure calculated without reference to s 25A will necessarily produce a fair result in four years. At the same time, a further inquiry into the figures is likely to be both expensive and time-consuming, and may well encounter many of the unknown factors which
e currently confront us. Once again, therefore, I am in the event persuaded that the course proposed by Thorpe LJ (at [77], above) is the correct one.

[143] I end by reiterating a theme of this judgment, namely that these two cases are, in my view, exceptional. It may well be that the specialist profession has a number of cases in which a spouse has a high six figure or even seven figure net income which is not matched by sufficient capital to achieve an immediate
f clean break at the point when the wealth of the family falls to be distributed at the end of the marriage. No doubt, in certain professions (including sport) incomes of the magnitude demonstrated by these appeals are more common than heretofore. However, such incomes remain exceptional. As Thorpe LJ has pointed out, in the overwhelming majority of cases, the income (whether
g generated by one spouse or jointly by both) on which husband, wife and children have lived together is stretched to meet the needs of two households, and is frequently inadequate to do so. In such cases, the approach of the judge would be unimpeachable. I therefore repeat my agreement with Thorpe LJ that these two appeals arise on exceptional facts.

[144] That said, however, such cases have to be fitted into the statutory
h framework. In my judgment, the profession, in attempting this exercise, asked itself the wrong question in these two cases. The question was not: what are the principles governing an award of periodical payments during joint lives or until remarriage in any case where the net income of the payer significantly exceeds what both parties need in order to meet their outgoings at the standard of living
i which the court has found to be appropriate? This question ignores the clear statutory language of s 25A.

[145] The profession inevitably craves certainty, so that it can advise its clients appropriately. That, of course, is not a new aspiration. In *Martin v Martin* [1977] 3 All ER 762, [1978] Fam 12, in which this court upheld the right of a wife to remain indefinitely in a very modest matrimonial home against the

claim of her former husband that it should be sold and the proceeds equally divided, Ormrod LJ said ([1977] 3 All ER 762 at 768–769, [1978] Fam 12 at 20):

‘I appreciate the point he [Mr Aglionby, counsel for the husband] has made, namely that it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973. It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore, it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word. There is bound to be an element of uncertainty in the use of the wide discretionary powers given to the court under the 1973 Act, and no doubt there always will be, because as social circumstances change so the court will have to adapt the ways in which it exercises discretion. If property suddenly became available all over the country many of the rationes decidendi of the past would be quite inappropriate.’

[146] No doubt ancillary relief has become more sophisticated since 1977, but the speech of Lord Nicholls in *White’s* case is a timely reminder that the only principled approach is the application of the words of the statute to the pursuit of fairness. For the reasons given by Thorpe LJ I agree that this approach applies to both capital and income. In my judgment these two cases went awry because the terms of s 25A were not properly considered, with the consequence that an attempt was made to impose joint lives orders in exceptional circumstances to which they were not fitted.

[147] For these reasons, in addition to those given by Thorpe LJ, I would, accordingly, allow these appeals.

Appeals allowed. Mr Parlour’s application for permission to cross-appeal dismissed. Permission to appeal to the House of Lords refused.

Melanie Martyn Barrister.

a **Autologic Holdings plc and others v Inland Revenue Commissioners**

[2004] EWCA Civ 680

b COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON AND LONGMORE LJ
20–21, 28 MAY 2004

c *High Court – Jurisdiction – Tax appeals – Statutory procedure for tax appeals to General or Special Commissioners – Taxpayers bringing proceedings in High Court against Inland Revenue claiming damages and restitution for breaches of EC Treaty – Whether taxpayers required to follow statutory procedure for tax appeals.*

d In 2001 the Court of Justice of the European Communities held, in a case concerned with particular provisions of United Kingdom taxation, that where the tax legislation of a member state afforded subsidiary companies resident in the member state the possibility of obtaining a benefit where their parent company was also so resident, it was contrary to Community law for the member state to deny that possibility where the parent company was resident in another member state. Subsequently, a large number of companies brought
e claims against the Inland Revenue on various other tax points relating to provisions dealing with resident and non-resident companies. Several group litigation orders were made. Claimants within one of the group litigation orders brought proceedings against the Revenue in the High Court for restitution and damages under various heads in consequence of not having been able to use losses of non-resident companies in group loss relief. A
f procedural dispute arose concerning whether the parts of the claims for the profits of United Kingdom profit-making companies to be relieved by the losses of non-resident companies should have been brought under the normal statutory procedure for the determination of tax disputes, which was that a company would make a quantified claim to its inspector of taxes and, if the
g claim were not allowed, the company would appeal to the General Commissioners or the Special Commissioners, with a right of appeal from the commissioners' decision to the High Court. The Revenue applied to strike out those parts of the claims of six test claimants. The judge found that issues of tax law which were disputed between a taxpayer and the Revenue ought to be resolved by way of appeal to the commissioners and accordingly struck out
h those parts of claims. The claimants appealed, contending, inter alia, that the procedural issue raised was essentially the same as that in the 2001 decision of the Court of Justice, and that by reason of that decision, the High Court was required to hear the disputed parts of the claims.

j **Held** – It was contrary to Community law for a national court, such as the High Court, to refuse a claim brought before it by a resident company having profits for restitution or damage for the financial loss suffered as a consequence of not being able to obtain group loss relief from the surrender to the resident company of losses by a non-resident company in the same group on the sole ground that the companies had not made use of the statutory procedure. In the

instant case, the High Court had been obliged to entertain the claims, and, if made out, to give effect to them. The appeal would, accordingly, be allowed and the Revenue's application to strike out dismissed (see [19]–[21], [28], [31], [32], below).

Metallgesellschaft Ltd v IRC, Hoechst AG v IRC Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620 applied.

Notes

For appeals and references in tax matters, 23(1) *Halsbury's Laws* (4th edn reissue) paras 1750–1761.

Cases referred to in judgment

Amministrazione della Finanze dello Stato v Simmenthal SpA Case 106/77 [1978] ECR 629, ECJ.

Glaxo Group Ltd v IRC [1995] STC 1075, *aff'd* [1996] STC 191, CA

Köbler v Austria Case C-224/01 [2004] All ER (EC) 23, [2004] 2 WLR 976, ECJ.

Marks and Spencer plc v Halsey (Inspector of Taxes) [2003] STC (SCD) 70.

Marks and Spencer plc v Halsey (Inspector of Taxes) [2003] EWHC 1945 (Ch).

Metallgesellschaft Ltd v IRC, Hoechst AG v IRC Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620, ECJ.

Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais Case C-88/99 [2000] ECR I-10465, ECJ.

Telemarsicabruzzo SpA v Circostel Joined cases C-320–322/90 [1993] ECR I-393, ECJ.

Cases referred to in skeleton arguments

Argosam Finance Co Ltd v Oxby (Inspector of Taxes) [1964] 3 All ER 561, [1965] Ch 390, CA.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Barraclough v Brown [1897] AC 615, [1895–9] All ER Rep 239, HL.

Beecham Group plc v IRC [1992] STC 935.

Danner (Proceedings brought by) Case C-136/00 [2002] STC 1283, [2002] ECR I-8147, ECJ.

R v IRC, ex p Bishopp [1999] STC 531.

Ritter Coulais v Finanzamt Gernersheim Case C-152/03, ECJ.

Unilever plc v Chefaro Proprietaries Ltd [1995] 1 All ER 587, [1995] 1 WLR 243, CA.

Vandervell Trustees v White [1970] 3 All ER 16, [1971] AC 912, HL.

Woolwich Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70, [1992] 3 WLR 366, HL.

Appeals

Autologic Holdings plc and five other test claimants within the Loss Group Litigation Order bringing proceedings against the Inland Revenue claiming restitution and damages for contraventions of the EC Treaty applied for permission to appeal, and to appeal from the decision of Park J on 3 March 2004 ([2004] EWHC 3588 (Ch), [2004] STC 594 (sub nom *Re Claimants under Loss Relief Group Litigation Order*)) striking out those parts of their claims relating to

a group loss relief under Ch IV of Pt X of the Income and Corporation Taxes Act 1988. The facts are set out in the judgment of Peter Gibson LJ.

Graham Aaronson QC, David Cavender and Paul Farmer (instructed by *Dorsey & Whitney*) for the claimants.

b *Richard Plender QC and David Ewart* (instructed by the *Solicitor of Inland Revenue*) for the Revenue.

Cur adv vult

28 May 2004. The following judgments were delivered.

c **PETER GIBSON LJ.**

[1] In *Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620 (I will call the joined cases *Hoechst*) the European Court of Justice (ECJ) has held that it is contrary to art 43 EC (relating to freedom of establishment) (formerly art 52 of the EC Treaty) for a member state by its tax legislation, which affords subsidiaries resident in the member state the possibility of obtaining a benefit where their parent company is also so resident, to deny that possibility where their parent company is resident in another member state. In *Hoechst* the benefit was the payment of dividends by the subsidiaries to their parent company without having to pay advance corporation tax (ACT) on those dividends. The ECJ further held that art 43 EC requires that resident subsidiaries and their non-resident parent companies which have suffered loss in consequence should have an effective legal remedy to obtain reimbursement of or compensation for that loss from which the member state has benefited.

f [2] The decision in *Hoechst* has spawned a huge number of claims against the Revenue totalling many billions of pounds as international groups of companies seek to take advantage of the implications of the decision. Those implications have been seen to go beyond the type of relief in issue in *Hoechst*. Many cases have been brought in the High Court. We are told that a group litigation order (GLO) has been made for each of five different classes of cases.

g [3] We are concerned with what is known as the Loss Relief GLO. There are currently 59 claimants in this GLO. They have brought proceedings in the Chancery Division claiming against the defendants, the Commissioners of Inland Revenue, restitution and damages. They say that the United Kingdom tax rules relating to group loss relief contravene arts 43 EC and 56 EC (relating to freedom of movement of capital). They also claim that those rules contravene the non-discrimination articles in the relevant double taxation treaties because those rules confine group loss relief to cases where all the resident companies are resident in the United Kingdom or, after 2000, are subject to United Kingdom corporation tax in respect of activities carried on in the United Kingdom. They say that arts 43 EC and 56 EC and the non-discrimination articles require group relief to be available irrespective of the place of incorporation, residence or business activities of the companies in the group. We are told that a further 140 companies have made claims in respect of group loss relief which are outside the Loss Relief GLO. Those claims have not been brought in the High Court.

[4] Six test claimants in the Loss Relief GLO have been selected for the purpose of the determination of a procedural dispute which has arisen between the GLO claimants and the Revenue. That dispute is as to whether the claims, so far as they relate to group loss relief, should have been brought pursuant to the ordinary statutory procedure for the determination of tax disputes, that is to say that there should have been a quantified claim made by the appropriate company to the appropriate inspector of taxes and, if the claim is not allowed, the company should appeal to the General Commissioners or, at the company's option, to the Special Commissioners (I will call the General or Special Commissioners hearing such appeal 'the Commissioners'), with a right of appeal from the Commissioners' decision to the High Court in the ordinary way. It is common ground that the other parts of the claims are correctly brought in the High Court as the Commissioners do not have jurisdiction to deal with them. The Revenue applied to strike out those parts of the claims which relate to group loss relief on the basis that the High Court either lacked jurisdiction or, if it had jurisdiction, it should exercise it by refusing to entertain those claims.

[5] Park J ([2004] EWHC 3588 (Ch), [2004] STC 594) on 3 March 2004 acceded to that application and refused permission to appeal. The claimants applied for permission to appeal to this court. Chadwick LJ, considering the application on paper, adjourned the application to a with notice hearing, with the appeal to follow, if permission were granted. At the outset of the hearing we indicated that we gave permission. This hearing has therefore been the hearing of the appeal.

[6] I must now refer briefly to the statutory provisions in point. Corporation tax is assessed and charged for any accounting period of a company on its profits arising in that period (ss 6 and 12 of the Income and Corporation Taxes Act 1988). If a company has trading losses, it may set off those losses against its profits (s 393 of the 1988 Act). Chapter IV of Pt X of the 1988 Act contains rules for group loss relief, extending the relief for a company's own losses to be set off against its profits, so that when one company in a group suffers losses, it may surrender those losses to another company in the same group, if the other company makes a claim so as to set off the losses against its profits. For accounting periods ended before 1 April 2000 the conditions for claims for group loss relief were governed by ss 402(2) and 413(3) and (5) of the 1988 Act. They provide:

'402(2) Group relief shall be available where the surrendering company and the claimant company are both members of the same group ...'

'413(3) For the purposes of this Chapter—(a) two companies shall be deemed to be members of a group of companies if one is the subsidiary of the other or both are 75% subsidiaries of a third company ...

413(5) References in this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this Chapter whether one company is a 75% subsidiary of another, the other company shall be treated as not being the owner— ... (c) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom.'

a For accounting periods ending after 31 March 2000 the following conditions, in s 402(3A) and (3B), apply:

‘402(3A) Group relief is not available unless the following condition is satisfied in the case of both the surrendering company and the claimant company.

b (3B) The condition is that the company is resident in the United Kingdom or is a non-resident company carrying on a trade in the United Kingdom through a branch or agency.’

c [7] Schedule 17A to the 1988 Act contains other detailed provisions relating to the making of group loss claims. It was originally provided by s 412 of the 1988 Act that such a claim in respect of an accounting period of a company had to be made within two years from the end of that period. That limitation period was later extended to six years for accounting periods ending after 30 September 1993. The claim must be for a quantified amount to be included in a corporation tax return. Throughout the Schedule the provisions are worded on the footing that both the surrendering company and the claimant company are companies resident in the United Kingdom. Thus by para 10 a claim requires the consent of the surrendering company and consent to surrender is to be of no effect unless notice of consent is given by the consenting company to the inspector to whom the surrendering company makes its returns, and notice of consent to surrender is to be of no effect unless it contains particulars including the accounting period of the surrendering company to which the surrender relates, and the tax district references of the surrendering company, and the company to which relief is being surrendered.

f [8] By para 12 of Sch 17A all such assessments or adjustments of assessments shall be made as may be necessary to give effect to a claim. Appeals against assessments are governed by s 31 of the Taxes Management Act 1970 which, by sub-s (4), provides for appeals to go to the Commissioners.

g [9] At the date of the hearing before Park J the six test claimants were all at different stages in making claims for loss relief to the inspector. (I will refer to the claimants by the abbreviated names by which they have been known in the proceedings.) (i) Autologic: there was an appeal pending before the Commissioners. (ii) Future Network: there was a claim made to the inspector which had been refused although not yet the subject of an appeal. (iii) BT: claims had been made to the inspector but had not yet been determined. (iv) Caterpillar: a claim had been made to the inspector but had subsequently been withdrawn. **h** (v) Heinz: no claim had been made to the inspector, but time had not expired for making claims for some accounting periods. (vi) BNP Paribas: no claim had yet been made to the inspector and the statutory time limit for making a claim had expired.

j [10] In the High Court proceedings all the claimants have claims for group loss relief to reduce the amount of corporation tax payable. They are the primary claims, but there are also other claims for damages or restitution. The various claims were summarised by the claimants before the judge as being for at least two and in some cases all four of the following categories:

(i) For the profits of the UK profit-making company to be relieved by the losses of a non-UK resident company. a

(ii) Because of the clear legislative requirement for all the relevant companies to be resident in the UK basic group relief was regarded in every case as not available. In many cases the profit-making companies used other reliefs (e.g. capital allowances or surplus ACT) which they would not have used had basic group relief been available. In these cases the profit-making companies claim restitution of the other reliefs or, in the alternative, compensation for their use. b

(iii) In many cases other UK members of the group surrendered their own reliefs to the UK profit-making company; and those companies are reclaiming the reliefs. c

(iv) In all of the cases the companies which would have surrendered losses, if the group relief rules were not confined to UK resident companies, may have been paid for allowing their losses to be set-off against the profit-making companies' profits, and they seek compensation for the loss of these payments. d

[11] It has throughout been the contention of the Revenue that the High Court has no jurisdiction to determine the category (i) claims, as they must proceed by way of the statutory procedure of a claim to the inspector whose decision can only be challenged by way of an appeal to the Commissioners: alternatively, if the High Court has jurisdiction, it should in the exercise of its discretion refuse to exercise it. It is not in dispute that the High Court has jurisdiction to determine the categories (ii), (iii) and (iv) claims and that the Commissioners have no power to grant those reliefs. The Revenue, however, said that those claims are dependent on the category (i) claims and cannot proceed until the category (i) claims have been determined by following the ordinary statutory procedure including a determination by the Commissioners. e

[12] The judge agreed with the Revenue. He said that issues of tax law which are disputed between the taxpayer and the Revenue ought to be resolved by way of appeal to the Commissioners. He rejected the submission advanced by the claimants that the *Hoechst* decision required the High Court to accept jurisdiction. He thought that it did not matter greatly whether the High Court had no jurisdiction or whether, if it had, he needed to decide whether or not to exercise it since, if there was jurisdiction, he would decline to exercise whatever jurisdiction he had. He reviewed the authorities on jurisdiction and found helpful the statement by Robert Walker J in *Glaxo Group Ltd v IRC* [1995] STC 1075 at 1083–1084 where that judge, having analysed the authorities, said: f

'Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment; but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction.' g

Park J said that the category (i) claims where there had been an assessment were precisely co-extensive with adjudicating on an existing open assessment and, where there was no existing open assessment, relief of the same nature was claimed. He was not impressed by the claimants' arguments that the more h

a convenient course for the parties was for him to accept jurisdiction. He said that the statutory procedure should be followed and it would be wrong to subvert and undermine the jurisdiction of the Commissioners by allowing cases between taxpayer and the Revenue on an issue of tax law to be commenced in the High Court. Accordingly he struck out two paragraphs of the claimants' pleadings relating to relief sought in respect of the category (i) claims. If I might b say so, the attitude adopted by the judge was that which would perhaps appeal to most lawyers experienced in tax matters if Community law considerations could be left out of account.

[13] Mr Graham Aaronson QC for the claimants took three main points. (1) By reason of *Hoechst* the judge should have found that the High Court not only had jurisdiction but was required to hear the category (i) claims. (2) The c judge erred in not deciding whether he had jurisdiction; he should have found on the authorities that he had jurisdiction and should have exercised it. (3) The judge erred in failing to appreciate or give adequate consideration to the practical difficulties in requiring the category (i) claims to be severed from all the other claims and consigned to the Commissioners; those difficulties should d have led the judge to exercise jurisdiction by hearing all the claims in the High Court.

[14] Mr Richard Plender QC for the Revenue submitted that the judge was right for the reasons which he gave. He said that on the authorities the High Court had no jurisdiction to deal with the category (i) claims and that e jurisdiction cannot be created by the admixture of admissible and inadmissible claims. He reminded us of the well-established constraints on this court if it is to interfere with an exercise of discretion by the judge and submitted that in the present case there were no grounds for such interference.

f HOECHST

[15] I start with Mr Aaronson's first point. In *Hoechst* ([2001] All ER (EC) 496 at 507, [2001] Ch 620 at 629 (para 13)) question 5 of the questions referred to the ECJ was:

g 'Is a member state entitled to plead in answer to such a claim for restitution, tax credit or damages, that the plaintiffs are not entitled to recover, or that the plaintiffs' claim should be reduced, on the grounds that, despite the terms of the national statute which prevented them from doing so, as a matter of national law they ought to have made a group h income election, or claimed a tax credit and have appealed to the commissioners and, if necessary, the courts, against the decision of the inspector of taxes refusing the election or claim, relying upon the primacy and direct effect of the provisions of Community law?'

[16] The Revenue in that case, as in this, had argued that the claims brought j by the companies in the High Court were invalid because they should have followed the statutory procedure whereby the companies could have appealed to the Special Commissioners against a refusal by the inspector to accept a claim to allow the dividend to be paid without an obligation to account for ACT. Mr Aaronson points out that the procedural issue raised in *Hoechst* is essentially the same as that in the present case with the deletion of references

to tax credit and to claiming a tax credit and the substitution of a reference to a claim for loss relief for the reference to group income election in question 5. a

[17] Advocate General Fennelly addressed question 5 in his opinion. He said ([2001] All ER (EC) 496 at 525, [2001] Ch 620 at 648–649 (paras 58, 59)):

‘58. Since I consider that the court should rule that the denial of the option to make a group income election to subsidiaries whose parent companies were resident in other member states constituted unlawful discrimination contrary to art 52 of the EC Treaty, and that the mere fact that the alleged resulting loss suffered by such subsidiaries concerned the time value of the use of the money paid by way of ACT does not preclude their claim, it is necessary to consider briefly whether the alleged omission of the claimants, over an extended period of time, to challenge that denial, on the basis of the relevant national statutory appeal mechanism, or, indeed, by way of an earlier direct judicial review application than that actually brought in the main proceedings, may be invoked by the defendant member state to defeat or reduce the damages sought subsequently by them in a claim based on its incompatibility with Community law. It is true that it has been accepted by the court that a failure to show “reasonable diligence” in order to avoid loss or damage or limit its extent and particularly to avail “in time of all the legal remedies available”, may, if similar rules would be applied in purely national law cases, be taken into account by the national court to reduce, and perhaps in extreme cases, eliminate member state liability (see *Ex p Factortame* [1996] All ER (EC) 301 at 368, [1996] QB 404 at 503 (para 84) and, in particular, the opinion of the Advocate General (Tesauro) ([1996] All ER (EC) 301 at 349, [1996] QB 404 at 482 (para 104))). In my opinion, it should not be permissible, save in the most extreme of cases, for a member state, whose legislation created a difference in treatment to the detriment of non-residents that admitted of no exceptions and which would have required them, on pain of penalties, to continue paying the tax in question even if its compatibility with Community law had been called into question, to rely upon a taxpayer’s failure to use a statutory remedy—one which, moreover, was not, in its own terms, applicable to it—for the purpose of making such a Community law claim, or to rely upon the direct effect and supremacy of art 52 of the EC Treaty, as an excuse for seeking to limit a subsequent claim for damages based on the incompatibility of that legislation with Community law. b
c
d
e
f
g

59. This conclusion reflects the important principle that a member state must not be allowed to profit from its own wrong. It may not, therefore, insist on the application of its rules against taxpayers and then, when those rules are found to be contrary to Community law, deny an obligation to make reparation for the loss it caused on the basis that those rules were not immediately challenged. In my view, in cases such as the present case, where claimants are essentially faced with an unambiguous national legislative rule, on the one hand, and the possible right to oppose the application against them of that rule on the basis of Community law, on the other hand, and where neither the rule in question nor any similar rule of another member state has previously been considered by this court, a delay on the part of the claimant in challenging the national rule in h
j

a question should only be taken into account by the competent national court when considering the possible limits affecting the claim before it flowing from national limitation periods or from other comparable rules regarding laches that would also apply to similar claims based purely on national law.'

b [18] The ECJ accepted ([2001] All ER (EC) 496 at 541, [2001] Ch 620 at 666 (para 102)) that claimants can be required by national rules of procedure to act with reasonable diligence. It continued ([2001] All ER (EC) 496 at 541–542, [2001] Ch 620 at 666–667):

c '103. Next, it is not disputed that in the cases in the main proceedings the tax legislation of the United Kingdom clearly denied resident subsidiaries of non-resident parent companies the benefit of the group income election, with the result that the claimants cannot be faulted for failure to indicate their intention to apply to make a group income election. According to the
d orders for reference, it is not disputed that, had the claimants applied for that taxation regime, their application would have been refused by the inspector of taxes because the parent companies were not resident in the United Kingdom.

e 104. Finally, the orders for reference make it clear that an appeal against such a refusal by the tax authorities could have been brought before the Special or General Commissioners and then, if necessary, before the High Court. According to the national court, before judgment could be given in such an appeal, the subsidiaries would still have had to pay ACT in respect of all the dividends which they had paid out and, furthermore, if the appeal had succeeded, they would not have obtained reimbursement of the ACT,
f since no such right to reimbursement exists under English law. If the subsidiaries had chosen not to pay ACT in respect of dividends paid before the determination of their appeals, they would nevertheless have been assessed to ACT, would have had to pay interest on those sums and would have laid themselves open to statutory penalties if they had been judged to have acted negligently and without reasonable cause.

g 105. It therefore appears that, in the cases in the main proceedings, the United Kingdom government is blaming the claimants for lack of diligence and for not availing themselves earlier of legal remedies other than those which they took to challenge the compatibility with Community law of the national provisions denying a tax advantage to subsidiaries of non-resident
h parent companies. It is thus criticising the claimants for complying with national legislation and for paying ACT without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application.

j 106. The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax

authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. a

107. The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.' b
c

[19] Mr Aaronson lays particular emphasis on the last 20 words of para 107. He says that in the present case on any view United Kingdom law denied resident companies, having profits liable to corporation tax and being in the same group as non-resident companies having losses, the benefit of the United Kingdom tax regime which allows a resident company to surrender losses to another resident company to set off against the latter company's profits. He submits that it is therefore contrary to Community law for a national court such as the High Court to refuse a claim brought before it by the resident company having profits for restitution or damages for the financial loss suffered as a consequence of not being able to obtain group loss relief from the surrender to the resident company of losses by a non-resident company in the same group on the sole ground that the companies did not make use of the statutory procedure. d
e
f

[20] Mr Plender distinguishes *Hoechst* on the basis of the matters referred to in para 104 which apply to ACT but which do not apply to group loss relief. It is accepted by Mr Aaronson that nothing comparable to one feature of the ACT regime, viz that ACT which is paid is not recoverable, is to be found in relation to group loss relief. But he rightly says that just as the non-payment of ACT on dividends paid before the determination of appeals would have led to assessments with interest payable on the ACT not paid and the possibility of statutory penalties, so the non-payment by a resident company of corporation tax by reason of the set-off of losses surrendered by a non-resident company would have led to assessments and interest becoming payable and the possibility of statutory penalties. Mr Aaronson submits, and I accept, that the irrecoverability of ACT once paid is not the central feature of the reasoning of the ECJ. The ECJ is saying that the member state, which by its legislation breaches Community law in discriminating against groups which have both resident and non-resident companies by denying them a taxation benefit allowed to groups which have only resident companies, cannot defeat claims for restitution or compensation based on Community law solely on the ground that the statutory procedure had not been followed, when the member state's legislation denied that benefit. g
h
j

[21] I have been persuaded by Mr Aaronson that that his submission on this point is correct. It has always been a principle of Community law that every

a court of a member state must, in a case within its jurisdiction, apply that law in its entirety, protect rights which that law confers on persons in the member state and set aside any provision of national law which may conflict with it.

[22] Thus in *Amministrazione della Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629 an Italian company, required under an Italian measure to pay inspection fees on importing beef from France, brought an action before the Pretore di Susa for repayment of the fees which had been levied contrary to Community law. The Pretore made an order for repayment. The Amministrazione appealed on the basis that under the Italian constitution only the Constitutional Court could hold the measure to be unconstitutional. On a reference the ECJ held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with the requirements of Community law (see [1978] ECR 629 at 644 (para 22)). The ECJ further held that national courts must protect rights conferred by provisions of the Community legal order and that it was not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules (see [1978] ECR 629 at 645 (para 26)). Thus, notwithstanding that the Constitutional Court under Italian law was the sole court which had jurisdiction to override the measure which breached Community law, the Pretura was treated by the ECJ as having jurisdiction to deal with the case presented to it.

[23] Similarly in other cases before the ECJ stress has been laid on the duty of national courts to give 'direct, immediate and effective protection of the rights which individuals derive from Community law' (see the comments of Advocate General Léger in *Köbler v Austria* Case C-224/01 [2004] All ER (EC) 23 at 41, [2004] 2 WLR 976 at 994 (para 52)). The fact that it is the member state itself which has benefited from the breach of Community law at the expense of the taxpayer militates in favour of the taxpayer being entitled to recover what he has lost without obstacles being put in the taxpayer's way.

[24] Mr Plender referred us to the statement by the ECJ in *Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais* Case C-88/99 [2000] ECR I-10465 to the effect that it is for each member state to designate the courts having jurisdiction and to determine the procedural conditions governing proceedings to safeguard rights derived from Community law (see [2000] ECR I-10465 at 10490 (para 20)). A fuller and more recent statement of the applicable principle is to be found in *Hoechst* where the ECJ said ([2001] All ER (EC) 496 at 538, [2001] Ch 620 at 663 (para 85)):

'In the absence of Community rules on the restitution of national charges that have been improperly levied, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they

do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) ...'

[25] The importance of the principle of effectiveness in Community law cannot be overstated. Any provision of national law which makes the exercise of a right conferred by Community law practically impossible or excessively difficult cannot prevail. Mr Aaronson contrasted how relatively easy it was for companies in the *Hoechst* case to use the statutory procedure with how difficult it was for the claimants in the present case to do so. A *Hoechst* company resident here would simply withhold paying ACT on a dividend it had paid, and when the inspector raised an assessment the company could appeal against it to the Commissioners. Nevertheless the ECJ held that the Revenue could not rely on the company's failure to use the statutory procedure as a defence to the company's claim based on a Community law right. In the present case there is a very serious difficulty, if not an impossibility, for companies resident outside the United Kingdom to comply with the formal statutory requirements for group loss relief. I have already drawn attention to the provisions which not only require the surrendering company and the claimant company to be resident in the United Kingdom or to carry out trade here through a branch or agency, but presuppose that the companies have inspectors to whom they make their returns. Mr Aaronson has told us that there are also major difficulties in identifying the accounting period for a non-resident company, in quantifying the appropriate loss to be surrendered and even in some cases (he referred to German companies in particular) in identifying which company would be the surrendering company. He says that, if the judge's decision stands, a vast amount of work will have to be done and considerable time and cost expended to make a quantified claim to an inspector so that the statutory procedure can commence. He accepts that in the High Court proceedings at some stage that work may have to be done and that expenditure incurred, but he submits that that should not have to be done and incurred unless and until the points of principle have been decided, most likely with the aid of a reference to the ECJ, in a way which makes it necessary.

[26] Mr Plender drew our attention to the decision of the ECJ in *Telemarsicabruzzo SpA v Circostel* [1993] ECR I-393 at 426 (para 6) in which it was said that the need to provide an interpretation of Community law which will be of use to the national court made it necessary for that court to 'define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. I do not doubt that it would be possible for a reference to be duly made which would satisfy that test even without the full quantification of the claims. The ECJ is entitled to be satisfied that the case is not purely hypothetical. Provided that there is a non-resident company with losses which it wishes to surrender to a resident company with profits in respect of the same period and the two companies are in the same group, I would have thought it immaterial that the precise amounts of losses had not been determined before the reference was made.

[27] The fact that some claimants are out of time for making claims by reference to the two-year or six-year limitation period will no doubt be an issue in many cases. We were told by Mr Aaronson that many of the claimants had at some stage taken the view that they would be unable to comply with the

a statutory requirements for claiming group loss relief and consequently in respect of various accounting periods they did not make a claim under the statutory regime and so are out of time. Further, he said that in some cases this was as a result of the inspector saying that, because of the residence requirements, group loss relief claims were impossible and could not be recognised or accepted; in some cases this was in advance of a decision by a company on whether to make a claim; in some cases it was indicated after a claim had been made, and in consequence the claim was withdrawn. I do not doubt that, if there was a reference to the ECJ, a range of factual circumstances alleged or agreed could be provided to enable the ECJ to give guidance on whether the UK tax regime made it impossible or excessively difficult for companies to comply with the requirements within the limitation period.

c [28] The judge, in rejecting Mr Aaronson's argument based on *Hoechst*, thought that the answer to it lay in the ability of the Special Commissioners to adjudicate on that argument just as much as the High Court and to refer questions of Community law to the ECJ. He pointed out that if a party was dissatisfied with the way the Commissioners dealt with the case, it was always possible to appeal to the High Court in its appellate capacity and he commented that that is what happened in another group loss relief case, *Marks and Spencer plc v Halsey (Inspector of Taxes)* [2003] EWHC 1945 (Ch), which ended up by being referred to the ECJ. The judge regarded what happened in that case as the exemplar of the right approach. With due respect to the judge, I do not think that thereby he gave effect to the full import of the ECJ's decision on question 5 in *Hoechst*. Given that the United Kingdom tax law has denied groups of resident and non-resident companies the benefit of group loss relief, it is no answer to the claimants' claims in the High Court, by which they seek to invoke the primary and direct effect of Community law, to require the claimants to apply for a tax benefit denied to them by national law with a view to challenging the inevitable refusal of that application through the statutory procedure for tax appeals. In my judgment, consistently with *Hoechst*, the High Court was obliged to entertain the claims and, if made out, give effect to them, and the judge was wrong to strike out part of the claims.

[29] I am the happier to reach that conclusion because of the inconvenience, which would flow from the judge's decision, of part of the claimants' claims proceeding before the Commissioners (on the assumption that claims are made to the inspector for group loss relief and that his decision will be challenged by an appeal to the Commissioners) and the remainder proceeding in the High Court. There is an obvious convenience in all parts of the claims being subject to the loss relief GLO and managed accordingly. A consequent benefit may be that if questions arising out of the claims are to be referred, that can be done by way of a single reference covering all the referable points rather than by way of successive references with significant delays ensuing.

JURISDICTION AS A MATTER OF ENGLISH LAW

j [30] In the light of the conclusion which I have reached on the issue relating to the *Hoechst* decision, it is unnecessary to consider the other grounds of appeal and I prefer to say nothing about them.

CONCLUSION

[31] I would allow the appeal, discharge the judge's order and dismiss the Revenue's application to strike out.

LONGMORE LJ.

[32] I agree. It is, for my part, with considerable hesitation that I part company with Park J on a matter so comprehensively within his expertise. I am, however, satisfied that he has not given full effect to the principle of effectiveness and proper weight to the decision of the European Court of Justice in *Metallgesellschaft Ltd v IRC*, *Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620. The purpose of referring question 5 to the ECJ in that case must have been to obtain an authoritative ruling on the question whether the taxpayer in that case was required to go through the procedural steps required by national law. *Hoechst* decided that if it is impossible or excessively difficult for the taxpayer to comply with such procedural steps, then it was not requisite that those steps be followed.

Permission to appeal granted. Appeals allowed.

Melanie Martyn Barrister.

a Atkinson v Director of Public Prosecutions

[2004] EWHC 1457 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

b AULD LJ AND PITCHERS J

12 MAY 2004

Magistrates – Jurisdiction – Trial of information – Validity of information – Laying of information – Laying of information by means of data entries in computer system –
 c *Time of laying of information where data entries capable of being added to or amended – Magistrates' Courts Act 1980, s 127.*

The appellant received a summons relating to an alleged offence which had taken place on 16 June 2002. The summons had been produced by a computer system, to which the police and the magistrates' court both had access. The practice of the police was to enter details of an alleged offence into the computer system. Those details might be complete, and contain all that was necessary to constitute an information, or they might be incomplete, and require further data entries. When the police considered that everything necessary to constitute an information was included, they 'validated' the information. The magistrates' court office would then print a summons. Such a printed summons would show an 'information date', which was the date of the first entry of data by the police. However, if the police had had to enter further data after the date of the first entry, the 'information date' shown on the summons would not be the date which the information was laid for the purposes of s 127^a of the Magistrates' Courts Act 1980, which provided inter alia that a magistrates' court 'shall not try an information' unless the information was laid within six months from the time when the offence was committed. The 'information date' shown on the summons received by the appellant was 10 December 2002. It also showed the date when the information was printed, being 20 December 2002, which was four days outside the six months' time limit. The workings of the computer system meant that it would have been possible for the police, as part of the process on the way to 'validation' to have added to the data or to have changed it between 10 and 20 December, so possibly delaying the date of the laying of the information until after the end of the time limit set out in s 127 of the 1980 Act. The district judge refused the appellant's application for a stay of prosecution and he was subsequently convicted of the offence alleged. He appealed against the ruling of the district judge by way of case stated.

Held – There was no distinction between an uncertainty as to the date of laying an information arising from evidence as to police practice and their computer system and uncertainty evident on the face of the documents relied on as informations. If magistrates doubted the date of an information, on evidence of whatever nature, such that it could have been laid outside the time limit, then they were entitled to, and should, decline jurisdiction. It was matter of fact for

a Section 127, so far as material, is set out at [1] below

their determination in accordance with the ordinary criminal burden and standard of proof. In the instant case the information could have been laid outside the time limit and the district judge had been wrong, given such uncertainty, not to apply to it the ordinary criminal burden and standard of proof. The appeal would therefore be allowed (see [18], [19], [21], [22], [24], below).

Lloyd v Young [1963] Crim LR 703 applied.

Notes

For magistrates' courts: limitation of time, see 29(2) *Halsbury's Laws* (4th edn reissue) para 589.

For the Magistrates' Courts Act 1980, s 127, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 212.

Cases referred to in judgments

Hill v Anderton [1982] 2 All ER 963, sub nom *R v Manchester Stipendiary Magistrate, ex p Hill*; *R v Dartford JJ, ex p Dhesi*; *R v Edmonton JJ, ex p Hughes* [1983] 1 AC 328, [1982] 3 WLR 331, HL

R (on the application of Ebrahim) v Feltham Magistrates' Court [2001] EWHC Admin 130, [2001] 1 All ER 831, [2001] 1 WLR 1293, DC.

Lloyd v Young [1963] Crim LR 703.

Case stated

David Charles Atkinson appealed by way of case stated from the ruling of District Judge Day in the Ealing Magistrates' Court on 14 August 2003 that a prosecution should proceed against him for the offence of carrying an insecure load, contrary to s 42 of the Road Traffic Act 1988 and reg 100(2) of the Road Vehicles (Construction and Use) Regulations 1986. The question for the opinion of the High Court is set out at [11], below. The facts are set out in the judgment of Auld LJ.

Karen Moss (instructed by *Lamport Bassitt*, Southampton) for Mr Atkinson.

Nicholas Preston (instructed by the *Crown Prosecution Service*) for the Director of Public Prosecutions.

AULD LJ.

[1] Section 127 of the Magistrates' Courts Act 1980 provides that—

'a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed ...'

[2] Before the advent of present day computer technology, a written information was laid by delivering it either by post or by hand to the magistrates' court where it would or should be stamped with the date of its receipt for later incorporation in a summons. In *Hill v Anderton* [1982] 2 All ER 963, [1983] 1 AC 328, Lord Roskill, with whom the other Law Lords agreed, held that a written information is laid for the purpose of s 127 when it is received at the office of the clerk to the justices for the relevant area. If it is received out of time, a recipient of the summons issued as a result of it may invite the magistrates not to proceed with the matter for want of jurisdiction. That is how the matter should be

a considered, as it was in *Hill*'s case, not as an issue of abuse of process as the district judge appears to have done in this case. The threshold notion of jurisdiction is usually, as in the case of s 127, capable of ready identification and application. Only if there is jurisdiction, may the more elastic notion of abuse of process arise for consideration.

b [3] Nowadays there is a computer system, to which the police and magistrates have access, in which the police may enter details of an alleged offence which, as they enter them, are at the same time entered on the computer at the magistrates' court. It appears that this can, if the circumstances require it, be done in an incomplete way, requiring a further entry or entries before all the details necessary for the information are present. Once the police consider that all the details necessary to constitute an 'information' are included, they 'validate' the information. Thereafter, it is for someone in the clerk's office at the magistrates' court to print a summons. At the head of the printed summons there is an 'Information Date', which is the date of the initial police entry. But, if the police have had to make further entries, either to complete necessary further details not to hand on that date or, say, to amend or correct a faulty information, the effective date of laying the information may be later than that shown as such at the head of the summons. Thus, the initial data entry date shown on the summons is not necessarily the date for the laying of the information for the purpose of s 127.

e [4] It appears that any subsequent entries prior to and including validation of the information are contained in the computer system itself. But, unless there is evidence of that, and there was not in this case, it may not be possible for the prosecution to establish to the criminal standard of proof the exact date when the information was effectively laid.

f [5] That may be important in a case like this, where the information is laid, or allegedly laid, by computer within a short time before the end of the six months' limitation period set by s 127. The initial data entry recording that exercise may, for all the recipient of the summons knows, have been insufficiently complete so as to require later completion, or it may have been incorrect so as to require later correction by a further data entry. In either case such further entry may have been made after the effluxion of the 6 months' time limit.

g [6] The matter comes before the court as an appeal by David Atkinson by way of case stated by District Judge Day from his ruling in the Ealing Magistrates' Court on 14 August 2003 that a prosecution should proceed against Mr Atkinson for the summary offence of carrying an insecure load, contrary to reg 100(2) of the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078 and s 42 of the Road Traffic Act 1988. At an adjourned hearing before a different Ealing bench, one of lay magistrates, on 16 September 2003, Mr Atkinson was convicted of the offence and fined.

j [7] The date of the alleged offence was 16 June 2002. The information date printed at the head of the summons was 10 December 2002; that is six days before the effluxion of the six months' limitation period. The summons, which was dated 9 January 2002, included a statement of facts. It also bore the date when the information was printed, 20 December 2002; that is four days outside the limit. As the district judge observed in his statement of case, the significance of that date is that, on the evidence before him, the summons could not have been generated before then. And, at any time from the initial information data entry shown on the summons of 10 December 2002 up to then, it would have been possible for

the police, as part of the process on the way to validation, to have added to the information or to have changed it, effectively delaying the date of its laying for this purpose. a

[8] As I have indicated, there was no evidence before the district judge of what, if any, details had been added or changes made after the initial information data entry shown on the summons of 10 December 2002.

[9] Mr Atkinson sought a stay of the proposed prosecution as an abuse of process on the ground that he was unable to discover, on the material before the court, the precise date of the laying of the information, given that it could have been added to or amended up to 20 December 2002, four days outside the time limit. He made no allegation of bad faith. His case was simply that, as he could not go behind what was shown on the summons to establish whether there had been any addition to or alteration of the information after the initial information entry date shown at the head of it, he was deprived of a possible defence and that any doubt on the matter should be resolved in his favour. The prosecution agreed that, on the material before the court, there could have been such an amendment, but simply asserted, as was the case, that there was no evidence of it. b c

[10] The district judge refused the application for a stay, holding that there had been no abuse of process. He stated at para 8 of the case: d

‘Having established that there was no statutory or other authority dealing specifically with this point, the argument being based on possible unfairness rather than either of the two types of abuse spelt out in *R (on the application of Ebrahim) v Feltham Magistrates’ Court* [2001] EWHC Admin 130, [2001] 1 All ER 831, [2001] 1 WLR 1293, I ruled that there was no abuse. The appellant appeared to be asking the court to declare a third category of abuse cases by using a complete lack of evidence of impropriety to raise the possibility that there may have been. Accordingly, I ruled that there was no abuse and returned the case to be dealt with on 16 September by a different bench.’ e f

[11] The question he has asked this court to determine is whether he was right in law to rule on the facts before him that the proceedings should not be stayed as an abuse of process, although the date on which the information was laid could not conclusively be determined and therefore may have been outside the six months’ time limit. g

[12] Miss Karen Moss, on behalf of Mr Atkinson, has submitted that the district judge erred in law on the facts in ruling as he did. She says that he should have declined jurisdiction or stayed the prosecution as an abuse. In so submitting she advanced three arguments. h

[13] The first is the most straightforward, going as it does to jurisdiction of the magistrates’ court to hear and determine the proposed prosecution. Miss Moss submitted that, if, as on the evidence, the information date of 10 December 2002 shown on the summons may not have been the date when the information was laid, the doubt on the matter should be resolved in favour of Mr Atkinson. She has emphasised that the purpose of an information is to enable a magistrates’ court to consider whether to issue a summons (somewhat theoretical nowadays) and that it is the foundation of its jurisdiction to hear the case. She rightly drew attention to rr 4 and 100 of the Magistrates’ Courts Rules 1981, SI 1981/552. The former provides for the commencement of a prosecution in the magistrates’ courts by the laying of an information or the making of a complaint. The latter j

a describes the requirements, albeit not rigorous, for a document to constitute an information. It provides that it:

b '(1) ... shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms without necessarily stating all the elements of the offence, and gives such particulars as may be necessary for giving reasonable information of the nature of the charge.'

It also provides:

c '(2) If the offence charged is one created by or under any Act, the description of the offence shall contain a reference to the section of the Act, or, as the case may be, the rule, order, regulation, byelaw or other instrument creating the offence.'

d [14] Miss Moss submitted that the validation exercise that I have described is the moment at which the data entered by the police onto the computer system clearly satisfies, or should satisfy, those basic requirements. Any incomplete entries may not do so. And, unless they do satisfy them within the time limit, the court never reaches the stage of acquiring jurisdiction to hear and determine the prosecution.

e [15] The uncertainty on the evidence in this case as to the effective date of laying of the information on the way to validation, and as to its effect on jurisdiction, is one, as I have said, that Miss Moss has submitted should be resolved in favour of Mr Atkinson. She has the authority of this court, consisting of Lord Parker CJ, Havers and Edmund Davis JJ in *Lloyd v Young* [1963] Crim LR 703.

f [16] Mr Nicholas Preston, who has been instructed by the Director of Public Prosecutions at very short notice, said that he had no answer to Miss Moss's submission on the issue of jurisdiction. But he nevertheless went on to rely on the district judge's recourse to the notion of abuse of process and his reasoning that the uncertainty here as to the laying of information did not, in the absence of impropriety, come within any recognised category of abuse of process which could prevent the prosecution proceeding. He suggested that there could be no prejudice to Mr Atkinson's right to a fair trial because the delay, if any, was only for a few days. For the reasons I have given, Mr Preston's argument in this respect was misconceived. If there was no jurisdiction because the information was made outside the time limit, it could not be revived by praying in aid the absence of abuse of process and the opportunity for Mr Atkinson of a fair trial.

h [17] In *Lloyd's* case there was doubt on the face of the summonses as to the date of the laying of the information. The court dismissed the prosecutor's appeal against the magistrates' dismissal of the information for want of jurisdiction. They held that the summonses were on their faces bad, and that, although that defect was not of itself fatal to the prosecution, the question was whether there was sufficient evidence for the justices to say that they were satisfied that the information was laid within six months. They concluded that, on the evidence, the justices were entitled to dismiss the information because of their doubt as to its date.

j [18] Now that was a case in which the uncertainty was evident on the face of the documents relied on as informations. Here, the uncertainty arises not from the face of the document, but from uncontradicted evidence as to police practice

and their computer system giving rise to it. In my view, the distinction is not material. The ratio of the decision is that, if on evidence of whatever nature before the court, magistrates doubt the date of the information, such that it could have been laid outside the time limit, they are entitled to, and should decline, jurisdiction. It is a matter of fact for their determination in accordance with the ordinary criminal burden and standard of proof.

[19] In my view, on that simple proposition, fortified by the strong authority of *Lloyd's* case, Miss Moss's first submission should succeed. The data giving rise to the printing of the summons in the magistrates' court shortly after the effluxion of the time limit may or may not have been in sufficient form at the initial data entry date or over the few days thereafter before the effluxion of that limit.

[20] The district judge, whose attention seemingly was not drawn to *Lloyd's* case, does not, in his reasoning in para 8 of the case, appear to have grappled with the issue as a matter of jurisdiction. As I have said, he dealt with it as one of abuse of process. He focused on, and rejected, unfairness as a possible category of such abuse. Rehearsing his construction, he rejected 'a complete lack of evidence of impropriety' as being capable of '[raising] the possibility that there may have been' such a category.

[21] He came nearer to identifying the proper question in the question he posed for this court, namely, whether the proceedings should be stopped because of the uncertainty as to whether the information was laid outside the time limit. For the reasons I have given, he was wrong, given such uncertainty, not to apply to it the ordinary criminal burden and standard of proof. If it has to be looked at as a matter of unfairness, that burden and standard embody the long-standing principle of fairness in criminal cases. And failure to meet it does not need any separate treatment, whether under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or otherwise. Here, unless the prosecution could prove the date of the information, there was uncertainty for want of evidence, and that was unfair to Mr Atkinson in that it denied him the opportunity to challenge, if appropriate, the prosecution's assertion that the information had been laid in time.

[22] Accordingly, in my view, it is not necessary for the court to consider Miss Moss's alternative submissions. The first of them is a mix of her main argument as to want of jurisdiction and as to abuse of process; the second, in its focus on art 6 of the convention and 'legitimacy of the process', does not add anything of substance to either of the foregoing submissions. Therefore, for the reasons I have given, I would answer 'No' to the district judge's question. I would allow this appeal, direct that the conviction should be quashed and that the matter should be remitted to the district judge with a direction that, given the acknowledged uncertainty whether the information was laid in time, he should decline jurisdiction.

[23] This judgment may have wide-ranging implications for the manner in which the police may continue to use the computer system that I have described so as to secure both administrative efficiency and fairness to potential defendants who may be uncertain as to whether they have a jurisdictional defence under s 127. It may be that the computer can be programmed so as to make readily retrievable any entries and their dates between the initial entry date and that of printing of the summons. Or it may be that it could be programmed so that there

a is no communication of entries on the police system to the magistrates' courts' terminals until validation, so that date of validation would patently be the date of the laying of the information before the magistrates. There may be other possibilities.

PITCHERS J.

b [24] I agree.

Appeal allowed.

Martyn Gurr Barrister.

Re St Peter's Church, Limpsfield

SOUTHWARK CONSISTORY COURT

DEPUTY CHANCELLOR PETCHEY

8 JUNE 2004

Ecclesiastical law – Memorial within churchyard to person not buried there – Parishioners petitioning for faculty to erect monument in churchyard commemorating former churchwarden whose ashes had been scattered elsewhere – Whether permissible.

After the death of a former churchwarden of St Peter's Church, Limpsfield, his remains were cremated and his ashes scattered on Limpsfield common. His widow and children sought a faculty for erection of a monument in his memory in the churchyard of St Peter's. The petitioners submitted, that although the monument would not mark the deceased's grave, such a memorial would be appropriate given his service to the community.

Held – The purpose of a churchyard was first and foremost for the interment of human remains. A consequence of remains being buried in a churchyard was 'memorialisation', which was primarily to enable relatives and others to know where the remains of the deceased were interred. More general memorialisation, such as a record of the achievements of a deceased person and his standing in the community, was secondary. Moreover, the memorial proposed in the instant case would use up a space in consecrated ground which might otherwise be used for a burial and burial space was at a premium both in the instant churchyard and nationally. Accordingly, the petition would be dismissed (see [27]–[29], below).

Notes

For the faculty jurisdiction in general, and for faculties relating to churchyards, and to monuments, see 14 *Halsbury's Laws* (4th edn) paras 1306, 1315, 1316.

Petition

Jeanne Morris, John Morris and Victoria Martin applied by a petition dated 7 July 2003 for a faculty for the erection of a monument in the churchyard of St Peter's Church, Limpsfield, Surrey to commemorate Lt Col Peter Victor Morris, who died in December 2000. The petitioners did not wish to present their case at a hearing of the consistory court and the application was determined on paper following a visit by the deputy chancellor to the church and churchyard on 26 May 2004. The facts are set out in the judgment.

PETCHEY Dep Ch.

INTRODUCTION

1. This matter concerns a petition for a faculty dated 7 July 2003 which is applied for by Jeanne Morris, John Morris and Victoria Martin.

a 2. The petition seeks authorisation for the erection of a monument in the churchyard of St Peter's Church, Limpsfield, Surrey to commemorate Lt Col Peter Victor Morris who died in December 2000. The petitioners are, respectively, Lt Col Morris' widow, son and daughter. The Rector of Limpsfield, Rev Neil H Thompson did not consider this to be an appropriate case in which he could approve the introduction of the monument by virtue of his delegated powers under the *Diocesan Churchyard Regulations*^a and accordingly it was necessary for the matter to proceed by way of an application for a faculty.

b 3. The proposed memorial, of which there is a sketch in the petition, would be 6 ft in height, 18 ins in width and 3 ins in depth (1.8 m x 457 mm x 76 mm). It would be of green slate and have engraved upon it the following inscription in Roman lettering:

c
 'REMEMBER PETER VICTOR MORRIS
 SEPTEMBER 1929–DECEMBER 2000
 LIEUTENANT COLONEL ROYAL ARTILLERY

d
 He nothing knew of envy or of hate,
 His soul was full of worth and honesty
 And of one thing; quite out of date
 called modesty'

e
 4. It is intended that the lettering should be hand-engraved. The stone would also be decorated by, I think, a carving of an owl in outline. The details of this decoration are not before me and if this faculty were to be granted, it would be necessary for it to provide for details of this carving to be submitted to me for approval before the monument was erected.

f
 5. The proposed position of the monument is indicated on a plan of the churchyard which is not to scale. Again, if this faculty were to be granted, it would be necessary for it to provide for details of the precise siting to be submitted and approved. The plan I have is sufficient to indicate the general location proposed: the monument would stand in the eastern part of the churchyard, in block M, close to an attractive shelter which has been built for visitors to the churchyard, and also close to two yew trees which Mrs Morris has planted in her husband's memory.

g
 6. Two matters take this application out of the ordinary. The first is the height of the monument. It is higher than any other monument in the churchyard. The second is that it would not mark a grave. After Lt Col Morris' death, his remains were cremated and his ashes scattered on Limpsfield Common.

BACKGROUND

j 7. The proposal was considered by the parochial church council (PCC) of St Peter's Limpsfield on 25 March 2003. The PCC had before it the following motion, proposed by Lillian Hindley and seconded by Sue Eastwood:

a See, in particular, reg 4: '... the minister shall not approve a proposed memorial if he or she considers that it is: (i) likely to be controversial for some reason ...'

'The PCC of St. Peter's Limpsfield supports the application of Mrs Jeanne Morris to introduce a memorial stone of slate 6 feet high as per the drawing by Don Sheppard, stonemason of Chiddingstone, Kent, in memory of the late Lt Col Peter Morris to be situated near the two Irish Yew Trees planted in his memory in 2002.'

The voting was by secret ballot. Five votes were cast in favour of the motion, and five against. There was one abstention.^b

8. On 1 August 2003, the chancellor gave his preliminary views in respect of the application and referred it to the Diocesan Advisory Committee (the DAC). His comments were as follows:

'It seems to be that—save that exceptionally—no headstone should be erected in a churchyard unless there is an associated body buried. When there are ashes buried then normally no stone is allowed but occasionally a small plaque. Here the ashes were strewn elsewhere and, as I understand it, two yew trees have already been planted—a generous and appreciated gesture. Though the stone itself is of a high standard, and I am personally a great supporter of Memorials by Artists, I am troubled that it would set an unfortunate precedent.'

9. The DAC considered the matter at its meeting on 2 September 2003. On the point of principle they were divided:

'Some members were concerned that this would set an unfortunate precedent as no remains were buried in the churchyard, whilst others felt it would not be a problem as it would be similar to, say, a war memorial.'

10. The following views were also expressed:

'There were general concerns, however, about the size of the memorial—whether its height was unsuitable for its setting; whether it would be stable; and as normal memorials for cremation are small, whether it would set a precedent for large memorials.'

11. The petitioners were given the opportunity to comment on the DAC's two points. Mrs Morris responded by a letter dated 28 October 2003. This sets out some valuable background information but does not address in terms the first of the points. I surmise that she agrees with those members of the DAC who do not see any difficulty about this aspect of the matter; further, it seems likely she considers that if it is appropriate that there should generally not be memorials to those whose remains are not interred in the churchyard, this is an appropriate case in which an exception should be made in the light of Lt Col Morris' service to the community.

12. On the second point, Mrs Morris explained that the height of the monument was inspired by her husband's physical stature (he was 6 ft 5 ins in

^b I am told that, by custom, the chairman does not vote. I am not sure whether the abstention recorded was that of the chairman.

a height) and that the stone will 'stand strong and upright to commemorate a strong and upright man'. She also said:

'... there are many headstones of a comparable height to my design, and some quite individual ones which, in my opinion, are very pleasing and create a churchyard of variety, peace and charm.'

b 13. More generally she added:

c '... my husband is representative of the many forebears of his that served in India and Malaya. These old families that gave their years and health in service to their country seem to me to deserve a recognition in an English country churchyard.'

d 14. Further, it was explained to the petitioners that they could present their case at a hearing of the Consistory Court. They did not wish there to be a hearing and, accordingly, I have determined this application in the light of the written material before me and following a visit to the church and churchyard which took place on 26 May 2004.

LIEUTENANT COLONEL MORRIS

e 15. Lieutenant Colonel Morris served St Peter's Church, Limpsfield as churchwarden, treasurer of the PCC and as a member of the churchyard committee. As Mrs Morris observes, he supported the nitty gritty of everyday work in the church. He was also chairman of the local Commons committee and of the local branch of the British Legion.

f THE CHURCHYARD

g 16. The churchyard of St Peter's Church, Limpsfield is, in my judgment, particularly attractive. Surrounding the historic church on three sides, it contains many interesting monuments and many of high quality. Here are buried a number of distinguished people, including, in particular, a number of famous musicians—Eileen Joyce, Sir Thomas Beecham, Norman Del Mar, Beatrice Harrison and the composer Delius. Also are buried there those whose service was local—Harriet Kenward who nursed workers who were building the railway to Oxted during a cholera outbreak and died of the disease herself, and members of Limpsfield families who have lived here for generations. This churchyard is h plainly, in the words of *The Churchyards Handbook* (4th edn, 2001), 'a precious place' both because it holds the remains of the departed and also because it embodies the history of this community. Not surprisingly it is very well maintained.

j 17. The churchyard contains a garden of remembrance—a designated area wherein are interred cremated remains.

DIOCESAN GUIDANCE

18. The *Chancellor's Guidance on Churchyards and Memorials* (2003) p 2 gives the following relevant guidance on design:

'A memorial should be in harmony with those round it, and with the churchyard as a whole; and the appearance of the churchyard should harmonise with that of the surrounding area. This does not mean that there has to be strict uniformity: there is little virtue in being bland and dull. But a memorial should not stick out, and the design cannot be left entirely to the individual choice of the bereaved. The churchyard will last for many years to come; and its character depends on that of all the memorials within it. There is a distinction between private grief and public remembrance. No single memorial can be allowed to spoil that general appearance, nor can the amount of private grief currently felt determine in any absolute way the form and content of what is to constitute a public memorial. In practice, this means that the choice of stone for a memorial, and its size, thickness, shape, and general design, should only be finalised after looking carefully at the churchyard as a whole, and in particular at the part of it containing the grave under consideration. Memorials that are much darker, lighter, taller, or smaller than those nearby, or which are of a completely different stone, are unlikely to fit in harmoniously.'

19. No guidance is given as to memorials in circumstances where the remains of the person who is commemorated have been interred elsewhere or, in the case of cremated remains, scattered elsewhere.

20. Against this background I turn to consider two points at issue in this case.

THE HEIGHT OF THE MEMORIAL

21. In my judgment, the issue that arises for determination as regards this aspect of the case is whether, notwithstanding its height, this memorial would, in the words of the guidance, 'be in harmony with those round it, and with the churchyard as a whole'; or, to put the matter in terms of what should be avoided, whether the memorial would 'stick out'. In this connection I particularly note the view expressed in the guidance 'Memorials that are much ... taller ... than those nearby ... are unlikely to fit in harmoniously'. I also note the concern of the DAC in this regard.

22. I understand Mrs Morris' wish that the memorial should reflect her husband's stature, and I can see that, if it were erected, the height of the monument would remind her of him, as well as others who knew Lt Col Morris. However with the passage of time it would be inevitable that those who remembered Lt Col Morris would become fewer and this particular significance of a tall memorial would be lost.^c Accordingly as a justification for erecting a memorial that is out of the ordinary, it seems to me that this is not a matter to which I should attach great weight.

23. There are no other memorials that are 6 ft in height in this part of the churchyard, or anywhere in the churchyard. There are some, not in the immediate vicinity of the proposed memorial, which are perhaps 5 ft 6 ins in height; I think these are generally Victorian memorials in the form of a cross, and thus of rather different style.

^c Similarly, I can understand Mrs Morris' wish that the memorial be in some way a memorial to others who served abroad. However there is no way that visitors to the churchyard would be able to make this connection.

a 24. I think that the memorial would inevitably stick out. Given that the object of the guidance is to achieve harmony, it seems to me that it should not be permitted. As I have already observed I do not consider that there is a case for making an exception to the guidelines. Similarly, I do not think that the fact that this would only be one memorial in a large churchyard (and that its impact would accordingly be lessened) is a reason for permitting it.

b 25. Finally, I should note the concern of the DAC that permission here might set a precedent for large memorials. I think that there is some force to this argument. If permission were granted for this memorial, which is not within the 'norm', then it would be more difficult to resist another application which did not accord with the guidance; and if another exception were made, it would be more difficult to resist a further application; and so on. If there are to be guidelines it is necessary that they should be upheld, unless there are exceptional circumstances justifying departure from them.

IS IT APPROPRIATE TO PERMIT A MEMORIAL TO A PERSON WHOSE ASHES HAVE BEEN SCATTERED ELSEWHERE?

d 26. It seems to me that what the petitioners propose is novel. I am unaware of any Consistory Court case which has addressed this question, and I cannot recollect having seen a headstone in a churchyard which did not record the interment of human remains alongside it.^d I think that a war memorial (and there is a war memorial in this churchyard, to the side of the pathway to the church) is in a category by its own; similarly, although I cannot call to mind an example, a memorial in a churchyard to the victims of a natural disaster, or some similar event. There are public memorials to community events which one may understand are appropriately situated in churchyards. (Although not necessarily so—many war memorials are situated in other public locations.) However because there is not a precedent for something does not mean that it is objectionable.

f 27. It does seem to me that there is a reasonable objection to the erection of a memorial in a churchyard which looks like a headstone commemorating interred remains, but in fact is not. It would be misleading. However this objection would be met by appropriate wording on the memorial—in this case along the lines of 'whose ashes are scattered on Limpsfield Common'. If the petitioners were not in this case prepared to agree to wording on these lines it seems to me that it would not be appropriate to grant a faculty. I do not imagine that this would cause any difficulty even if, perhaps, the petitioners might prefer these words not to appear.

g 28. There is, it seems to me, a more fundamental objection. It is this. The purpose of a churchyard is first and foremost for the interment of human remains. 'Memorialisation', to coin a word, is a consequence of remains being buried in a churchyard and, first and foremost, it is to enable relatives and others to know where the remains of the deceased are interred. More general memorialisation—eg to record the achievements of the deceased and his standing in the community and to contribute what may be an artefact of intrinsic value to enhance a precious space are secondary.

d I accept of course that if others had done what the petitioners here propose, there would be no way of knowing from the headstone that no human remains were interred nearby. However I would, I am sure, be aware of the practice if it occurred on anything other than a very occasional basis.

29. If the memorial in this case were to be permitted it would use up a space in consecrated ground which might otherwise be used for the interment of the remains of someone else. (In theory, of course, the burial space would remain available but it would not be appropriate for anyone to be buried in it.) The loss of one space might not seem significant, but there is not very much space left in this churchyard; nationally, also, burial space is at a premium. Moreover, although it is hard to gauge the precedent effect—because it is difficult to know whether others would want to do what the petitioners here propose—it is difficult to see why if this proposal were allowed a similar proposal by others here or in another churchyard in the diocese should not be permitted. Although it might not in practice happen, in principle one might have a consecrated churchyard with a significant number of spaces not taken up with any burials at all.

30. Further, the guidelines say the following about the interment of ashes: 'The random interment of ashes in churchyards is discouraged. It is wasteful of gravespace, and tends to lead to a proliferation of memorials.'^e Rather, interment of ashes in a specially designated area is encouraged. This normally takes the form of a garden of remembrance. As I have said, such a garden is provided in this churchyard. It would, however, be difficult to say to someone who wishes to inter the ashes of a relative in the churchyard with a full-sized headstone that it was inappropriate for him to do so against the background that a full-sized memorial had been permitted to commemorate someone whose remains were not interred in the churchyard at all.

CONCLUSION

31. Accordingly, for the reasons set out at paras 21–25 and 26–30, above, I do not think that it is appropriate for a faculty to issue in this case.

ADDITIONAL POINTS

32. I should add the following points.

33. As has been seen, one of the DAC's concerns was whether the memorial proposed would have been stable. There was no evidence before me suggesting that its stability could not be secured or that what was proposed was intrinsically unsafe. None the less, safety in churchyards is a very important matter and had I been otherwise minded to grant a faculty I would not have done so before receipt of a short report from the stonemason or other competent person giving me assurance on this matter.

34. Mrs Morris could seek to reserve a grave space in the churchyard to receive her own remains in due course. If this was permitted, when a stone came to be erected, it could also commemorate Lt Col Morris, recording that his ashes were scattered elsewhere.

35. It might be possible to find a space in the churchyard where a memorial stone could be erected which would not take up a possible future grave space. This is not the proposal before me. If such a space were identified the matter

^e *The Churchyards Handbook* (4th edn, 2001) makes a similar point (pp 64–65): 'In some rural churchyards headstones are used, indistinguishable in size and style from those used to mark burials of bodies. This obviously gives more scope for a satisfying memorial, but there is an incongruity in using a marker that is so large in relation to the remains themselves. It is also extravagant in its usage of space and is frankly at odds with the whole concept of cremation.'

a would have to be considered again by the PCC and the DAC before this court could consider it. I can see that there might be objections to such a proposal, but they would be different objections to those that have led me not to grant a faculty in the present case.

b 36. I realise that this decision will disappoint the petitioners. However, as I have noted, two yew trees have been planted in the churchyard in memory of Lt Col Morris. There, the petitioners will be able to see them growing and beautifying what is a particularly 'precious place'—to them, to the local community which Lt Col Morris served with such distinction, and to the wider world.

37. In the circumstances there will be no order for costs.

c Faculty refused.

Victoria Parkin Barrister.

Dar International FEF Co v Aon Ltd

[2004] EWCA Civ 1833

COURT OF APPEAL, CIVIL DIVISION

MANCE LJ

10 DECEMBER 2003

Costs – Security for costs – Jurisdiction – Court of Appeal – Whether Court of Appeal having jurisdiction to make order in favour of appellant defendant for security for its costs below – Supreme Court Act 1981, s 15(3) – CPR 25.12, 25.13, 52.10.

After granting a defendant permission to appeal from the court below, the Court of Appeal has jurisdiction to make an order for security for the defendant's costs below. Such an order, in respect of costs that can only be awarded to the defendant if successful on appeal, will be made for 'purposes of and incidental to' the hearing of the appeal within the meaning of s 15(3)^a of the Supreme Court Act 1981, and will be 'In relation to an appeal' within the meaning of CPR 52.10^b. Moreover, in view of the application and scope of s 15(3) of the 1981 Act, the Court of Appeal falls within CPR 25.12^c and 25.13^d which give 'The court' the power to make an order for security for costs, if it is just in all the circumstances to do, in favour of 'A defendant to any claim'. An appellant defendant does not cease to be regarded as the defendant to a claim for the purpose of seeking security for the costs of the proceedings, at least in the sense of the proceedings below, just because he has lost and is now also a judgment debtor (see [8], [12], below).

Notes

For the jurisdiction of the Civil Division of Court of Appeal generally, see 10 *Halsbury's Laws* (4th edn reissue) para 639, and for security for costs and appeal court's powers, see 37 *Halsbury's Laws* (4th edn reissue) paras 834–835, 1515.

For the Supreme Court Act 1981, s 15, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1059.

Case referred to in judgment

Stabilad Ltd v Stephens & Carter Ltd [1998] 4 All ER 129, [1999] 1 WLR 1201, CA.

- a Section 15, so far as material, provides: '... (3) For all purposes of and incidental to—(a) the hearing and determination of any appeal to the civil division of the Court of Appeal; ... the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought ...'
- b Rule 52.10, so far as material, provides: '(1) In relation to an appeal the appeal court has all the powers of the lower court ...'
- c Rule 25.12, so far as material, provides: '(1) A defendant to any claim may apply ... for security for his costs of the proceedings ...'
- d Rule 25.13, so far as material, provides: '(1) The court may make an order for security for costs under rule 25.12 if—(a) it is satisfied, having regard to all circumstances of the case, that it is just to make such an order; and (b)(i) one or more of the conditions in paragraph (2) applies, or (ii) an enactment permits the court to require security for costs ...'

Application for security for costs

a Aon Ltd, the defendant to proceedings in the Central London County Court brought by the claimant, Dar International FEF Co, for sums allegedly due under an agreement for the sharing of insurance brokerage, applied to the Court of Appeal for an order requiring the claimant to provide security for its costs of proceedings below in which Judge Knight QC had given judgment for the claimant on
b 16 September 2003. Longmore LJ granted the defendant permission to appeal on 29 October 2003 and adjourned the application for security for costs for argument on notice to the claimant. The facts are set out in the judgment.

David Head (instructed by *CMS Cameron McKenna*) for the defendant.

James Drake (instructed by *Fishers*) for the claimant.

MANCE LJ.

[1] This is an application for security in respect of costs, not of the appeal (which is by defendants against whom judgment was given below) but in respect of the defendants' costs of the proceedings below. The defendants, who are the
d appellants in this court, make the application in order to secure their costs below in the event that they should succeed in this appeal. It is therefore an unusual application which raises two main points: firstly, jurisdiction, and secondly, discretion.

[2] There was security for the defendants' costs of the proceedings below. It was put up in the form of a letter of guarantee from Arab Bank plc issued on
e 4 September 2002 and expiring on 4 September 2003. It was to pay on first demand:

‘... within 14 days such sums as may be agreed in writing to be due to you, or as may be awarded to you by a final judgment or final interim costs order of the Courts of England and Wales in respect of your costs of defending [the
f claimant's] claim in the proceedings ...’

[3] But, as I say, it was expressed only to be valid until 4 September 2003, and ‘expires in full and automatically if your written request for payment and your written confirmation are not in our possession on or before that date’. The security was put up pursuant to an order of Thomas J dated 26 April 2002. The jurisdictional
g basis for that order consisted in CPR 25.13(2)(a), namely that the claimant was resident out of the jurisdiction and not resident in a Brussels or Lugano Convention or regulation state as defined in s 1(3) of the Civil Jurisdiction and Judgments Act 1982.

[4] The claimant, Dar International FEF Co, is an overseas entity described by
h its owner at trial as a ‘shell company’. It is registered in Saudi Arabia. The security put up under the bank guarantee was originally £22,000, but was subsequently increased by agreement to £59,000. The correspondence shows that the parties discussed, and had in mind by the 12-month period, a period sufficient to cover the anticipated trial date. In the event, a draft judgment in
j favour of the claimant was handed down within the 12-month period. In July 2003 there was some to-ing and fro-ing relating to the scope of the issues which the judge had or had not covered, and there was a further hearing at the end of July leading to a letter from the judge towards the end of August in which he indicated that he did not propose to add anything to his draft judgment and enclosed a draft order under which the claimant succeeded and would obtain an order for the costs of the proceedings in its favour. The judgment was only

finalised at a hearing attended only by solicitors on 16 September 2003, shortly after the lapse of security. a

[5] The question of security was raised with the judge at that hearing and the solicitor for the claimant asked for the security to be reinstated. The judge refused this at that stage, but said that the application could be renewed to him or the Court of Appeal if permission to appeal was given. Permission to appeal has been given by Longmore LJ on 29 October 2003, and the defendant below now therefore applies to this court for security in respect of the costs below. b

[6] The defendant submits that the same factors apply which led to an order for security for costs below, that is the difficulty of enforcement, and the additional risk of getting nothing from an overseas 'shell' company. Those are, no doubt, the factors which led the judge on 16 September 2003 to accede to an application to stay the payment of the judgment sum and the order for costs of the proceedings below made in favour of the successful claimant. c

[7] I turn, therefore, to the two aspects of the application. As to jurisdiction, it is said by Mr Drake, on behalf of the claimant, that this court only has jurisdiction over the costs of the appeal. Section 15 of the Supreme Court Act 1981 defines this court's jurisdiction, so far as is presently material, by conferring on it the authority and jurisdiction of the court below 'for all purposes of or incidental to' the hearing of any appeal. Mr Drake submits that a grant of security in respect of the costs below cannot be for the purposes of or incidental to the hearing of the appeal. He also says that it cannot be 'In relation to an appeal' within the meaning of CPR 52.10, which is the rule reflecting the same subject matter as s 15. For good measure he points out, correctly, that the application does not fall within CPR 25.15 which deals only with the costs of the appeal. d

[8] In my view, an order by this court for security in respect of the costs of proceedings below, which costs would only be awarded to the defendant if successful on appeal, would be made for purposes of or incidental to the hearing of the appeal. Its aim would be to ensure that a costs order made on a successful appeal in respect of the proceedings below would be paid. Likewise, in my judgment, such an order would also be 'In relation to an appeal' within CPR 52.10. e

[9] As a matter of principle, it would seem surprising if the power to order security in favour of a defendant for the costs of proceedings brought by an overseas claimant was only effective if the defendant succeeded at first instance and was not available to cover the possibility that the defendant might succeed only on appeal. Suppose for example a situation where it was fairly clear that the defendant was going to fail in the light of binding authority at first instance, but there was a very real prospect of success on appeal to the Court of Appeal or House of Lords. f

[10] It is clear that there is no general rule that security for the costs below of a defendant against whom judgment is in the event given below should be released immediately upon such a judgment and cannot be preserved against the outcome of an appeal. In *Stabilad Ltd v Stephens & Carter Ltd* [1998] 4 All ER 129, [1999] 1 WLR 1201, this court held that it has jurisdiction to grant a stay of the release of security granted by a first instance judge to a defendant. That was, however, under RSC Ord 59, r 13, giving the court specific power to stay the effect of an order made below. In that case, the security ordered by the first instance court would otherwise have continued in place indefinitely and the judge below had, on giving judgment in favour of the plaintiff, ordered the release of the security. This g

a court stayed that order. This court must, however, have been acting in doing so for the purposes of or incidental to the appeal within s 15 of the 1981 Act.

[11] Here, of course, the factual position is different in that the defendant failed to obtain security that was unlimited in time, and failed to apply to the judge before the security expired and before judgment was obtained with a view to obtaining extended security. But, if this court can retain security pending an appeal, one would think that it also had jurisdiction under the statute to order further security. The purpose and effect in each case is the same. Whether it should exercise such jurisdiction is a different matter since a stay is a self-sufficient remedy operating on its own and requiring no positive enforcement or sanction, whereas an order such as is now suggested would be made in the air without obvious means of enforcement or obvious sanction in the event of its breach.

[12] As to specific rules, under CPR 25.12 and 25.13 the court has power to make an order for security for costs, if it is just in all the circumstances so to do, in favour of 'A defendant to any claim'. In the light of my view on the scope and application of s 15, the court here includes this court. I see no reason why the appellant to this appeal should cease to be regarded as 'the defendant to a claim' for the purpose of seeking security for the costs of the proceedings, at least in the sense of the proceedings below, just because the defendant has lost and is now also a judgment debtor. It follows that, in my view, there would be jurisdiction to make the order sought if it were just to do so. I turn therefore to discretion.

[13] The factors which weigh here are, on the one hand, the claimant's nature as a foreign shell company in a jurisdiction where one would not expect enforcement to be easy and its willingness and ability to put up security by bank guarantee below. I am not impressed by the claimant's criticism of the paucity of evidence deployed on this application when the claimant's own description of itself as a Saudi Arabian shell company is clear and is attested to.

[14] On the other hand, one must place in the scales a number of factors. The first is the claimant's success below. This cannot alone be fatal. That follows from the court's undoubted power and willingness in some circumstances to stay execution of a judgment debt and costs order in favour of the claimant below, and also to stay release of any security if there has been continuing security: see, in particular in the latter context, Scott V-C's words in *Stabilad Ltd v Stephens & Carter Ltd* [1998] 4 All ER 129 at 136, [1999] 1 WLR 1201 at 1207, where he regarded the fact of success below as outweighed by the result for the defendant of being unable to recover any of its costs of the trial if it should be able to satisfy the appeal court that it should have won at trial.

[15] The second factor is an important one. It is the defendant's acceptance of a limited one-year guarantee specifically restricted to cover a period until trial, and its failure to apply for any extension of the security below until after judgment below, and indeed until after the security had already expired. This failure occurred even after the handing down of a draft judgment in July 2003 by which it must have been clear to the defendant that it had lost, and after which, presumably, the defendant was contemplating an appeal.

[16] The third factor is that, in the present context where security has expired, there is no sanction which it is easy to contemplate the court applying in the event of a breach of an order to provide security—CPR 52.9 provides none. Arguments that the respondent here, the successful claimant below, could find itself in contempt, could not lead to any personal enforcement in the present case since the respondent and its officers are out of the jurisdiction. Arguments that on that basis an order might be made debarring the claimant from defending an

appeal in proceedings which it had won below, seem to me to highlight a certain incongruity about an application made by the losing party after the expiry of consensual security in its favour and after judgment given in favour of the other party which had provided the security. In such a situation the court would, as Mr Head accepted when pursuing this appeal, still have to consider the merits of the appeal, but would have to do so without the benefit of any argument from the claimant. If an appeal raised a point of general importance (although this appeal does not), the odd result might follow that the court would then feel it appropriate for the appointment of a friend of the court at public expense in order to defend the interests of someone who was in contempt. a

[17] In answer to all this it may be said that the court should proceed on the basis that its orders would be obeyed even without an effective sanction, but the absence of any sanction which it is easy to contemplate does underline the oddity of what it is that the defendant is asking the court to do. In my view, questions of security should usually be resolved at a time when the court still has some readily exercisable and appropriate control over the claimant who is being asked to put up the security in respect of the proceedings below. b

[18] For these reasons, although I think there is jurisdiction, I do not think that it would be right to exercise it here. This application will therefore be dismissed. c

Application dismissed.

Kate O'Hanlon Barrister. d

a **Eastwood and another v Magnox Electric plc**

McCabe v Cornwall County Council and others

[2004] UKHL 35

b

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD BROWN OF EATON-UNDER-HEYWOOD

c

12, 17 MAY, 15 JULY 2004

d

Employment – Contract of service – Breach of contract – Damages – Whether prohibition of common law claims for damages arising from manner of dismissal precluding employee from bringing common law claims for damage suffered before dismissal as result of employer's failure to act fairly when taking steps leading to dismissal.

e

In two conjoined appeals to the House of Lords heard on the basis of assumed facts, employees had brought complaints of unfair dismissal before an employment tribunal. They were either awarded compensation by the tribunal or received payments in settlement of their claims for unfair dismissal. In both cases the employees subsequently brought court proceedings for negligence and breach of contract, claiming that they had suffered financial losses flowing from psychiatric illnesses caused by pre-dismissal unfair treatment. Their claims were summarily dismissed at first instance, the judge holding in each case that the claim was bound to fail in view of a recent House of Lords authority (the House of Lords authority) which had held that an employee had no right of action at common law, either in contract or negligence, to recover damages arising from the unfair manner of his dismissal since such a right would be inconsistent with the statutory code relating to unfair dismissal. In the first case the Court of Appeal upheld the judge's decision, but in the second a differently-constituted Court of Appeal allowed the claim to proceed to trial. The employees appealed in the first case, while the defendants, including the employer, appealed in the second case.

g

h

Held – Where, as a result of his employer's failure to act fairly when taking steps leading to his dismissal, an employee had a common law cause of action which preceded, and was independent of, his subsequent dismissal, he was not precluded from pursuing that cause of action by the House of Lords authority. The statutory code provided remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, was the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee had acquired a cause of action at law, for breach of contract or otherwise, that cause of action remained unimpaired by his subsequent unfair dismissal and the statutory right flowing therefrom. By definition, in law such a cause of action existed independently of the dismissal. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal did not of itself cause the employee

j

financial loss. The loss arose when the employee was dismissed, and it arose by reason of his dismissal. The resultant claim for loss would then fall squarely within the exclusion area established by the House of Lords authority. Exceptionally, however, financial loss might flow directly from the employer's failure to act fairly when taking steps leading to dismissal, eg where an employee suffered financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee had a common law cause of action which preceded, and was independent of, his subsequent dismissal. In respect of his subsequent dismissal he could present a claim to an employment tribunal. If, however, he brought proceedings both in court and before a tribunal he could not recover any overlapping heads of loss twice over. In both of the instant cases, the assumed facts constituted causes of action which had accrued before the dismissal of the employees. They disclosed reasonable causes of action which should proceed to trial. Accordingly, the appeal in the first case would be allowed, while the appeal in the second case would be dismissed (see [27]–[29], [34], [35], [52]–[54], below).

Johnson v Unisys Ltd [2001] 2 All ER 801 distinguished.

Notes

For damages in an action for breach of contract of employment, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 455.

Cases referred to in opinions

Addis v Gramophone Co Ltd [1909] AC 488, [1908–10] All ER Rep 1, HL.

Dunnachie v Kingston-upon-Hull City Council [2004] UKHL 36, [2004] 3 All ER 1011, [2004] 3 WLR 310.

Gogay v Hertfordshire CC [2000] IRLR 703, CA.

Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597, [1991] 1 WLR 589.

Johnson v Unisys Ltd [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518, [2001] 2 WLR 1076; *affg* [1999] 1 All ER 854, [1999] ICR 809, CA.

King v University Court of the University of St Andrews [2002] IRLR 252, Ct of Sess (OH).

Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

Malloch v Aberdeen Corp [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL.

Maw v Jones (1890) 25 QBD 107, DC.

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183, [1973] 1 WLR 45, NIRC.

Page v Smith [1995] 2 All ER 736, [1996] 1 AC 155, [1995] 2 WLR 644, HL.

Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 All ER 949, [1972] 2 QB 455, NIRC and CA.

Wellman Alloys Ltd v Russell [1973] ICR 616, NIRC.

Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA.

Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, EAT; *affd* [1982] ICR 693, CA.

Cases referred to in list of authorities

- a** *Barber v Somerset CC* [2004] UKHL 13, [2004] 2 All ER 385, [2004] ICR 457, [2004] 1 WLR 1089.
- Barrett v Enfield London BC* [1999] 3 All ER 193, [2001] 2 AC 550, [1999] 3 WLR 79, HL.
- b** *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
- Boardman v Copeland BC* [2001] EWCA Civ 888, [2001] All ER (D) 99 (Jun).
- Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, EAT.
- Edwards v Hanson School Governors* [2001] IRLR 733, EAT.
- c** *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345, HL.
- French v Barclays Bank plc* [1998] IRLR 646, CA.
- Gunton v Richmond upon Thames London Borough* [1980] 3 All ER 577, [1981] Ch 448, [1980] 3 WLR 714, CA.
- d** *Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613.
- Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.
- e** *J Sainsbury plc v Hitt* [2002] EWCA Civ 1588, [2003] IRLR 23, [2003] ICR 111.
- Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL.
- Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898, [1973] AC 435, [1972] 3 WLR 143, HL.
- f** *London Fire and Civil Defence Authority v Betty* [1994] IRLR 384, EAT.
- McKerr, Re* [2004] UKHL 12, [2004] 2 All ER 409 [2004] 1 WLR 807.
- McLoughlin v Grovers (a firm)* [2001] EWCA Civ 1743, [2002] QB 1312.
- O'Laoire v Jackel International Ltd* [1991] ICR 718, CA.
- g** *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40, [1963] 2 WLR 935, HL.
- Robinson v Crompton Parkinson Ltd* [1978] ICR 401, EAT.
- Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309, [1983] 2 WLR 16, HL.
- h** *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.
- Swain v Hillman* [2001] 1 All ER 91, CA.
- Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1.
- Turner v London Transport Executive* [1977] ICR 952, CA.
- j** *Waters v Comr of Police of the Metropolis* [2000] 4 All ER 934, [2000] ICR 1064, [2000], WLR 1607, HL.
- White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, sub nom *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1998] 3 WLR 1509, HL.
- Wilson and Clyde Coal Co Ltd v English* [1937] 3 All ER 628, [1938] AC 57, HL.

Appeals

Eastwood and anor v Magnox Electric plc

The claimants, George Brian Eastwood and John Roger Williams, appealed with permission of the Appeal Committee of the House of Lords given on 17 December 2002 from the order of the Court of Appeal (Peter Gibson, Mantell LJ and Sir Swinton Thomas) on 22 March 2002 ([2002] EWCA Civ 463, [2002] IRLR 447, [2003] ICR 520n) dismissing their appeals from the order of Judge Elystan Morgan in Llangefni County Court on 19 June 2001 giving judgment for the defendant, Magnox Electric plc, on the determination of a preliminary issue in proceedings brought by the claimants against Magnox for breach of contract and negligence. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

McCabe v Cornwall CC and ors

The defendants, Cornwall County Council and the Governors of Mount's Bay School, appealed with permission of the Appeal Committee of the House of Lords given on 8 April 2003 from the order of the Court of Appeal (Auld, Brooke and Sedley LJ) on 19 December 2002 ([2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501) allowing an appeal by the claimant, Robert Jocelyn McCabe, from the order of Judge Overend, sitting as a judge of the High Court at Exeter, on 31 May 2002, giving effect to his decision of 27 May 2002 ([2002] EWHC 3055 (QB)), (i) refusing Mr McCabe permission to amend his statement of claim in proceedings brought by him against the defendants for breach of contract, negligence and breach of statutory duty, and (ii) striking out the statement of claim as disclosing no cause of action. The National Union of Teachers (NUT) was given permission to intervene on the appeal. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Winston Hunter QC and Alistair Wright (instructed by *Jack Thornley & Partners*, Manchester) for Mr Eastwood and Mr Williams.

Robert Owen QC and Peter Cowan (instructed by *Berrymans Lace Mawer*, Manchester) for Magnox.

Michael Beloff QC and Richard Mawhinney (instructed by *Hancock Caffin*, Truro, as agents for *Richard Williams*, Truro) for the council and the governors.

Oliver Hyams (instructed by *Vincent Roe & Co*, Brynmawr) for Mr McCabe.

Andrew Buchan (instructed by *Graham Clayton Solicitors*, Ilford) for the NUT.

Their Lordships took time for consideration.

15 July 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, in October 1905 Mr Addis was abruptly and ignominiously dismissed as manager of the business of Gramophone Co Ltd in Calcutta. He sued his employer for wrongful dismissal, in proceedings which have cast a long shadow over the common law. Mr Addis was entitled to six months' notice. Your Lordships' House held that his damages were confined to loss of salary and commission for six months. He was not entitled to recover damages in respect of the 'manner of his dismissal' in the phrase of Lord Loreburn LC. The way

a Mr Addis was sacked may have imported obloquy and permanent loss in the commercial community of Calcutta, but in respect of these matters he had no cause of action: see *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1.

b [2] This was still settled law when the Royal Commission on Trade Unions and Employers' Associations (1965–1968) (Cmnd 3623), under the chairmanship of Lord Donovan, reported in 1968. Protection at common law against 'wrongful' dismissal was strictly limited. The employer, as much as the employee, was entitled to end the contract of employment without cause. The employer could act unreasonably or capriciously. He was not bound to hear the employee before dismissing him: see the oft-quoted words of Lord Reid in *Malloch v Aberdeen Corp* [1971] 2 All ER 1278 at 1282, [1971] 1 WLR 1578 at 1581.

c In its report the Donovan Commission recommended the law should be changed by 'early legislation'. Statute should establish machinery to safeguard employees against unfair dismissal (see para 1057).

d [3] Parliament gave effect to this recommendation in the Industrial Relations Act 1971. The relevant provisions are now contained in Pt X of the Employment Rights Act 1996. An employee has the right not to be unfairly dismissed by his employer (see s 94). The remedies for unfair dismissal are set out in Ch II of Pt X. A complaint may be made to an employment tribunal. If the tribunal upholds the complaint the tribunal may make an order for reinstatement or re-engagement or an award of compensation for unfair dismissal calculated as provided in the 1996 Act.

e

THE 'TRUST AND CONFIDENCE' IMPLIED TERM

f [4] These provisions in the 1971 Act prompted a development in the common law. The statutory remedy of unfair dismissal was available only if an employee was dismissed. If an employer behaved in a way no employee could be expected to tolerate, and the employee then resigned in the face of such behaviour, the employee had no remedy. He had not *actually* been dismissed by his employer. In order to claim he had been *constructively* dismissed the employee had to be able to point to a breach of contract by his employer which he was entitled to treat as a repudiation of the contract of employment: see *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, [1978] QB 761.

g Showing that the employer had behaved unreasonably was not sufficient.

h [5] The Employment Appeal Tribunal led the way in finding a means to bring such cases within the reach of the unfair dismissal legislation. It is a well-established principle that a servant owes a duty of loyalty and faithfulness to his master. Thus, in a modern context an employee will be in breach of contract if he 'works to rule' in such a way as to frustrate the commercial objective of his contract of employment: see *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 All ER 949, [1972] 2 QB 455. From here it was a short step to recognise that both parties to an employment contract owe a duty to conduct themselves in a way which will enable the contract to be performed. The developed formulation of this duty became, so far as the employer is concerned, that an employer will not, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This formulation of a wide-ranging 'trust and confidence' implied term emerged in the late 1970s and the 1980s in cases such

j

as *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, affirmed [1982] ICR 693. a

[6] This term, implied as a legal incident of employment contracts, provides the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress. Such conduct is a breach of a fundamental term of the contract of employment, and an employee who accepts this breach as a repudiation of the contract by the employer is 'constructively' dismissed by the employer. The employee can, accordingly, make a complaint of unfair dismissal to an employment tribunal. b

MAHMUD v BCCI SA

[7] The principal application of this trust and confidence implied term in legal proceedings has been for this purpose, that is, as an adjunct in unfair dismissal cases. In *Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20, the House considered the application of this implied term in a different type of case. In *Mahmud's* case breach of this term was not relied upon as a foundation for a claim for constructive dismissal. A former employee first learned of breach of this implied term after his employment had ended. He claimed damages at common law for breach of this term. The House held that this claim was well-founded as a matter of law. Damages for breach of the trust and confidence implied term should be assessed in accordance with ordinary contractual principles. c

JOHNSON v UNISYS LTD

[8] The ramifications of this decision came under scrutiny in *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518. In *Johnson's* case the plaintiff sought to extend the *Mahmud* principle further. He sought to rely on breach of the trust and confidence implied term, not as a foundation for a statutory claim for unfair dismissal or as a foundation for a claim for damages unrelated to dismissal, but as a foundation for a claim at common law for unfair dismissal. d

[9] Mr Johnson's grievance concerned the way he had been summarily dismissed: the way the dismissal decision had been reached. He made a complaint of unfair dismissal to an industrial tribunal. The tribunal upheld his complaint. Unisys had not given Mr Johnson a fair opportunity to defend himself nor had it complied with its disciplinary procedures. The tribunal awarded him £11,000, the maximum amount it could award. Mr Johnson then brought proceedings in the county court, claiming that the way he had been dismissed was in breach of the 'trust and confidence' term and other implied terms in his contract of employment. He also put forward a claim in negligence. Unisys knew or should have known he was 'psychologically vulnerable' and would suffer injury if treated as he was by Unisys. He claimed damages in excess of £400,000. His court proceedings were summarily struck out by the judge. e

[10] The judge's decision was upheld by the Court of Appeal ([1999] 1 All ER 854, [1999] ICR 809) and by a majority decision of your Lordships' House ([2001] 2 All ER 801, [2003] 1 AC 518). Mr Johnson's claim was founded on the fact that he had been dismissed, and the trust and confidence implied term cannot be applied to dismissal itself. Further, the grounds on which it would be wrong to impose an implied contractual duty regarding exercise of the f

a power of dismissal make it equally wrong to achieve the same result by imposing a duty of care. All the matters of which Mr Johnson complained in his court proceedings were within the statutory jurisdiction of an employment tribunal.

[11] Mr Johnson's claim was not without attraction. The trust and confidence implied term means, in short, that an employer must treat his employees fairly. b In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith. In principle, this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of his which affect a subsisting employment relationship. It makes little sense, for instance, that the implied obligation to act fairly should apply when an employer is considering whether to suspend an employee but not c when the employer is proposing to take the more drastic step of dismissing him. Considerations of this nature suggest that the natural, continuing development of this aspect of the common law should be that the implied obligation to act fairly applies to dismissal decisions. This would mean that if an employee were treated today in the same shameful way as Mr Addis he would have a remedy at d common law for breach of contract.

[12] This development of the common law, however desirable it may be, faces one overriding difficulty. Further development of the common law along these lines cannot co-exist satisfactorily with the statutory code regarding unfair dismissal. A common law obligation having the effect that an employer e will not dismiss an employee in an unfair way would be much more than a major development of the common law of this country. Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly, and it would do so in a manner inconsistent with the statutory provisions. In the statutory code Parliament has addressed the highly sensitive and controversial issue of what compensation should be paid to employees who are dismissed f unfairly. This code is now an established and central part of this country's employment law. The code has limited the amount payable as compensation. In 1971 the limit was £4,160. Reflecting inflation, this limit was raised periodically up to £12,000 in 1998. In the following year the statutory maximum was raised in one bound to £50,000. From there it has risen to the present figure of £55,000.

[13] In fixing these limits on the amount of compensatory awards g Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further a common law implied term when this would depart significantly from h the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that. A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal. It would also be j inconsistent with the statutory exclusion of the statutory right where an employee had not been employed for a qualifying period or had reached normal retiring age or the age of 65 and further, with the parliamentary intention that questions of unfair dismissal should be dealt with by specialised tribunals and not the ordinary courts of law.

[14] I recognise that, by establishing a statutory code for unfair dismissal, Parliament did not evince an intention to circumscribe an employee's rights in

respect of wrongful dismissal. But Parliament has occupied the field relating to unfair dismissal. It is not for the courts now to expand a common law principle into the same field and produce an inconsistent outcome. To do so would, incidentally, have the ironic consequence that an implied term fashioned by the courts to enable employees to obtain redress under the statutory code would end up supplanting part of that code.

[15] As was to be expected, the decision in *Johnson v Unisys Ltd* has given rise to demarcation and other problems. These were bound to arise. Dismissal is normally the culmination of a process. Events leading up to a dismissal decision take place during the subsistence of an employment relationship. If an implied term to act fairly, or a term to that effect, applies to events leading up to dismissal but not to dismissal itself unsatisfactory results become inevitable.

[16] The two cases now before the House are stark illustrations of these problems. In each case an employee or employees complained of unfair dismissal to an employment tribunal. In each case the employees subsequently brought court proceedings which were summarily dismissed at first instance on the basis that, having regard to the decision in *Johnson v Unisys Ltd*, the proceedings were bound to fail. In neither case, therefore, has there been a trial. Appeals to the Court of Appeal and to your Lordships' House have proceeded on the footing that if trials take place the claimants may be able to establish the truth of their allegations. The defendants are not to be taken to admit the truth of these allegations.

EASTWOOD v MAGNOX ELECTRIC PLC

[17] The case of *Eastwood v Magnox Electric plc* concerns two employees, George Eastwood and John Williams, of Magnox Electric plc. They were long-serving employees who worked in the security section of the Magnox Power Station at Wylfa, Anglesey. In summary, the assumed facts are that Mr Eastwood's immediate superior had a longstanding grudge against him. In May 1996 there was a disagreement between them. Mr Eastwood's superior reported this to Mr Eastwood's manager Mr Allen. Mr Eastwood refused to admit matters alleged against him. From then on there followed a series of events whose purpose was to secure evidence as a foundation for disciplinary proceedings against Mr Eastwood. Individuals were counselled to provide false statements. In June 1996 Mr Allen found Mr Eastwood guilty of misconduct and gave him a final written warning for what was a trivial incident. Mr Eastwood appealed in accordance with the firm's disciplinary code. Mr Allen regarded this as a further attempt to challenge his authority and made it known he wanted any information which could be used to destroy Mr Eastwood's appeal. Mr Williams was summoned to Mr Allen's office and asked to provide a false statement against Mr Eastwood. When he refused he was threatened with possible investigation into his own conduct. There were no grounds for making any such investigation. In July 1996 Mr Eastwood's appeal succeeded to the extent that his final written warning was reduced to a warning to remain on his file for six months.

[18] An inquiry was then conducted into employee relationships in the security section. Its real purpose was to seek information adverse to Mr Eastwood and Mr Williams. A past dispute between Mr Eastwood and Mrs Roberts, also a member of the security staff, came to light. Mr Allen and other members of management encouraged Mrs Roberts to formulate a series of complaints against Mr Eastwood and Mr Williams. On 31 July 1996 Mrs Roberts lodged a formal

a complaint, and Mr Eastwood and Mr Williams were ordered to leave the site. They were told that serious allegations of sexual harassment had been made against them, but they were not given any details or the name of the complainant. A week later, on 7 August, both men were very publicly suspended from work. Those responsible for investigating the complaint on behalf of management then encouraged individuals to provide statements with the promise they would not be asked to attend any hearing. Members of management asked Mrs Roberts to 'beef up' her allegations and assisted her to do this.

b [19] The disciplinary hearing in respect of Mr Williams took place on 30 September 1996. Facts were assumed against him even though no witnesses were called to support them and even though witnesses attending on behalf of Mr Williams withdrew what they had previously said. On 4 October c Mr Williams was dismissed. By the time of the disciplinary hearing, after four months of a campaign to demoralise and undermine him, Mr Williams had symptoms of anxiety and fear, later diagnosed as a depressive illness. Mr Eastwood's disciplinary hearing was postponed until April 1997 because he was suffering from a depressive illness. He too was dismissed.

d [20] Both men pursued claims for unfair dismissal. Mr Williams' complaint resulted in a finding of unfair dismissal. Before a remedies hearing took place on Mr Williams' claim, and before any hearing on Mr Eastwood's claim, a compromise agreement was reached. Both men received financial payments. The agreement reserved the men's right to pursue a claim at common law for any claims they might have in respect of personal injuries arising out of their e employment.

f [21] Mr Eastwood and Mr Williams then commenced proceedings in the county court in July 1999 for negligence and breach of contract. They alleged they suffered personal injuries in the form of psychiatric illnesses caused by a deliberate course of conduct by certain individuals using the machinery of the disciplinary process. Judge Elystan Morgan dismissed both claims on the basis that, as a matter of law, they had no reasonable prospect of success. *Johnson v Unisys Ltd* showed that the development of the common law implied terms, of trust and confidence and the like, cannot proceed further 'in so far as they come up against the buffers, as it were, of the unfair dismissal legislation'. Those terms are excluded from the area within the purview of an employment tribunal, and g that area includes acts done from the time the disciplinary machinery starts running.

[22] The Court of Appeal, comprising Peter Gibson and Mantell LJ and Sir Swinton Thomas, upheld the judge's decision: see [2002] EWCA Civ 463, [2002] IRLR 447, [2003] ICR 520n. Peter Gibson LJ delivered the only reasoned h judgment. Having referred to *Johnson v Unisys Ltd*, he said (at [23]):

'The implied term of trust and confidence cannot be used in connection with the way the employer/employee relationship is terminated. There may be cases where the particular manner in which an employee is dismissed or the circumstances attending dismissal is or are confined to events i occurring at the same time or immediately before the dismissal. In other cases that manner and those circumstances may include a pattern of events stretching back over a period. It is a question of fact for the trial judge to determine in each case.'

[23] Peter Gibson LJ then concluded, in short, that the circumstances attending Mr Williams' dismissal began in May 1996. All these circumstances were

considered by the employment tribunal. The compensation recoverable in the employment tribunal covers the substance of what Mr Williams is claiming in his court proceedings. There can be no justification for allowing Mr Williams a second bite of the cherry. In Mr Eastwood's case there has been no hearing in the employment tribunal. But on analysis his position is no different from that of Mr Williams.

MCCABE v CORNWALL CC

[24] The second case concerns Robert McCabe. He was employed by Cornwall County Council as a teacher at Mount's Bay School, Heamoor, in Cornwall from September 1991 until dismissed in March 1994. In May 1993 allegations were made that he had behaved inappropriately towards certain female pupils, and he was suspended from his employment. At a disciplinary hearing held by the school governors in November 1993 Mr McCabe was given a final written warning. He appealed. At a hearing by an appeal panel in March 1994 the governors decided to dismiss him. He was then dismissed. Mr McCabe appealed again. A hearing took place over several days in July and August 1996, but his appeal was unsuccessful. He lodged a complaint with an industrial tribunal. In November 1996 the tribunal found he had been unfairly dismissed. The dismissal was in breach of the relevant disciplinary procedures, as the allegations had not been investigated at the time by a senior member of staff and the complainant girls had not signed their statements. He was awarded £11,504, being a basic award of £504 and the maximum compensatory award of £11,000. The tribunal stated, however, that Mr McCabe had contributed 20% to the dismissal as his conduct had merited reproof and warning. In February 1998 the Employment Appeal Tribunal upheld the industrial tribunal's finding on liability but overturned the tribunal's finding of 20% contributory fault.

[25] Meanwhile in March 1997 Mr McCabe instituted proceedings in the High Court against the council and the school governors claiming damages for breach of contract, negligence and breach of statutory duty. His primary complaint in his statement of claim as originally served was that by reason of the council's failure to investigate the allegations properly and to conduct the disciplinary hearings properly and his dismissal he had sustained psychiatric illness. He claimed special damages approaching £200,000. Later, in response to the decision in *Johnson v Unisys Ltd*, Mr McCabe sought to amend his statement of claim by limiting the focus of his complaint to the period before his dismissal, that is, to the period of his suspension and to the failure to carry out a proper investigation. On 27 May 2002 Judge Overend, sitting as a judge of the High Court, refused permission to amend the statement of claim and struck out the original statement of claim as disclosing no cause of action. In doing so he followed the approach of the Court of Appeal in *Eastwood's* case. The conduct of which Mr McCabe complained was all part and parcel of the events which led up to his dismissal and as such it is 'caught by the *Eastwood* extension of the *Johnson* principle': [2002] EWHC 3055 (QB) at [41].

[26] The Court of Appeal, comprising Auld, Brooke and Sedley LJ, allowed an appeal by Mr McCabe on 19 December 2002 ([2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501). Auld LJ (at [27]) identified the essential question as one of determining where on the facts of any particular case the line should be drawn between dismissal, caught by the unfair dismissal legislation, and conduct prior to that causing injury compensatable in damages at common law. The case should be permitted to go to trial to enable the underlying facts to be ascertained.

- a Brooke LJ, agreeing, said (at [33]) he was 'very uneasy' about aspects of the present state of the law. It would be odd if the law were to permit a claim by an employee known to be psychologically vulnerable when dismissal was not in prospect at the time of the triggering event but disallow such a claim if the disciplinary process intended to lead to dismissal was the triggering event (see [43]).
- b Sedley LJ, also agreeing, said (at [49]) the action should proceed in order to decide whether the act of suspension was 'part of the process of dismissal'. It will have to be decided whether, if the pleaded facts are proved, they are subsumed in the dismissal for which Mr McCabe has already recovered such compensation as statute allows, or whether they constitute a 'separate and antecedent wrong' (see [52]).

c THE BOUNDARY LINE

- [27] Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute.
- d If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.

- e [28] In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area.

- f [29] Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of
- g his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over.

- [30] If identifying the boundary between the common law rights and remedies and the statutory rights and remedies is comparatively
- h straightforward, the same cannot be said of the practical consequences of this unusual boundary. Particularly in cases concerning financial loss flowing from psychiatric illnesses, some of the practical consequences are far from straightforward or desirable. The first and most obvious drawback is that in such cases the division of remedial jurisdiction between the court and an
- j employment tribunal will lead to duplication of proceedings. In practice there will be cases where the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs.

[31] Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of

constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed.

[32] The existence of this boundary line produces other strange results. An employer may be better off dismissing an employee than suspending him. A statutory claim for unfair dismissal would be subject to the statutory cap, a common law claim for unfair suspension would not. The decision of the Court of Appeal in *Gogay v Hertfordshire CC* [2000] IRLR 703 is an example of the latter. Likewise, the decision in *Johnson v Unisys Ltd* means that an employee who is psychologically vulnerable is owed no duty of care in respect of his dismissal although, depending on the circumstances, he may be owed a duty of care in respect of his suspension.

[33] It goes without saying that an interrelation between the common law and statute having these awkward and unfortunate consequences is not satisfactory. The difficulties arise principally because of the cap on the amount of compensatory awards for unfair dismissal. Although the cap was raised substantially in 1998, at times tribunals are still precluded from awarding full compensation for a dismissed employee's financial loss. So, understandably, employees and their legal advisers are seeking to side-step the statutory limit by identifying elements in the events preceding dismissal, but leading up to dismissal, which can be used as pegs on which to hang a common law claim for breach of an employer's implied contractual obligation to act fairly. This situation merits urgent attention by the government and the legislature.

THE PRESENT CASES

[34] It follows from what is set out above that I would dismiss the appeal in Mr McCabe's case and allow the appeals of Mr Eastwood and Mr Williams. In the case of all three men the assumed facts constitute causes of action which accrued before the dismissals. They disclose reasonable causes of action which should proceed to trial.

LORD STEYN.

[35] My Lords, on the assumed facts Mr Eastwood, Mr Williams and Mr McCabe arguably have causes of action which accrued before and independently of their dismissals. In all three cases there are reasonable causes of action which should be allowed to proceed to trial. They are unaffected by the restrictive effect of the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518. In my view the Court of Appeal in *Eastwood v Magnox Electric plc* [2002] EWCA Civ 463, [2002] IRLR 447, [2003] ICR 520n erred in extending the principle in *Johnson v Unisys Ltd* to wiping out accrued rights. The decision of the Court of Appeal in *McCabe v Cornwall CC*

a [2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501 avoided this pitfall. I therefore agree that the appeal in Mr McCabe's case should be dismissed and that the appeals of Mr Eastwood and Mr Williams should be allowed.

b [36] There is however a wider perspective to be mentioned. It may be necessary to reconsider the decision in *Johnson v Unisys Ltd* in a future case. Having disagreed with the main thrust of the majority decision in *Johnson v Unisys Ltd*, I make this suggestion with considerable diffidence. Moreover, although the printed cases lodged on behalf of the employees invited the House to depart from *Johnson v Unisys Ltd* if necessary, the House did not in the event hear oral argument from counsel for the employees calling in question the correctness of *Johnson v Unisys Ltd*. My observations must, therefore, be read subject to this caveat. On the other hand, the subject is of enormous importance: the personal contract of employment affects almost all individuals and families at some time. And, as I shall attempt to show, there are grounds for thinking that *Johnson v Unisys Ltd* has left employment law in an unsatisfactory state. I will only be able to touch on a few aspects. But my remarks may provide some focus for a future re-examination of the position.

c [37] The ground upon which *Johnson v Unisys Ltd* was decided is summarised in the headnote of the Appeal Cases report ([2003] 1 AC 518 at 518–519). It reads as follows:

e '... under Part X of the Employment Rights Act 1996 Parliament had provided the employee with a limited remedy for the conduct of which he complained; that, although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the manner of his dismissal, it would be an improper exercise of the judicial function for the House to take such a step in the light of the evident intention of Parliament that such claims should be heard by specialist tribunals and the remedy restricted in application and extent ...'

f In other words, the majority held that the statutory regime of *unfair* dismissal precludes a common law development in respect of *wrongful* dismissal despite the different meanings of those concepts.

g [38] This is the context in which Lord Hoffmann, who gave the leading opinion in *Johnson v Unisys Ltd*, observed about s 116(1) of the Industrial Relations Act 1971 (the ultimate precursor of the current s 123(1) of the 1996 Act):

h 'I know that in the early days of the National Industrial Relations Court it was laid down that only financial loss could be compensated: see *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45; *Wellman Alloys Ltd v Russell* [1973] ICR 616. It was said that the word 'loss' can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life.' (See [2001] 2 All ER 801 at [55].)

j This observation was relevant to Lord Hoffmann's reasoning that the development of a general common law remedy as contended for by the employee would have involved a complete or virtually complete overlap with the statutory remedy. Lord Hoffmann's assumption was shared by the other Law Lords hearing the case. In *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2004] 3 All ER 1011, [2004] 3 WLR 310 the House has now

unanimously held that s 123(1) of the 1996 Act does not permit the recovery of non-pecuniary loss. While Lord Hoffmann's observation was in terms of precedent only an obiter dictum it did lend support to his reasoning. That support of the reasoning in *Johnson v Unisys Ltd* has now disappeared. It does not necessarily follow that, if the true position had been appreciated, *Johnson v Unisys Ltd* would have been decided differently. But it raises some doubt about the reasoning in *Johnson v Unisys Ltd*.

[39] A second matter not considered in *Johnson v Unisys Ltd* was the type of demarcation disputes which would be generated. *Johnson v Unisys Ltd* laid down the proposition that cases of dismissal may only be brought in the employment tribunal. On the other hand if before dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action survives his subsequent unfair dismissal: see the lucid analysis of Lady Smith in *King v University Court of the University of St Andrews* [2002] IRLR 252. This dichotomy will often give rise to questions whether earlier events do or do not form part of the dismissal process. After all, such problems in relationships between an employer and an employee will often arise because of a continuing course of conduct. In practice this will inevitably lead to curious distinctions and artificial results. It will involve case by case decision-making rather than principled adjudication. The outcome of litigation will be very unpredictable. This policy aspect of the consequences of the reasoning of the majority in *Johnson v Unisys Ltd* was not considered by the House in that case. But the present appeals illustrated the type of difficulties and uncertainties inherent in the legalism which prevailed in *Johnson v Unisys Ltd*. This is relevant because the way in which a rule or principle operates in the real world is one of the surest tests of its soundness.

[40] A third perspective is raised by the decision of the Court of Appeal in *Gogay v Hertfordshire CC* [2000] IRLR 703. This case was decided after the Court of Appeal decision in *Johnson v Unisys Ltd* [1999] 1 All ER 854, [1999] ICR 809 and before the House of Lords' decision in *Johnson v Unisys Ltd* [2001] 2 All ER 801, [2003] 1 AC 518. *Gogay's* case was referred to in the argument of counsel in the House but not mentioned in any of the opinions of the majority. It concerned a claim brought in respect of psychiatric injury caused by the manner in which an employer operated a disciplinary procedure. Giving the leading judgment Hale LJ observed ([2000] IRLR 703 at 711):

'The case before us can be distinguished from *Johnson* [in the Court of Appeal]. The complaint here relates to a suspension, which manifestly contemplates the continuation of the employment relationship. The clear import of *Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* ([1997] 3 All ER 1, [1998] AC 20), is that the ambit of *Addis v Gramophone Co Ltd* ([1909] AC 488, [1908-10] All ER Rep 1) should be confined. There are in this case two differences from *Addis*: first, this was not a dismissal, and secondly, this was psychiatric illness rather than hurt feelings. In my judgment, therefore, the judge was right to award damages for both the financial loss and the non-pecuniary damage resulting from the claimant's illness. I recognise that this produces the strange result that, according to *Johnson*, the defendant authority would have done better had they dismissed rather than suspended the claimant. That simply reinforces my view that the sooner these matters

a are comprehensively resolved by higher authority or by Parliament, the better.'

b Unfortunately, as Hale LJ implicitly pointed out, *Johnson v Unisys Ltd* will tend to encourage precipitate and unfair decisions by employers to dismiss employees. The decision of the Court of Appeal in *Gogay's* case sits uneasily with *Johnson v Unisys Ltd*. How in policy terms the disharmony should be reconciled is not clear. The majority's reasoning in *Johnson v Unisys Ltd* also means that, although the exercise of the power to suspend must be exercised with due regard to trust and confidence (or fairness), the more drastic power of dismissal may be exercised free of any equivalent constraint. An employee confronted with a repudiatory breach of contract by an employer who elects to

c treat the contract as continuing may still have a claim for breach of contract. But in practice an employee may often not have much choice but to accept the repudiation. If the employee accepts the repudiation, the claim becomes one of unfair dismissal and the *Johnson* exclusion zone comes into play. In constructive dismissal cases the employee's response to the employer's breach

d will dictate whether there can be common law liability. The more outrageous the breach the less likely it is that the employee can affirm the contract: see Lizzie Barmes 'The Continuing Conceptual Crisis in the Common Law of the Contract of Employment' (2004) 67(3) MLR 435 at 451. Contractual analysis arguably suggests a more even-handed solution as between employer and employee. These negative policy factors were not explicitly considered in

e *Johnson v Unisys Ltd*.

[41] A fourth troublesome feature of the reasoning of the majority in *Johnson v Unisys Ltd* [2001] 2 All ER 801, [2003] 1 AC 518 is that it was assumed that an employer's conduct causing psychiatric illness to an employee resulting in financial loss may be compensated under s 123(1) of the 1996 Act. But for this

f assumption Lord Nicholls of Birkenhead (at [2]) could not have described the common law remedy in question as 'covering the same ground as the statutory right'. Lord Hoffmann observed (at [55]):

'In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most

g substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award.'

These observations were critical to the decision in *Johnson v Unisys Ltd*.

h [42] Was the assumption that in an unfair dismissal case an employment tribunal may award compensation for financial loss flowing from psychiatric injury correct? The jurisdiction of an employment tribunal does not extend to the awarding of compensation 'in respect of personal injuries': see the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI

j 1994/1623, art 3, as amended by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a); and s 3(3) of the Employment Tribunals Act 1996. A claim in contract or tort for damages for psychiatric injury is a claim in respect of personal injuries: *Page v Smith* [1995] 2 All ER 736 at 759, 760-761, [1996] 1 AC 155 at 188, 190 per Lord Lloyd of Berwick; compare s 38(1) of the Limitation Act 1980, sv 'personal injuries'. There is no reason to give to the words 'in respect of personal injuries' in the statutory regime governing employment tribunals any different

meaning. On the plain meaning of those words claims for financial loss caused by psychiatric injury are excluded from the jurisdiction of employment tribunals. Subject to a novel judicial interpretation to bring such claims under the statutory regime, there are cogent grounds for thinking that in *Johnson v Unisys Ltd* the majority proceeded on a fundamentally wrong assumption. The unfair dismissal scheme is less comprehensive than it was thought to be. The symmetry between the statutory regime and the proposed common law development visualised by the majority probably did not exist. If this is the case, the core reasoning of the majority in *Johnson v Unisys Ltd* is flawed.

[43] A fifth matter is the reception of *Johnson v Unisys Ltd*. Since *Johnson v Unisys Ltd* was decided more than two years ago, there has been a great deal of comment on this decision by academic and practising labour lawyers: see Professors Deakin and Morris *Labour Law* (3rd edn, 2001) pp 410–411, 418–419; Professor Freedland, *The Personal Employment Contract* (2003) pp 162–167, 303–305, 342–345, 362–364; Professor Freedland (2001) 30 ILJ 309; Professor Collins ‘Recent Cases—Claim for Unfair Dismissal’ (2001) 30 ILJ 305; Professors Hepple QC and Morris ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’ (2002) 31 ILJ 245 at 253; Brodie ‘Legal Coherence and the Employment Revolution’ (2001) 117 LQR 604 at 624–625; Lizzie Barmes ‘The Continuing Conceptual Crisis in the Common Law of the Contract of Employment’ (2004) 67(3) MLR 435. Making due allowance for differences in emphasis between the writers on the subject, there is apparently no support for the analysis adopted in *Johnson v Unisys Ltd*.

[44] The thrust of much of the comment on the central question is summarised by Deakin and Morris *Labour Law*, p 419 (para 5.3):

‘More generally, the argument that legislative intervention somehow equates to Parliament “occupying the field” at the expense of the future development of the common law would, if more generally applied, have already prevented the application of the implied term of mutual trust and confidence to many other aspects of the employment relationship. It may be argued that just as employment legislation normally acts as a “floor of rights” in relation to the contract of employment, implicitly encouraging the parties to improve on the basic standards supplied by statute, so the court should be willing, in appropriate cases, to use the enactment of protective legislation as a basis for extending, rather than limiting, recognition of the legitimate common law interests of the employee.’

A footnote to the first quoted sentence observes:

‘Thus there has been extensive statutory intervention in the areas of health and safety at work, grievance procedures, and the exercise of employer discretion in relation to occupational pension schemes, all of which have been the subject of judicial innovation in respect of the duty of mutual trust and confidence and which were accepted as legitimate in both *Malik* and *Johnson*. ...’

Hepple QC and Morris (2002) 31 ILJ 245 at 253–255 put the point as follows:

‘... in *Johnson v Unisys Ltd*, the House of Lords, by a 4:1 majority, stopped the common law developing to “reflect modern perceptions of how employees should be treated fairly and with dignity” in the context of dismissal. The reasoning of the majority has disturbing implications for employment rights in general. Although prepared to contemplate a term

a that a contractual power to dismiss without cause would be exercised fairly and in good faith, they regarded the introduction of the statutory remedy of unfair dismissal as fatal to the implication of such a contractual duty (and to the imposition of a duty of care) ... The argument that Parliament had intended to freeze out the development of the common law by creating a statutory remedy for unfair dismissal is contentious; the absence of any
b reference to the common law in the legislation may have occurred because Parliament was content to let the courts develop it in the usual way. Indeed, it would be open to the courts to reason by analogy that a requirement for employers to follow a fair procedure is not regarded by Parliament as unduly onerous. The majority's reasoning means that although the exercise of the power to suspend must be exercised with due
c regard to trust and confidence, the more drastic power of dismissal is free from any equivalent constraint ... In viewing statutory rights as a ceiling rather than a floor, *Johnson* creates the anomalous situation that employees may be better protected by implied terms in areas in which Parliament has failed or chosen not to legislate than in those in which it has.'

d Freedland *The Personal Employment Contract*, pp 304, 342 described the principal reasoning in *Johnson v Unisys Ltd*, founded as it was on an account of the intention of Parliament, as 'more than slightly artificial' and 'rather contrived'. He stated (at pp 342-343):

e 'It must be said that none of these various grounds of decision seems at all compelling in and of itself. In particular, the reasons advanced by the majority of the Law Lords seem rather contrived, and to be in the nature of rationalizations of a prior decision that it would be undesirable as a matter of policy for a claim of this nature to be allowed to succeed. Thus, if the obligation of mutual trust and confidence is a genuine reading of the
f implied intentions of the parties to the contract of employment, there seems no special reason why it should be regarded as stopping short of controlling the termination of the contract. If, on the other hand, the adjudication is a genuine attempt to comply with the design of the unfair dismissal legislation, it is rather surprising to have regarded Parliament, when it introduced a set of statutory protections for workers with regard
g to dismissal, as intending, indeed as enjoining, that the common law should not, in the future, develop parallel protections as part of the implied content of their personal work or employment contracts.'

h These are quotations from the writings of distinguished and experienced specialists in the field.

[45] The decision of the majority in *Johnson v Unisys Ltd* could be justified if, and only if, it could be shown that the co-existence of the statutory scheme and the development of a common law remedy would be unworkable. The majority in *Johnson v Unisys Ltd* did not put their decision on the basis that this
j test is satisfied. Nothing in the opinions in the present case, arrived at admittedly without the benefit of oral argument, persuades me that this test has indeed been satisfied. What is plain is that if the common law is allowed to develop as argued for by the employee in *Johnson v Unisys Ltd* no claimant would be allowed to make a double recovery. In practice this will pose no more serious problems than in other areas where possible double recovery problems occur and are dealt with by judges on the facts of each case.

[46] In *McCabe v Cornwall CC* in the Court of Appeal, decided after *Johnson* in the House of Lords, Auld LJ ([2003] IRLR 87 at [22]) described the law on this matter as 'clearly still in a state of development'. Brooke LJ stated (at [33]):

'I am very uneasy about certain aspects of the present state of the law, which appear to me to warrant re-examination by the House of Lords, or by Parliament, at an early date.'

The concerns expressed in *McCabe's* case are understandable.

[47] If the central ground on which *Johnson v Unisys Ltd* was decided proves, upon re-examination, vulnerable, one may pose the question whether the result of *Johnson v Unisys Ltd* could be justified on different grounds.

[48] It would be wrong now to assume that *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 reflected settled law which made impossible the development contended for in *Johnson v Unisys Ltd*. In *Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 9, [1998] AC 20 at 38–39, Lord Nicholls of Birkenhead observed about *Addis's* case:

'For present purposes I am not concerned with the exclusion of damages for injured feelings. The present case is concerned only with financial loss. The report of the facts in *Addis's* case is sketchy. Whether Mr Addis sought to prove that the manner of his dismissal caused him financial loss over and above his premature termination losses is not clear beyond a peradventure. If he did, it is surprising that their Lordships did not address this important feature more specifically. Instead there are references to injured feelings, the fact of dismissal of itself, aggravated damages, exemplary damages amounting to damages for defamation, damages being compensatory and not punitive, and the irrelevance of motive. The dissenting speech of Lord Collins was based on competence to award exemplary or vindictive damages. However, Lord Loreburn LC's observations were framed in quite general terms, and he expressly disagreed with the suggestion of Lord Coleridge CJ in *Maw v Jones* (1890) 25 QBD 107 at 108 to the effect that an assessment of damages might take into account the greater difficulty which an apprentice dismissed with a slur on his character might have in obtaining other employment. Similar general observations were made by Lord James of Hereford, Lord Atkinson, Lord Gorell and Lord Shaw of Dunfermline. In my view these observations cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss. *Addis v Gramophone Co Ltd* was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time.'

My analysis was to the same effect: see [1997] 3 All ER 1 at 19–20, [1998] AC 20 at 50–51. The other Law Lords in the case agreed with this analysis. On a careful analysis of *Addis's* case it will be seen that there was no majority for ruling out the recovery of financial loss flowing from the manner of a wrongful dismissal. The headnote of *Malik's* case [1998] AC 20 at 21 rightly states '*Addis v. Gramophone Co. Ltd.* [1909] A.C. 488, H.L.(E.) not followed'. In *Johnson v Unisys Ltd* the view prevailed that because of the statutory regime the common law development

a contended for could not be permitted. But in terms of *stare decisis* the status of *Addis's* case remained exactly the same as it was when *Malik's* case was decided. The reasoning of the majority in *Johnson v Unisys Ltd* did not reinvigorate the corpse of *Addis's* case. In any event, in the present case the House heard no oral argument on the status of *Addis's* case.

b [49] In *Johnson v Unisys Ltd* [2001] 2 All ER 801 at [46] Lord Hoffmann was prepared to accept the existence within the contract of 'a separate term that the power of dismissal will be exercised fairly and in good faith'. Lord Nicholls did not deal with the point. Lord Millett was prepared to countenance (at [79]) a common law term imposing upon the employer 'a more general obligation ... to treat his employee fairly even in the matter of dismissal'. This explains the ratio decidendi of *Johnson v Unisys Ltd* as I have set it out in [37], above. In my
c dissenting judgment in *Johnson v Unisys Ltd* I further pointed out that the implied obligation of mutual trust and confidence was developed in the context of a series of constructive dismissal cases. I cited Hepple and O'Higgins *Employment Law* (4th edn, 1981) pp 134–135 (paras 291–292). I added (at [21]) that it cannot, therefore, be confined to breaches during the subsistence of the contract. After a
d detailed discussion I concluded (at [24]):

e 'The interaction of the implied obligation of trust and confidence and express terms of the contract can be compared with the relationship between duties of good faith or fair dealing with the express terms of notice in a contract. They can live together. In any event, the argument of counsel for the employers misses the real point. The notice provision in the contract is valid and effective. Nobody suggests the contrary. On the other hand, the employer may become liable in damages if he acts in breach of the independent implied obligation by dismissing the employee in a harsh and humiliating manner. There is no conflict between the express and implied terms.'

f This was, of course, said in the context of a claim for financial loss.

[50] At the hearing of the present appeals the House did not have the benefit of oral argument on potential scope of the implied obligation of mutual trust and confidence, or what Browne-Wilkinson V-C in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 at 606, [1991] 1 WLR 589 at 597,
g more simply called 'the implied obligation of good faith'. Perhaps it would be conducive to clarity if the latter description is generally used.

[51] As a result of *Johnson v Unisys Ltd* the law in the vitally important area of personal contracts of employment is in an unsatisfactory state. The cap (now standing at £55,000) under the statutory scheme on compensatory awards for
h true financial loss is one aspect of the problem. No doubt it is intended to protect the competitiveness of business but if it is allowed to constrain the development of the common law it may come at too high a price in the failure of corrective justice. The inhibitory effect of *Johnson v Unisys Ltd* on the development of the common law poses a great structural problem. It prevents,
j and will continue to prevent, the natural and sensible evolution of our employment law in a critical area. I do not believe that Parliament ever intended such a result. A re-examination by Parliament is needed.

LORD HOFFMANN.

[52] My Lords, I have had the privilege of reading the speech of my noble and learned friend, Lord Nicholls of Birkenhead, in draft. I agree with it and, for the

reasons he gives, I too would make the orders which he proposes in each of the appeals. a

LORD RODGER OF EARLSFERRY.

[53] My Lords, I have had the privilege of considering the speech of my noble and learned friend, Lord Nicholls of Birkenhead, in draft. I agree with it and, for the reasons he gives, I too would make the orders which he proposes in each of the appeals. b

LORD BROWN OF EATON-UNDER-HEYWOOD.

[54] My Lords, I have had the privilege of considering the speech of my noble and learned friend, Lord Nicholls of Birkenhead, in draft. I agree with it and, for the reasons he gives, I too would make the orders which he proposes in each of the appeals. c

Appeal in first case allowed. Appeal in second case dismissed.

Celia Fox Barrister. d

Dunnachie v Kingston-upon-Hull City Council

[2004] UKHL 36

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD BROWN OF EATON-UNDER-HEYWOOD

18 MAY, 15 JULY 2004

Unfair dismissal – Compensation – Amount which is just and equitable having regard to the loss sustained by employee – Whether compensation recoverable for non-economic loss brought about by manner of unfair dismissal – Employment Rights Act 1996, s 123.

The respondent employee brought a successful complaint of unfair dismissal against the appellant employer before an employment tribunal. Under s 123(1)^a of the Employment Rights Act 1996, the compensatory award for unfair dismissal was to be 'such amount as the tribunal considers just and equitable in all the circumstances' having regard to the 'loss' sustained by the complainant in consequence of the dismissal in so far as that loss was attributable to action taken by the employer. The tribunal awarded the employee compensation under that provision, including a sum for injury to feelings. The employer appealed to the Employment Appeal Tribunal (EAT), raising the issue whether compensation for injury to feelings was recoverable under s 123(1) of the 1996 Act. The EAT allowed the appeal, concluding that s 123(1) did not allow recovery for non-economic loss. That decision was reversed by the Court of Appeal which held, by a majority, that compensation for non-economic loss could be awarded under s 123(1). In so holding, one member of the majority concluded that the word 'loss' in s 123(1) could include non-economic loss, while the other ruled that the governing principle was expressed in the requirement to award 'such amount as the tribunal considers just and equitable in all the circumstances', and that the word 'loss' did not limit what might be awarded under the controlling principle. The employer appealed to the House of Lords.

Held – On its true construction, s 123(1) of the 1996 Act did not allow for the recovery of non-pecuniary loss. The plain meaning of the word 'loss' in s 123(1) excluded non-economic loss. It was inconceivable that Parliament had intended that word to mean, in that particular context, anything other than financial loss. Section 123(1) had to be construed as a composite formula. Splitting up the formula unjustifiably relegated the criterion of loss to a subordinate role. Given the hypothesis that the legislature had expressly provided for the recovery of economic loss, it failed to explain why the legislature had not also expressly provided for compensation for injury to feelings. It also failed to take full account of the context. On that expansive interpretation, there would be nothing on the face of the statute to exclude the award (subject to the statutory cap) of aggravated or exemplary damages. That could not have been intended. Moreover, in cases where the tribunal made an order for reinstatement, it was

^a Section 123, so far as material, is set out at [2], below

required to specify any amount payable by the employer in respect of any benefit which the complainant might be expected to have had but for the dismissal. There was, however, no provision for the tribunal to award compensation for any non-pecuniary loss that the employee might have suffered as a result of the unfair dismissal. The same applied in the case of an order for re-engagement. If an employee, for whom an order of reinstatement or re-engagement had been made, received compensation for pecuniary losses but not non-pecuniary losses, it would be surprising if an employee, for whom a compensation order had been made, were entitled to recover compensation for non-pecuniary losses. Such a construction would introduce an inconsistency into the scheme of the legislation. Accordingly, the appeal would be allowed (see [1], [16], [18], [22], [26], [28]–[34], below).

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183 approved.

Dicta of Lord Hoffmann in *Johnson v Unisys Ltd* [2001] 2 All ER 801 at [55] disapproved.

Decision of the Court of Appeal [2004] 2 All ER 501 reversed.

Notes

For calculation of the compensatory award, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 529.

For the Employment Rights Act 1996, s 123, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 727.

Cases referred to in opinions

Devis (W) & Sons v Atkins [1977] 3 All ER 40, [1977] AC 931, [1977] 3 WLR 214, HL.

Johnson v Unisys Ltd [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518, [2001] 2 WLR 1076.

Malik v Bank of Credit and Commerce International SA (in liq), *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

McCabe v Cornwall CC [2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501; *aff'd* [2004] UKHL 35, [2004] 3 All ER 991, [2004] 3 WLR 322.

Normansell (Robert) (Birmingham) Ltd v Barfield (1973) 8 ITR 171, NIRC.

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183, [1972] ICR 501, [1973] 1 WLR 45, NIRC.

O'Donoghue v Redcar and Cleveland BC [2001] EWCA Civ 701, [2001] IRLR 615.

Vaughan v Weighpack Ltd [1974] IRLR 105, [1974] ICR 261, NIRC.

Wellman Alloys Ltd v Russell [1973] ICR 616, NIRC.

Cases referred to in list of authorities

Adams v Hackney London BC [2003] IRLR 402, EAT.

Addis v Gramophone Co Ltd [1909] AC 488, [1908–10] All ER Rep 1, HL.

Addison v Babcock FATA Ltd [1987] 2 All ER 784, [1988] QB 280, [1987] 3 WLR 122, CA.

A-G's Ref (No 1 of 1988) [1989] 2 All ER 1, [1989] AC 971, [1989] 2 WLR 729, HL.

Alexander v Home Office [1988] 2 All ER 118, [1988] ICR 685, [1988] 1 WLR 968, CA.

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.

Balmoral Group Ltd v Rae (14 November 1999, unreported), EAT.

- a* *Behrens v Bertram Mills Circus Ltd* [1957] 1 All ER 583, [1957] 2 QB 1, [1957] 2 WLR 404.
- Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
- Boardman v Copeland BC* [2001] EWCA Civ 888, [2001] All ER (D) 99 (Jun).
- Brassington v Cauldron Wholesale Ltd* [1977] IRLR 479, [1978] ICR 405, EAT.
- b* *Caffinbell v Dunoon & Cowal Housing Association Ltd* [1993] IRLR 496, Ct of Sess.
- Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL.
- Cleveland Ambulance NHS Trust v Blane* [1997] IRLR 332, [1997] ICR 851, EAT.
- Daley v AE Dorsett (Almar Dolls) Ltd* [1981] IRLR 385, [1982] ICR 1, EAT.
- Day v Society of Graphical and Allied Trades* 1982 [1986] ICR 640, EAT.
- c* *De Keyser Ltd v Wilson* [2001] IRLR 324, EAT.
- Devine v Designer Flowers Wholesale Florist Sundries Ltd* [1993] IRLR 517, EAT.
- Digital Equipment Co Ltd v Clements (No 2)* [1998] IRLR 134, [1998] ICR 258, CA; *rvsg* [1997] IRLR 140, [1997] ICR 237, EAT.
- Digital Equipment Co Ltd v Clements* [1996] IRLR 513, [1996] ICR 829, EAT.
- d* *Eastwood v Magnox Electric plc* [2002] EWCA Civ 463, [2002] IRLR 447, [2003] ICR 520n; *rvsd* [2004] UKHL 35, [2003] 3 All ER 991, [2004] 3 WLR 322.
- Edwards v Society of Graphical and Allied Trades* [1970] 3 All ER 689, [1971] Ch 354, [1970] 3 WLR 713, CA.
- EWP Ltd v Moore* [1992] 1 All ER 880, [1992] QB 460, [1992] 2 WLR 184, CA.
- Galloway v Galloway* [1955] 3 All ER 429, [1956] AC 299, [1955] 3 WLR 723, HL.
- e* *Gogay v Hertfordshire CC* [2000] IRLR 703, CA.
- Haigh v Royal Mail Steam Packet Co Ltd* (1883) 48 JP 230, [1881–5] All ER Rep 177, CA.
- Hardy v Polk* (2 February 2004, unreported), EAT.
- Harrison v Tew* [1990] 1 All ER 321, [1990] 2 AC 523, [1990] 2 WLR 210, HL.
- f* *Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613; *rvsd* sub nom *Barber v Somerset CC* [2004] UKHL 13, [2004] 2 All ER 385, [2004] 1 WLR 1089.
- Hinz v Berry* [1970] 1 All ER 1074, [1970] 2 QB 40, [1970] 2 WLR 684, CA.
- Jacobs v London CC* [1950] 1 All ER 737, [1950] AC 361, HL.
- g* *John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586, [1996] 3 WLR 593, CA.
- Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services* [1972] 1 All ER 145, [1972] AC 944, [1972] 2 WLR 210, HL.
- King v Eaton Ltd (No 2)* [1998] IRLR 686, Ct of Sess.
- Leonard v Strathclyde Buses Ltd* [1998] IRLR 693, Ct of Sess.
- h* *Muffet (SH) Ltd v Head* [1986] IRLR 488, [1987] ICR 1, EAT.
- North West Thames Regional Health Authority v Noone* [1988] IRLR 195, [1988] ICR 813.
- Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
- j* *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974, [1988] AC 344, [1987] 3 WLR 1153, HL.
- Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden* [2001] 1 All ER 550, [2000] ICR 1283, CA.
- Pretoria City Council v Levison* (1949) (3) SA 305.
- R (on the application of Kadhim) v Brent London BC Housing Benefit Review Board* [2001] QB 955, [2001] 2 WLR 1674, CA.

- R v Chard* [1983] 3 All ER 637, [1984] AC 279, [1983] 3 WLR 835, HL. a
- R v Kansal (No 2)* [2001] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69, [2001] 3 WLR 1562.
- R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.
- Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2003] 4 All ER 987, [2004] 1 AC 309, [2003] 3 WLR 1091. b
- Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390.
- Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.
- ICTS (UK) Ltd v Tchoula* [2000] IRLR 643, [2000] ICR 1191, EAT.
- Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318.
- Wilson (Paal) & Co A/S v Partenreederei, The Hannah Blumenthal* [1983] 1 All ER 34, [1983] 1 AC 854, [1982] 3 WLR 1149, HL. c
- Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680, EAT.

Appeal

Kingston-upon-Hull City Council (the employer) appealed with permission of the Court of Appeal from its decision (Sedley LJ and Evans-Lombe J, Brooke LJ dissenting) on 11 February 2004 ([2004] EWCA Civ 84, [2004] 2 All ER 501, [2004] ICR 481) allowing an appeal by the respondent, Christopher Dunnachie, from the decision of the Employment Appeal Tribunal (Burton J (President), D Bleiman and R Straker) on 22 May 2003 ([2003] IRLR 384, [2003] ICR 1294) allowing an appeal by the employer from the decision of an employment tribunal sitting at Hull on 24 May 2002 awarding Mr Dunnachie £10,000 for non-economic harm arising from his unfair dismissal by the employer. The facts are set out in the opinion of Lord Steyn. d

John Bowers QC, Joanna Heal and Jeremy Lewis (instructed by *Margaret Taylor, Kingston-upon-Hull*) for the employer. f

Antony White QC and Thomas Linden (instructed by *UNISON, Employment Rights Unit*) for Mr Dunnachie.

Their Lordships took time for consideration. g

15 July 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would allow this appeal. h

LORD STEYN.

[2] My Lords, this appeal raises an important point on the proper construction of s 123(1) of the Employment Rights Act 1996. Section 123 provides for the making of a compensatory award for unfair dismissal. It reads, so far as it is material, as follows: j

‘(1) Subject to the provisions of this section and sections 124, 126, 127 and 127A(1), (3) and (4) ... the amount of the compensatory award shall be such

a amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and (b) subject to subsection (3), loss of any benefit which he

b might reasonably be expected to have had but for the dismissal.
(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or (b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.
c

Omitting the opening words of qualification in s 123(1), which are not directly relevant, the question is whether this provision allows compensation to be awarded for non-economic damage. An employee, who claims to have suffered d humiliation, injury to feelings and distress, as a result of a constructive dismissal, argues that properly construed s 123(1) allows for the recovery of non-pecuniary heads of loss. The employer argues that s 123(1) only permits recovery of pecuniary loss. This is the central dispute of statutory construction before the House.

e [3] The ultimate genesis of s 123(1) of the 1996 Act was s 116(1) of the Industrial Relations Act 1971. For present purposes the re-enactment of s 116 by para 19 of Sch 1 to the Trade Union and Labour Relations Act 1974, by s 76 of the Employment Protection Act 1975 and by s 74 of the Employment Protection (Consolidation) Act 1978 are not material. Section 116(1) of the 1971 Act provided:

f '... the amount of the compensation shall ... be such amount as the Court or tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, in so far as that loss was attributable to action taken by or on behalf of the party in default.'

g The differences in wording between s 116(1) of the 1971 Act and s 123(1) of the 1996 Act do not affect the issue before the House. The statutory formula for the making of a compensatory award remained exactly the same.

h [4] In *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 the question arose whether under s 116(1) compensation could be awarded for injury to feelings. The point was directly in issue in the proceedings and the court heard contrary arguments on it. Sitting as President of the National Industrial Relations Court Sir John Donaldson ruled ([1973] 1 All ER 183 at 186–187, [1972] ICR 501 at 504–505):

j 'In our judgment, the common law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the 1971 Act which has created an entirely new cause of action, namely, the "unfair industrial practice" of unfair dismissal. The measure of compensation for that statutory wrong is itself the creature of statute and is to be found in the 1971 Act and nowhere else. But we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrarily. On the other

hand, the amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle. The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle. The principles to be adopted emerge from [s 116 of the 1971 Act]. First, the object is to compensate, and compensate fully, but not to award a bonus, save possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or a tribunal. Second, the amount to be awarded is that which is just and equitable in all the circumstances, having regard to the loss sustained by the complainant. "Loss", in the context of the section, does not include injury to pride or feelings. In its natural meaning the word is not to be so construed, and that this meaning is intended seems to us to be clear from the elaboration contained in [s 116(2)]. The discretionary element is introduced by the words "having regard to the loss". This does not mean that the court or tribunal can have regard to other matters, but rather that the amount of the compensation is not precisely and arithmetically related to the proved loss. Such a provision will be seen to be natural and possibly essential, when it is remembered that the claims with which the court and tribunals are concerned are more often than not presented by claimants in person and in conditions of informality. It is not therefore to be expected that precise and detailed proof of every item of loss will be presented, although, after making due allowance for the skills of the persons presenting the claims, the statutory requirement for informality of procedure and the undesirability of burdening the parties with the expense of adducing evidence of an elaboration which is disproportionate to the sums in issue, the burden of proof lies squarely on the complainant.' (My emphasis.)

There was no appeal. The decision in the *Norton Tool* case was generally assumed to reflect the correct legal position until it was called into question in the judgment of Lord Hoffmann in *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518.

[5] While there may arguably be differences of opinion about the exact ratio decidendi of *Johnson's* case, I am content to accept that the central legal decision of the majority (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Millett) was as summarised in the headnote of the Appeal Cases report. It reads as follows:

'... under Part X of the Employment Rights Act 1996 Parliament had provided the employee with a limited remedy for the conduct of which he complained; that, although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the manner of his dismissal, it would be an improper exercise of the judicial function for the House to take such a step in the light of the evident intention of Parliament that such claims should be heard by specialist tribunals and the remedy restricted in application and extent ...'

This is the context in which Lord Hoffmann, who gave the leading opinion, commented on the meaning of s 123 of the 1996 Act. He said (at [54]) that

a Parliament adopted 'the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount'. He continued:

b '[55] In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award. The only doubtful question is whether it would have been open to the tribunal to include a sum by way of compensation for his distress, damage to family life and similar matters. As the award, even reduced by 25%, exceeded the statutory maximum and had to be reduced to £11,000, the point would have been academic. But perhaps I may be allowed a comment all the same. I know that in the early days of the National Industrial Relations Court it was laid down that only financial loss could be compensated: see *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45; *Wellman Alloys Ltd v Russell* [1973] ICR 616. It was said that the word "loss" can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life.

e [56] Part X of the 1996 Act therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.'

f In practice this observation was regarded as the green light to make claims for non-pecuniary loss in tribunals. It was the foundation of Mr Dunnachie's claim.

g [6] In 1986, at the age of 19, Mr Dunnachie began to work for the Kingston-upon-Hull City Council. In 1988 he qualified as an environmental health officer. In January 1995 he was appointed as senior environmental health officer. In March 2000 he was appointed as acting principal health officer in the commercial department of the food section. On 8 March 2001 Mr Dunnachie resigned on notice with effect from 9 April 2001. He alleged that he was constructively dismissed. On 29 June 2001 he commenced proceedings in an employment tribunal. Between 22 and 26 April 2002 his claims were heard. On h 15 May 2002 the tribunal held that he had been unfairly dismissed and also awarded him the sum of £438.46 in respect of an unlawful deduction of wages. The tribunal stated (para 50):

j '... we found that Mr Kitching [the colleague and sometime line manager of Mr Dunnachie] did, for whatever reason, have a low opinion of the applicant's capabilities. That opinion was misplaced. Nevertheless, he acted upon it by seeking to undermine the applicant whenever the opportunity presented itself. A particularly bad example was his irrational refusal to allow the prosecution of Skelton's Bakery to proceed. When the applicant challenged that decision by going to their manager, Mrs Cottis, we are satisfied that Mr Kitching retaliated by conducting an in-depth investigation

into the management of the applicant's files, without telling him that he was doing so. He then threatened the applicant with disciplinary proceedings and left the matter hanging in the air. Mr Kitching's conduct was compounded by that of Mrs Cottis, who failed to alleviate the applicant's anxieties about the prospect of being suspended. Both she and Mr Duxbury [her immediate superior] either failed or refused to recognise that the applicant had been a victim of bullying by Mr Kitching. Mr Duxbury deliberately sought to deflect the applicant from making a formal complaint under the respondent's personal harassment policy. The respondent's treatment of the applicant by those officers caused his ill-health. We are satisfied that there was the clearest evidence of a breach of the implied term of mutual trust and confidence.'

On 24 May a remedies hearing followed. Mr Dunnachie put forward a claim for humiliation and injury to feelings over several months before his departure. Relying expressly on Lord Hoffmann's observations in *Johnson's* case, including £10,000 for injury to feelings. After applying the statutory cap to the compensatory award, it ordered the employer to pay compensation in the sum of £51,700 (being the statutory maximum at the time of dismissal) and costs in the sum of £2,752. In addition, there was a basic award of £3,240.

[7] The employer appealed to the Employment Appeal Tribunal (the EAT). The appeal was heard together with two others which also raised the issue whether compensation for injury to feelings may be recovered under s 123(1). The EAT ([2003] IRLR 384, [2004] ICR 1294) allowed the appeal. Giving the judgment of the EAT, the President, Burton J, concluded that the views expressed by Lord Hoffmann in *Johnson's* case [2001] 2 All ER 801 at [55] were obiter and that on a correct construction of s 123 of the 1996 Act it did not allow recovery for non-economic loss. The EAT granted leave to appeal to the Court of Appeal. The other two appeals were settled before the hearing of the appeal in the Court of Appeal.

[8] The appeal to the Court of Appeal ([2004] EWCA Civ 84, [2004] 2 All ER 501, [2004] ICR 481) was only against the award for injury to feelings. The Court of Appeal allowed the employee's appeal. By a majority it was held that the remarks of Lord Hoffmann in *Johnson's* case [2001] 2 All ER 801 at [55] were obiter (per Brooke LJ and Evans-Lombe J; Sedley LJ dissenting). By a different majority the Court of Appeal decided that s 123(1) of the 1996 Act on its proper construction allowed compensation for non-economic damage (per Sedley LJ and Evans-Lombe J; Brooke LJ dissenting). The Court of Appeal unanimously held that the award of £10,000 for injury to feelings was not excessive and that the tribunal had given adequate reasons for the award.

[9] The principal issues before the House were as follows. (a) Was para [55] of the opinion of Lord Hoffmann in *Johnson's* case part of the ratio decidendi of the House? (b) If so, should the House depart from that part of the decision in *Johnson's* case? (c) If it was only an obiter dictum, does s 123 of the 1996 Act only allow compensation for financial loss or does it also permit compensation for non-pecuniary heads of loss?

THE STATUS OF LORD HOFFMANN'S OBSERVATION

[10] In submitting that Lord Hoffmann's observation in para [55] of his opinion in *Johnson's* case was part of the ratio decidendi of that case, counsel for the employee had the advantage of a detailed and carefully reasoned judgment by

a Sedley LJ in the Court of Appeal in his favour. It is necessary to examine this view critically. I am willing to accept that one may be able to infer that, in expressing general agreement with Lord Hoffmann's opinion, Lord Bingham of Cornhill and Lord Millett accepted Lord Hoffmann's comment. During oral argument on the present appeal Lord Nicholls of Birkenhead, who gave a separate opinion in *Johnson's* case which made no reference to Lord Hoffmann's opinion, observed
b that at the time he saw nothing wrong in Lord Hoffmann's comment. I was the dissenting member of the House. I made no reference to the point because at the time I too saw nothing wrong in the comment. If I had realised that the observation was of doubtful validity, it would have fitted into my line of reasoning to point this out.

c [11] On the other hand, the correctness of the decision in *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 was not an issue in *Johnson's* case. It is true that there were references by both sides in the oral argument to the *Norton Tool* case: see [2003] 1 AC 518 at 523 (counsel for the employee), 524 (counsel for the employer) and 524 (counsel for the employee). But the House heard no adversarial argument exploring the correctness or otherwise of that decision. In
d these circumstances a definitive overruling of a decision which had stood for nearly 30 years would have been a little surprising.

e [12] It can readily be accepted that Lord Hoffmann's observation in para [55] was relevant to his reasoning that the development of a general common law remedy as contended for by the employee would have involved a complete or virtually complete overlap with the statutory scheme. It tended to support his reasoning. But that does not mean that it was part of the ratio decidendi. Lord Hoffmann's language clearly excludes such a view. He described it as 'a doubtful question'. He described it as 'academic'. Then he introduced his comments by the words 'But perhaps I may be allowed a comment all the same'. This is not the language of a Law Lord inviting the House to overrule a
f longstanding decision on a point of statutory construction that was not in issue and not explored in opposing arguments.

[13] It is unnecessary to struggle any further with the point. The observation of Lord Hoffmann was an obiter dictum. It presents no obstacle to the House now considering the matter in depth.

g THE INTERPRETATION OF s 123

[14] While in no way determinative of the point of construction before the House, the way in which the *Norton Tool* case has been acted on since it was decided in 1972 is of some relevance. In practice it has been consistently applied
h at all levels. Burton J, the President of the EAT, summarised the position in his judgment in the present case ([2003] IRLR 384 at 387, [2004] ICR 1294 at 1300–1301):

j '9. Prior to *Johnson*, all claims and determinations in the employment tribunals (and consequently on appeal from such tribunals in the Employment Appeal Tribunal and higher appellate courts) have related to recovery for unfair dismissal only of economic loss and not of non-economic loss (or what might in the ordinary common law courts be referred to as "general damages"). Although in his judgment in *McCabe v Cornwall County Council* ([2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501), a post-*Johnson* decision of the Court of Appeal, Auld LJ (at paragraph 23) seems to have been under the apprehension that there had been decisions of

employment tribunals awarding non-economic loss prior to *Johnson*, it is common ground between the very experienced teams on both sides before me, a view shared by this tribunal, that such was not the case, and none have been produced. The decision which has been regarded as determinative, and to which express reference was made in the speech of Lord Hoffmann in the House of Lords in *Johnson*, as having “laid down that only financial loss could be compensated”, is that of the National Industrial Relations Court, presided over by [Sir John Donaldson (President)] in *Norton Tool Co Ltd v Tewson* ...

10. *Norton Tool* has been regularly and universally followed since. This was not simply by the National Industrial Relations Court before its demise in 1974 (eg *Wellman Alloys Ltd v Russell* [1973] ICR 616 and *Robert Normansell (Birmingham) Ltd v Barfield* (1973) 8 ITR 171 (where [Sir John Donaldson (President)] ruled out “loss of job satisfaction”), and *Vaughan v Weighpack Ltd* ([1974] IRLR 105, [1974] ICR 261) per Sir Hugh Griffiths) but by employment tribunals in England and Wales and Scotland, and in the Employment Appeal Tribunal, ever since: as recently as 15 May 2001 in the Court of Appeal (some seven weeks after the House of Lords had delivered judgment in *Johnson* but before it was reported in the law reports, and no reference is made to it) Potter LJ, giving the judgment of the Court in *O'Donoghue v Redcar & Cleveland Borough Council* ([2001] EWCA Civ 701 at [71], [2001] IRLR 615 at [71]), said: “Compensation for unfair dismissal is provided for in Chapter II of the Employment Rights Act 1996. Section 112 provides that compensation should be calculated according to ss. 118–127A. There is no compensation for injury to feelings or the manner of dismissal, unless that gives rise to financial loss: see *Norton Tool Co Ltd v Tewson* ...” The House of Lords cited *Norton Tool* for the proposition, by reference to it and to s. 123 of the 1996 Act, that financial loss can be recoverable resulting from damage to reputation in respect of unfair dismissal, without disapproval, in [*Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 10, 16, [1998] AC 20 at 40, 47].’

THE ACCURACY OF THIS ACCOUNT OF THE LAW IN ACTION WAS NOT DISPUTED BEFORE THE HOUSE.

[15] With the solitary exception of a critical note in 1991 on the *Norton Tool* case by Professor Hugh Collins (“The Just and Equitable Compensatory Award” (1991) 20 ILJ 201) I am not aware of any academic criticism of this decision. A contemporary case note described the decision in the *Norton Tool* case that loss does not include injury to pride or feelings as eminently sensible (see Bruce Reynolds ‘Compensation for unfair dismissal’ (1973) 36 MLR 424). In the 1970s and 1980s textbooks cited the *Norton Tool* case as stating the law (see Rideout *Principles of Labour Law* (2nd edn, 1976) pp 141–147; Anderman *The Law of Unfair Dismissal* (1978) pp 212, 217, 221, 222; Hepple & O’Higgins *Employment Law* (3rd edn, 1979) p 272 (para 608); Mead *Unfair Dismissal Handbook* (2nd edn, 1983) pp 307–311, 317). Except for the note of Professor Hugh Collins the argument that there was a need to depart from the *Norton Tool* case was not put forward.

[16] Professor Neil MacCormick in *Legal Reasoning and Legal Theory* (1995), wrote (at p 204):

‘In a democratic constitution, it is the elected Parliament which must enact new laws; whether or not all the members of the legislature have the least

a idea of the contents of clauses of Bills, the least unsuccessful way of securing that the will of elected legislators will prevail will be to take the words enacted by them at their face value and so far as possible apply them in accordance with their plain meaning. In so far as Governments effectively control the business of Parliament, they are then at least put to the necessity of making exactly explicit the policies for which they solicit Parliamentary approval in legislation. And the ordinary citizen will be able to take statutes at their face value.

c As he explains elsewhere Professor MacCormick had in mind a plain meaning of words read in their contextual setting. A statute does not always yield such a plain meaning. Sometimes arguments of principle must be considered and a balance of consequential arguments must be struck. But in the present case the citation is in point. Read in context the word 'loss' has a plain meaning which excludes non-economic loss. It does not cover *injury* to feelings. It is to be contrasted with s 66(4) of the Sex Discrimination Act 1975, s 57(4) of the Race Relations Act 1976 and s 8(4) of the Disability Discrimination Act 1995 which all expressly provide for compensation for injury to feelings.

d [17] It can readily be accepted that the words 'loss' in varying contexts may have wider and narrower meanings. But that proposition is of no legal interest. The question before the House is the meaning of the word 'loss' in s 116(1) of the 1971 Act. If properly construed it was restricted to economic loss, the re-enactment of the statutory formula in 1996 must bear the same meaning. It is not a case in which the ambulatory consequences of the always speaking canon of construction has any role to play. Nothing that happened since 1971 could justify giving to the statutory formula a meaning it did not originally bear.

e [18] In the Court of Appeal ([2004] 2 All ER 501) only Evans-Lombe J (at [63]) thought that 'loss' could include non-economic loss. I am not persuaded by his reasoning. I agree with the statement of Brooke LJ (at [93]) that it is inconceivable that in this particular context Parliament intended the word to mean anything other than financial loss. It is noteworthy that Sedley LJ (at [34]) accepted that the 'more natural meaning [of the word 'loss'] in s 123 is pecuniary loss'. He then proceeded (at [32], [33]) to conclude that tribunals may award compensation for non-economic damage on the different basis that 'in s 123(1) loss is not the defining category but a sub-set of the larger category of just and equitable compensation'.

g [19] Counsel for the employer made a telling point about the consequence of adopting the reasoning of Evans-Lombe J on the meaning of the word 'loss' in s 123. He asked: what in the language of s 123(1) would then rule out an award of aggravated or exemplary compensation by way of penalisation of the conduct of the employer? The answer is that only if the word 'loss' in s 123(1) is restricted to financial loss are such awards ruled out on the face of the legislation. And nobody could seriously suggest that Parliament intended to allow such awards.

j [20] Sir John Donaldson in the *Norton Tool* case [1973] 1 All ER 183, [1972] ICR 501 observed that the natural meaning of 'loss' in s 116(1) does not include injury to feelings. He added that this view is reinforced by the elaboration in s 116(2) of the 1971 Act, now s 123(2) of the 1996 Act. It is significant that in ss 116(2) and 123(2), and indeed in the remainder of ss 116 and 123, there is no reference to non-economic loss.

[21] It may be of some assistance to imagine a Parliamentary draftsman, faced in 1971 with a departmental brief to prepare a bill which would make provision for compensation for financial loss as well as for a solatium for injury to feelings. Such instructions could have been given pursuant to the recommendation in 1968 of the Royal Commission that the remedy for unfair dismissal should include compensation for 'injured feelings and reputation' (Cmnd 3623, p 149 (para 553)). Is it conceivable that a Parliamentary draftsman would have provided for the two radically different remedies by the rolled-up wording of s 116(1)? Intuitively, I regard it as implausible that if such a policy decision had been made the technique of providing simply for compensation for 'loss' would have been adopted.

[22] For all these reasons I would hold that the plain meaning of the word loss in s 123(1) excludes non-economic loss.

[23] On this hypothesis I must now turn to the different ground of decision of Sedley LJ which counsel for the employee urged on the House. Counsel summarised the point as follows. The governing principle is expressed in the requirement in s 123(1) of the 1996 Act to award 'such amount as the tribunal considers just and equitable in all the circumstances'. In exercising its discretion, the employment tribunal is to 'have regard to' the 'loss' sustained by the complainant which is attributable to the unfair dismissal, but this is not the only consideration which bears upon its determination of the compensatory award. The word loss does not limit what may be awarded under the controlling principle.

[24] Sedley LJ concluded (at [30]) that the construction in the *Norton Tool* case 'leaves the governing concept—compensation which is just and equitable—without a role'. I would not accept this proposition. It will be recalled that in the *Norton Tool* case Sir John Donaldson explained that the claims with which tribunals are concerned are more often than not presented in person and informally, and that it is therefore not to be expected that precise and detailed proof of every item of loss will be presented. The phrase 'just and equitable' gives the tribunal a degree of flexibility having regard to the informality of the procedures, and the fact that the maximum award is capped.

[25] Sedley LJ relied on the decision of the House in *W Devis & Sons v Atkins* [1977] 3 All ER 40, [1977] AC 931. He held that the *Devis* case established that resultant loss is not the only element to which regard is to be had. The leading opinion in the *Devis* case was given by Viscount Dilhorne. He stated ([1977] 3 All ER 40 at 49, [1977] AC 931 at 955):

'The paragraph does not, nor did s 116 of the 1971 Act, provide that regard should be had only to the loss resulting from the dismissal being unfair. Regard must be had to that but the award must be just and equitable in all the circumstances, and it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed.'

This reveals a decision to the effect that it is open to a tribunal to consider whether it is just and equitable in all the circumstances for the complainant to be awarded all or any of the loss attributable to the dismissal. It was not a ruling that a tribunal is free to award additional sums not amounting to loss.

[26] In my view s 123(1) must be construed as a composite formula. The interpretation preferred by Sedley LJ splits up the formula in a way which, with

a great respect, is more than a little contrived. It unjustifiably relegates the criterion of loss to a subordinate role. Given the hypothesis that the legislature expressly provided for the recovery of economic loss, it fails to explain why the legislature did not also expressly provide for compensation for injury to feelings. It also fails to take full account of the context. For example, on this expansive interpretation there would as already mentioned be nothing on the face of the statute to exclude the award (subject to the cap which is now standing at £55,000) of aggravated or exemplary damages. This could not have been intended. The better view is that the provision was not intended, in the words of Brooke LJ (at [93]), to provide for ‘palm tree’ justice.

b

[27] In his already cited note ((1991) 20 ILJ 201), Professor Collins argued that the *Norton Tool* case reversed the grammar of the statute. He said (at p 202) that the *Norton Tool* case—

c

‘elevated the sub-principle of causation of loss to the main principle, and then relegated the general standard of just and equitable compensation to the status of a minor limitation on the application of the principles of causation of economic loss.’

d

For substantially the same reasons as I have already given I find this argument unpersuasive.

[28] I would hold that s 123(1) does not allow for the recovery of non-pecuniary loss.

e

[29] For these reasons, as well as the additional reason given by my noble and learned friend Lord Rodger of Earlsferry, I would allow the appeal and restore the decision of the EAT.

f **LORD HOFFMANN.**

[30] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would allow this appeal.

LORD RODGER OF EARLSFERRY.

g [31] My Lords, I have had the privilege of studying the speech of my noble and learned friend, Lord Steyn, in draft. I agree with it and for the reasons he gives I too would allow the appeal.

[32] The issue turns on the construction of s 123 of the Employment Rights Act 1996 which provides for the making of a compensatory award for unfair dismissal. Section 112 envisages that an award of compensation is to be made if no order for reinstatement or re-engagement is made under s 113. The implication is that the award of compensation is to be regarded broadly as a substitute for these other possible orders. Where an order for reinstatement is made, under s 114(2)(a) the tribunal must specify any amount payable by the employer in respect of any benefit (including arrears of pay) which the complainant might reasonably be expected to have had, but for the dismissal, for the period between the date of termination of employment and the date of reinstatement. Significantly, there is no provision for the tribunal to award compensation for any non-pecuniary loss that the employee may have suffered as a result of the unfair dismissal. The same applies in the case of an order for re-engagement under s 115(2)(d).

h

j

[33] If, then, an employee for whom an order of reinstatement or re-engagement is made receives compensation for pecuniary losses but not for non-pecuniary losses, it would be surprising if an employee for whom a compensation order is made were entitled to recover compensation for non-pecuniary losses. Such a construction would introduce an inconsistency into the scheme of the legislation. The construction favoured by Lord Steyn avoids creating such an anomaly and is to be preferred for that reason also.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[34] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would allow this appeal.

Appeal allowed.

Kate O'Hanlon Barrister.

a Evans v Amicus Healthcare Ltd and others
[2004] EWCA (Civ) 727

COURT OF APPEAL, CIVIL DIVISION

THORPE, SEDLEY AND ARDEN LJJ

b 23, 24 MARCH, 25 JUNE 2004

Medical treatment – Human fertilisation – Embryo – Frozen stored embryos – Consent to treatment together of each of male and female gamete providers in treatment involving in vitro fertilisation, freezing and storage of embryos – Whether consent effective after couple separating – Whether implantation of embryo in female gamete provider ‘treatment together’ – Whether requirement for consent by both partners contrary to right to respect for private and family life and discriminatory – Human Fertilisation and Embryology Act 1990, Sch 3, para 6(3) – Human Rights Act 1998, Sch 1, Pt I, arts 8, 14.

d The claimant, who was childless, was referred to a fertility clinic, which she attended with her partner, the second defendant. She was diagnosed as having a slow growing cancerous tumour in both ovaries and the possibility of in vitro fertilisation treatment arose. Under s 12^a of the Human Fertilisation and Embryology Act 1990 compliance with the provisions of Sch 3 of that Act was required as a condition to every licence granted by the Human Fertilisation and Embryology Authority to bring about the creation of an embryo or to keep and use it. Paragraph 6(3)^b of Sch 3 required that an embryo the creation of which was brought about in vitro ‘must not be used for any purpose’ unless there was an effective consent by each person whose gametes were used to bring about the creation of the embryo, to the use of the embryo for that purpose and the embryo was used in accordance with those consents. Effective consent was defined as consent under Sch 3 ‘which has not been withdrawn’. The claimant and the second defendant each gave the necessary consents to storage and use of their gametes in the treatment of the claimant together with the second defendant. Eggs were harvested from the claimant and fertilised with the second defendant’s sperm, and six embryos were created and frozen. The claimant underwent a successful operation to remove the tumours. As a result of the operation, she had no prospect of having a child which was genetically hers unless she could use the frozen embryos. Before an embryo transfer had been attempted, the relationship between the claimant and the second defendant ended. The second defendant wrote to the clinic to notify it of the separation and to state that the embryos could be destroyed. The claimant sought, inter alia, an injunction requiring the second defendant to restore his consent to the use and storage of the embryos, and related declaratory relief, and a declaration that s 12 of and Sch 3 to the 1990 Act breached her right to respect for private and family life under art 8^c of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The judge dismissed the claim, and the claimant appealed, contending, inter alia: (i) that the judge had been wrong to

a Section 12, so far as material, is set out at [20], below

b Paragraph 6, so far as material, is set out at [20], below

c Article 8 is set out at [59], below

conclude that the second defendant had not effectively given a consent to the continuing treatment of the claimant on her own which could not be withdrawn; and (ii) that the respect for private life commanded by art 8 of the convention or the right not to be discriminated against in the enjoyment of convention rights contained in art 14^d of the convention required a secondary, or non-natural reading of the 1990 Act, or if that were not possible, created an incompatibility which the court should declare.

Held – (1) The 1990 Act drew clear distinctions throughout between the acts of creation, storage and use. Its clear policy was to ensure continuing consent from the commencement of treatment to the point of implant and the court should be extremely slow to recognise or create a principle of waiver that would conflict with the Parliamentary scheme. Accordingly, in the instant case, the second defendant had been entitled to withdraw his consent and the effect of that withdrawal was to prevent both the use and the continued storage of the embryo fertilised with his sperm (see [29], [33], [34], [37], [41], below); dicta of Hale LJ in *Re R (a child)* [2003] 2 All ER 131 at [17]–[25], in *U v Centre for Reproductive Medicine* [2002] Lloyd's Rep Med 259 at [23]–[26], and of Mance LJ in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] 3 All ER 257 at [111] considered.

(2) The 1990 Act could not be read down so as to make the withdrawal of the second defendant's consent immaterial to the continuation of the claimant's treatment. Mutuality was required at the point where the treatment services were being provided so that the requirement of continuing consent was inescapable. The refusal of treatment to the claimant was an interference with her right to respect for private life under art 8(1) of the convention but it was proportionate to the need which made it legitimate. That need, as perceived by Parliament, was for bilateral consent to implantation, not simply to the taking and storing of genetic material, and that need could not be met if one half of the consent was no longer effective. The factors which rendered the material provisions proportionate under art 8(2) also afforded objective justification for legislative discrimination between women seeking treatment whose partners had withdrawn their consent and those whose partners had not, or between women who could conceive through sexual intercourse and those who could not, so that a claim under art 14 could not succeed. The appeal would, accordingly, be dismissed (see [58], [69], [73], [74], [77], [78], [96], [99], [100], [110], [118], [121], below); *Re R (a child)* [2003] 2 All ER 131 applied.

Decision of Wall J [2003] 4 All ER 903 affirmed.

Notes

For human fertilisation and embryology: consents, see 30 *Halsbury's Laws* (4th edn reissue), para 65.

For the right to respect for private and family life, and for the prohibition of discrimination, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149–151, 164.

For the Human Fertilisation and Embryology Act 1990, Sch 3, para 6, see 28 *Halsbury's Statutes* (4th edn) (2001) reissue 335.

For the Human Rights Act 1998, Sch 1, Pt I, arts 8, 14, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555, 556.

d Article 14 is set out at [17], below

Cases referred to in judgments

- a** *B (minors) (parentage)*, Re [1996] 3 FCR 697.
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
F (in utero), Re [1988] 2 All ER 193, [1988] Fam 122, [1988] 2 WLR 1288, CA.
Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113.
- b** *Handyside v UK* (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.
Leeds Teaching Hospital NHS Trust v A [2003] 1 FLR 412.
MB (an adult: medical treatment), Re [1997] 2 FCR 541, CA.
Paton v UK (1980) 19 DR 244, E Com HR.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
- c** *Pretty v UK* [2002] 2 FCR 97, ECt HR.
R (a child), Re [2003] EWCA Civ 182, [2003] 2 All ER 131, [2003] 2 WLR 1485.
R (on the application of Carson) v Secretary of State for Work and Pensions, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.
- d** *R (on the application of P) v Secretary of State for the Home Dept*, *R (on the application of Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151, [2001] 3 FCR 416, [2001] 1 WLR 2002.
R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening) [2003] EWCA Civ 667, [2003] 3 All ER 257, [2004] QB 168, [2003] 3 WLR 878.
- e** *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687, [2003] 2 WLR 692.
R v DPP, ex p Kebeline, *R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
U v Centre for Reproductive Medicine [2002] EWCA Civ 565, [2002] Lloyd's Rep Med 259.
- f** *W and B (children) (careplan)*, Re, *Re W (children) (care plan)* [2001] EWCA Civ 757, [2001] 2 FCR 450; *rvsd in part sub nom Re S (children: care plan)*; *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
- g** *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568.
X, Y and Z v UK [1997] 3 FCR 341, (1997) 24 EHRR 143, ECt HR.

Cases referred to in skeleton arguments

- h** *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN. SpA* [2003] UKHL 17, [2003] 2 All ER 615, [2003] 2 AC 541, [2003] 2 WLR 1060.
Airedale NHS Trust v Bland [1993] 1 All ER 821, [1993] AC 789, [1993] 2 WLR 316, HL.
Baker v Secretary of State for the Home Dept [2002] EWHC Admin 381.
- j** *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, [1982] 1 All ER 925, [1979] 1 WLR 783; *affd* [1982] 1 All ER 925, [1981] 1 WLR 232, CA; *affd* [1982] 1 All ER 925, [1983] 2 AC 352, [1982] 2 WLR 253, HL.
Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46, PC.
Chassagnou v France (1999) 7 BHRC 151, ECt HR.
Combe v Combe [1951] 1 All ER 767, [1951] 2 KB 215, CA.

- Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, [1986] AC 112, [1985] 3 WLR 830, HL. a
- Goodwin v UK* (2002) 13 BHRC 120, ECt HR.
- Greenfield v Irwin (a firm)* [2001] EWCA Civ 113, (2001) 59 BMLR 43, [2001] 1 WLR 1279.
- International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344. b
- Jabari v Turkey* (2001) 9 BHRC 1, ECt HR.
- James v UK* (1986) 8 EHRR 123, [1986] ECHR 8795/79, ECt HR.
- Mellacher v Austria* (1989) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR.
- Paton v Trustees of BPAS* [1978] 2 All ER 987, [1979] QB 276, [1978] 3 WLR 687.
- Petrovic v Austria* (1998) 4 BHRC 232, ECt HR.
- R (on the application of CD) v Secretary of State for the Home Dept* [2003] EWHC 155 (Admin), [2003] 1 FLR 979. c
- R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623.
- R (on the application of Mellor) v Secretary of State for the Home Dept* [2001] EWCA Civ 472, (2001) 59 BMLR 1, [2002] QB 13, [2001] 3 WLR 533. d
- R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736.
- R v Lichniak, R v Pyrah* [2002] UKHL 47, [2002] 4 All ER 1122, [2003] 1 AC 903, [2002] 3 WLR 1834.
- R v North West Lancashire Health Authority, ex p A* [2000] 2 FCR 525, [2000] 1 WLR 977, CA.
- Rasmussen v Denmark* (1985) 7 EHRR 371, [1984] ECHR 8777/79, ECt HR. e
- S, Re* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
- Shah v Shah* [2001] EWCA Civ 527, [2001] 4 All ER 138, [2002] QB 35, [2001] 3 WLR 31.
- St George's NHS Trust v S* [1998] 3 All ER 673, [1998] 3 WLR 936, CA.
- Stubbings v UK* [1997] 3 FCR 157, ECt HR.
- Tameside Metropolitan BC v Barlow Securities Group Securities Ltd* [2001] EWCA Civ 1, [2001] BLR 113. f
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- Yaxley v Gotts* [2000] 1 All ER 711, [2000] Ch 162, [1999] 3 WLR 1217, CA. g

Appeal

The claimant, Natallie Evans, appealed with permission of the Court of Appeal given on 16 January 2004 from the decision of Wall J on 1 October 2003 ([2003] EWHC 2161 (Fam), [2003] 4 All ER 903) dismissing her claim for declaratory and injunctive relief against Amicus Healthcare Ltd, Howard Roy Johnston, and the Royal United Hospital Bath NHS Trust. The Secretary of State for Health and the Human Fertilisation and Embryology Authority had been joined to the proceedings by order of Dame Elizabeth Butler-Sloss P on 19 September 2002. The facts are set out in the joint judgment of Thorpe and Sedley LJ. h
j

Robin Tolson QC and *Susan Freeborn* (instructed by *Withy King, Trowbridge*) for Ms Evans.

Kambiz Moradifar (instructed by *Davey Franklin Jones, Gloucester*) for Mr Johnston.

Jason Coppel (instructed by the *Department of Health*) for the Secretary of State.

Dinah Rose (instructed by *Morgan Cole, Cardiff*) for the authority.

a *Amicus Healthcare Ltd and the Royal United Hospital Bath NHS Trust* were not represented.

Cur adv vult

25 June 2004. The following judgments were delivered.

b **THORPE AND SEDLEY LJ.**

[1] The judge in the family justice system is ordinarily required to exercise an experienced discretion that seeks to achieve fairness between adults or the protection and welfare of children. It is to be emphasised that in this case Wall J had the comparatively unusual task of arriving at an outcome that was solely dependent upon the resolution of the law. His first task was to construe the relevant provisions of the Human Fertilisation and Embryology Act 1990. His second task was to resolve whether the application of the statute once construed breached any of the appellant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to an extent that could not be justified by the Secretary of State.

[2] The parties represented on this appeal are Natallie Evans, the appellant, Howard Johnston the second respondent, the Secretary of State for Health, the fourth respondent, and the Human Fertilisation and Embryology Authority, the fifth respondent. As in the court below, the appellant is represented by Mr Robin Tolson QC and Miss Freeborn, Howard Johnston by Mr Moradifar and Miss McKinlay, the Secretary of State by Mr Jason Coppel and the authority by Miss Dinah Rose.

[3] The trial in the family division took place between 30 June and 4 July 2003. The judgment is now reported at [2003] EWHC 2161 (Fam), [2003] 4 All ER 903. At the trial there were two claimants, Lorraine Hadley as well as Natallie Evans, and their claims were dismissed by a reserved judgment dated 1 October 2003. Wall J refused permission to appeal on 6 October and Natallie Evans's application to this court was filed on 8 December 2003. Her application was granted in part at an oral hearing on 16 January 2004. Lorraine Hadley has elected not to appeal. Natallie Evans's appeal was argued on 23–24 March. This judgment is written by me and Sedley LJ.

THE FACTS

[4] The important date in the chronology is 10 October 2001. At that date Natallie Evans and Howard Johnston were engaged. She was 29 and he 24. She had a previous childless marriage during the course of which she had been referred for treatment to improve her chances of conception. Howard Johnston had not been married. After the breakdown of her marriage she and Mr Johnston became a couple. Accordingly she attended the clinic with him for the first time in July 2000. Her subsequent treatment culminated in the dramatic announcement on 10 October that she had a cancerous tumour in both ovaries. However, the tumours were slow growing, thus presenting a narrow window of opportunity for the couple to undergo in vitro fertilisation (IVF) treatment.

[5] On any view 10 October was a terrible day in Natallie Evans' life. First she had to comprehend that she was suffering from a potentially fatal operable cancer. Without interval for reflection or adjustment she had to engage in counselling as a prelude to IVF treatment at the clinic. As to the crucial events in the clinic Wall J heard oral evidence from the couple and from

Mrs Spearman, one of the nurses in the clinic. The judge's essential findings on that evidence were that: (a) Natallie Evans asked Mrs Spearman about the possibility of freezing her eggs as opposed to freezing fertilised embryos and was informed that that was not a possible procedure at that clinic; and (b) at that juncture Mr Johnston reassured Ms Evans that they were not going to split up. She did not need egg freezing. She should not be negative. He wanted to be the father of her child.

[6] Thereafter the couple entered into the necessary consents. The first was an internal consent form which regulated the relationship between the patients and the clinic. Much more significant were the forms which the couple signed to comply with the requirements of the authority. The form is headed: 'HFEA (00) 6 FORM FOR CONSENT TO STORAGE AND USE OF SPERM AND EMBRYOS.' Miss Rose informed us that this a prescribed form, the authority having statutory power to prescribe forms by directions. The form essentially reflects the provisions of the 1990 Act, and in particular the all-important Sch 3 to which we will come. Thus immediately beneath the title cited above appears the following warning:

'N.B. Do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent or withdraw this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate.'

[7] Section 1 of the form is headed 'Use'. In relation to the use of his sperm Mr Johnston was presented with three options. For the first 'In treating a named partner' he ticked the Yes box. For the second and third 'In treating others: In any project of research' he ticked the No boxes.

[8] In relation to consent to the use of his sperm to fertilise eggs in vitro and to the use of embryos developed from eggs he had the same three options. Again he ticked the Yes box in relation to the first option 'In the treatment of myself together with a named partner' and the No box in relation to the other two options.

[9] Mr Tolson makes some point of the fact that in section 2 headed 'Storage' he opted for the maximum storage period of ten years and also opted for sperm and embryos to continue in storage should he die or become mentally incapacitated within that period.

[10] The terminology of Ms Evans's form necessarily varies in its detail since she was consenting to the use of eggs rather than sperm. But her completion of the form essentially replicates Mr Johnston's. She ticked affirmatively the boxes providing for her own treatment and for 'The treatment of myself with a named partner'. She ticked negatively the other two options which are again in treating others and in any project of research.

[11] Sadly as the treatment became imminent stresses developed between the couple. However on 12 November both attended the clinic and 11 eggs were harvested and fertilised. From these six embryos were created and on the following day were consigned to storage.

[12] On 26 November 2001 Ms Evans underwent a successful operation for the removal of the tumours. Her subsequent treatment has been without setback. Her subsequent scans were clear and the independent medical expert concluded that she is able to carry a pregnancy normally. Of course unless she

a can use these six frozen embryos she has no prospect of bearing a child which is genetically hers.

[13] On 19 December Ms Evans was advised that she should wait two years before an embryo transfer should be attempted. However, sadly, on 27 May 2002 the relationship between the couple ended. During the break-up the future of the frozen embryos was inevitably discussed. On this discussion their evidence b conflicted. Wall J preferred the evidence of Mr Johnston but this finding does not bear on the issues raised by this appeal.

[14] On 4 July 2002 Mr Johnston wrote to the clinic to notify them of the separation and to state that the embryos could be destroyed. His withdrawal of consent was reported to Ms Evans who, on 11 September 2002 issued c proceedings and obtained an undertaking from the clinic to preserve the embryos until the determination of these proceedings.

THE PROCEEDINGS

[15] By her claim Ms Evans sought an injunction requiring Mr Johnston to restore his consent to the use and storage of the embryos and declarations that: d (a) Mr Johnston has not and may not vary or withdraw his consent of 10 October 2001; (b) the embryos may be stored throughout the remainder of the ten year period; and (c) Ms Evans may lawfully be treated with embryos during the storage period.

[16] Additionally Ms Evans sought a declaration of incompatibility to the effect that s 12 and Sch 3 of the 1990 Act breach her arts 8, 12 and 14 rights. e Finally it was pleaded that the embryos were entitled to protection under arts 2 and 8.

[17] For the above recital of the facts we have drawn heavily upon the clear and comprehensive judgment of Wall J.

[18] By his grounds of appeal Mr Tolson challenges the judge's construction f of the expression 'treatment together' within Sch 3 to the 1990 Act. Equally he challenges the judge's construction of the phrase 'used in providing treatment services' in para 4(2)(a) of Sch 3 to the 1990 Act. What Mr Tolson described as the meat of his appeal was his attack upon the judge's holding that the conceded interference in the private life of Ms Evans resulting from the judge's g construction of Sch 3 to the 1990 Act was 'both necessary for the protection of the rights of both gamete providers and proportionate'. Similar contentions are raised in relation to the statutory provisions for the storage of the embryos, as opposed to their use. Next Mr Tolson asserts that the judge was wrong to hold that Ms Evans was not discriminated against in the enjoyment of her art 8 rights to private life contrary to art 14 of the convention. Finally Mr Tolson asserts that h the judge wrongly held that Mr Johnston was not estopped from withdrawing his consent as expressed on 10 October on the grounds that an estoppel could not run in the face of the 1990 Act. He also challenged the judge's finding that on the facts no estoppel arose.

[19] At the permission hearing the application in relation to estoppel and j art 2 was adjourned to the appeal. At the end of Mr Tolson's submissions we allowed him to continue to argue the estoppel point but refused permission on the art 2 ground. Our reasons for refusing permission can be shortly stated. In our domestic law it has been repeatedly held that a foetus prior to the moment of birth does not have independent rights or interests: see *Re F (in utero)* [1988] 2 All ER 193, [1988] Fam 122 and *Re MB (an adult: medical treatment)* [1997] 2 FCR 541. Thus even more clearly can there be no independent rights or

interests in stored embryos. In this respect our law is not inconsistent with the decisions of the European Court of Human Rights. Article 2 protects the right to life. No convention jurisprudence extends the right to an embryo, much less to one which at the material point of time is non-viable. Mr Tolson was prepared to accept that the art 2 right would fail if both gamete providers wanted the embryo destroyed. Yet, as was pointed out to him, the right to life, where it exists, cannot be waived by its possessor, let alone by others. This simply illustrates the fallacy of invoking art 2 in the present argument. Ms Evans's case is not about the right to life; it is about the right to bring life into being. Mr Tolson sought to rely on *Paton v UK* (1980) 19 DR 244. However by that decision an abortion conducted in the tenth week of pregnancy was not condemned. Mr Tolson is thus obliged to say that the court might condemn an abortion conducted at a later stage in pregnancy by recognising and upholding a right to life in the foetus. First that is mere speculation. Second we are not here considering the possible rights of a foetus late in pregnancy but the possible rights of embryos in storage. For all those reasons we concluded that this ground of appeal held no realistic prospect of success.

THE STATUTORY MATERIAL

[20] Before considering Mr Tolson's remaining grounds it is necessary to set out the crucial parts of the 1990 Act:

'3.—(1) No person shall—(a) bring about the creation of an embryo, or (b) keep or use an embryo, except in pursuance of a licence ...

11.—(1) The Authority may grant the following and no other licences—(a) licences under paragraph 1 of Schedule 2 of this Act authorising activities in the course of providing treatment services, (b) licences under that Schedule authorising the storage of gametes and embryos ...

12. The following shall be conditions of every licence granted under this Act ... (c) that the provisions of Schedule 3 to this Act shall be complied with.

13.—(1) The following shall be conditions of every licence under paragraph 1 of Schedule 2 to this Act ...

(5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

SCHEDULE 2

Licences for treatment

1.—(1) A licence under this paragraph may authorise any of the following in the course of providing treatment services ... (d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose, (e) placing any embryo in a woman ... (g) such other practices as may be specified in, or determined in accordance with, regulations.

SCHEDULE 3

CONSENTS TO USE OF GAMETES OR EMBRYOS

Consent

1. A consent under this Schedule must be given in writing and, in this Schedule, "effective consent" means a consent under this Schedule which has not been withdrawn.

a 2.—(1) A consent to the use of any embryo must specify one or more of the following purposes—(a) use in providing treatment services to the person giving consent, or that person and another specified person together, (b) use in providing treatment services to persons not including the person giving consent, or (c) use for the purposes of any project of research, and may specify conditions subject to which the embryo may be
b so used.

(2) A consent to the storage of any gametes or any embryo must—(a) specify the maximum period of storage (if less than the statutory storage period), and (b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it, and
c may specify conditions subject to which the gametes or embryo may remain in storage.

(3) A consent under this Schedule must provide for such other matters as the Authority may specify in directions.

d (4) A consent under this Schedule may apply—(a) to the use or storage of a particular embryo or (b) in the case of a person providing gametes, to the use or storage of any embryo whose creation may be brought about using those gametes, and in the paragraph (b) case the terms of the consent may be varied, or the consent may be withdrawn, in accordance with this Schedule either generally or in relation to a particular embryo or particular
e embryos.

Procedure for giving consent

f 3.—(1) Before a person gives consent under this Schedule—(a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps and (b) he must be provided with such relevant information as is proper.

(2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 below.

Variation and withdrawal of consent

g 4.—(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.

h (2) The terms of any consent to the use of any embryo cannot be withdrawn, once the embryo has been used—(a) in providing treatment services, or (b) for the purposes of any project of research.

Use of gametes for treatment to others

j 5.—(1) A person's gametes must not be used for the purposes of treatment services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.

(2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.

(3) This paragraph does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services.

In vitro fertilisation and subsequent use of embryo

6.—(1) A person's gametes must not be used to bring about the creation of an embryo *in vitro* unless there is an effective consent by that person to any embryo the creation of which may be brought about with the use of those gametes being used for one or more of the purposes mentioned in paragraph 2(1) above. a

(2) An embryo the creation of which was brought about *in vitro* must not be received by any person unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for one or more of the purposes mentioned in paragraph 2(1) above of the embryo. b

(3) An embryo the creation of which was brought about *in vitro* must not be used for any purpose unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for that purpose of the embryo and the embryo is used in accordance with those consents. c

(4) Any consent required by this paragraph is in addition to any consent that may be required by paragraph 5 above. d

Storage of gametes and embryos

8.—(1) A person's gametes must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with the consent.

(2) An embryo the creation of which was brought about *in vitro* must not be kept in storage unless there is an effective consent, by each person whose gametes were used to bring about the creation of the embryo, to the storage of the embryo is stored in accordance with those consents. e

(3) An embryo taken from a woman must be kept in storage unless there is an effective consent by her to its storage and it is stored in accordance with the consent. f

THE ARGUMENTS

[21] Paragraph 2(1)(a) of Sch 3 contrasts the provision of treatment services 'to the person giving consent, or that person and another specified person together' with the provision of treatment services to persons not including the person giving consent or use for the purposes of research. The construction of this subparagraph has great bearing on the outcome of the appeal. In his general observations at the outset of his skeleton Mr Tolson recognises that the appellant must succeed on the first ground of appeal if success on grounds two and seven is to be meaningful. Mr Tolson's essential submission is that the judge was wrong to conclude that Mr Johnston had not effectively consented to the continuing treatment of Ms Evans on her own and that once they had withdrawn from joint treatment, they could not be said to be treated together. From those conclusions he submitted that Wall J wrongly held that in the events that had occurred there was no continuing consent from which Mr Johnston could be estopped from withdrawing. Mr Tolson submits that since there can be no dispute that effective consent operated at the dates of harvest and storage, continuing consent must be assumed. Otherwise the clinic would be subjected to an intolerable responsibility in having to investigate the state of the relationship between the couple, including whether, and to what extent, they remained together. g
h
j

a [22] By agreement Miss Rose responded upon the points of statutory construction leaving Mr Coppel to respond to the arts 8 and 14 points.

[23] This is not the first time that Miss Rose has represented the authority and she has considerable expertise in this field. We accept her broad analysis that the twin pillars supporting the parliamentary regulation of this difficult field were intended to be: (a) the requirement for informed consent, capable of
b being withdrawn at any point prior to the transfer of the embryos to the woman receiving treatment; and (b) the focus on child welfare required by s 13(5).

[24] In her skeleton argument Miss Rose summarises the material effect of Sch 3 as follows:

c '(i) Those contemplating the storage and/or use of embryos created from their gametes must first be offered counselling;

(ii) They must specifically be informed of the circumstances in which consent to the storage or use of an embryo may be varied or withdrawn;

d (iii) Consent given to the use of an embryo must specify whether the embryo is to be used to provide treatment services to the person giving consent, or to that person together with another, or to persons not including the person giving consent;

(iv) An embryo may only be stored while there is effective consent to its storage from both gamete providers, and in accordance with the terms of the consent;

e (v) An embryo may only be used while there is an effective consent to its use from both gamete providers, and in accordance with the terms of that consent;

(vi) Consent to the storage of an embryo can be varied or withdrawn by either party whose gametes were used to create the embryo at any time;

f (vii) Consent to the use of an embryo cannot be varied or withdrawn once the embryo has been used in providing treatment services.'

[25] This summary is in our judgment correct and we adopt it without qualification.

g [26] The concept of treatment together is not confined to Sch 3. It appears also in ss 4 and 28. Section 4, so far as relevant is in these terms:

h '(1) No person shall ... (b) in the course of providing treatment services for any woman, use the sperm of any man unless the services are being provided for the woman and the man together or use the eggs of any other woman, except in pursuance of a licence.'

[27] The meaning of this portion of the Act must strike any ordinary reader as extremely obscure. However Miss Rose explains that the unless clause removes from the licensing provision a couple who attend together for IVF treatment and provide fresh sperm where the fresh sperm is used in treatment such as artificial
j insemination which does not involve the creation, keeping or use of an embryo outside the human body.

[28] The purpose of s 28 is to define the 'father' in differing circumstances. Section 28(3)(a) refers to certain treatment 'in the course of treatment services provided for her and a man together'.

[29] In our judgment, and subject to what is said in [58] below, references to the provision of treatment services for a woman and a man together can be

construed uniformly throughout the statute. In simple terms, 'together' is an adverb qualifying the provision of treatment services to a woman and a man. The condition is satisfied provided and so long as the couple are united in their pursuit of treatment, whatever may otherwise be the nature of the relationship between them. Of course clinics can hardly be expected to investigate and pass judgment upon the physical, sexual, psychological and emotional togetherness of a couple, but it does not seem to us unrealistic to leave to the clinic the necessity to judge whether the couple remain united in their pursuit of IVF treatment. Indeed it can be said that that inquiry is but an element of the obligation created by s 13(5), namely the obligation to take account of the welfare of any child who may be born as a result of the treatment or who may be affected by the birth.

[30] We have also had regard to the authority's Code of Practice. Section 25 of the 1990 Act requires the writing of a Code of Practice and s 26 requires the Secretary of State's approval of the authority's draft. Paragraph 3.11 of the fifth edition of the code (in force at the relevant time and only just replaced by the sixth edition) demonstrates the obligation of the clinic to make inquiries of fathers to substantiate their continuing commitment. Paragraph 9.7 of the code makes plain that the welfare of the child is a consideration that must continue to be taken into account at the implant stage.

[31] Miss Rose also stresses the inter-connection between s 28 and Sch 3. As she puts it, s 28 cannot be divorced from Sch 3. She illustrates that submission by highlighting the direct reference to para 5 of Sch 3 in s 28(6) and to the consequences of s 28(2) and (4) which would result in the future husband being deemed the father were Ms Evans to remarry and were Mr Johnston to reinstate his consent. There would be the same consequence were Ms Evans to find a new partner: see s 28(3).

[32] Given the effect of s 28(2)–(4) the court inquired of Mr Moradifar, when he came to make his submissions, whether there was any prospect of his client agreeing to the continuing storage of the embryos to meet the possibilities that Ms Evans might remarry or find a new partner and Mr Johnston might reconsider his withdrawal of consent. Mr Moradifar made it plain that he had discussed these possibilities with his client, not only at the time of trial but in preparation for this appeal, and his client's clear position was one of fundamental rather than purely financial objection.

[33] Mr Tolson's second ground depends upon the proper construction of 'used in providing treatment services' in para 4(2)(a) of Sch 3. His bold submission is to this effect: the process by which the 11 eggs harvested on 12 November 2001 were reduced to the six stored on the following day was the simple one of visual examination with the aid of a microscope. This, submits Mr Tolson, constitutes 'use' for the purposes of para 4(2)(a). The respondents simply point out that, if that construction were right, it would neuter the right of withdrawal which the previous subsection of para 4 provides. It would in our judgment be almost absurd to adopt a construction the effect of which is to remove one person's right to withdraw consent on the very day that the embryos were created. We unhesitatingly uphold the construction of Wall J namely that the embryo is only used once transferred to the woman. This construction is both natural and free from anomalous consequences.

[34] In relation to ground two of the appeal we would also record Miss Rose's submission that throughout the Act clear distinctions are drawn between the acts

a of creation, storage and use. Sections (1) and (3) together with para 4(2) of Sch 3 are concerned with use. Paragraph 6(1) of Sch 3 is concerned with creation. With these distinctions in mind Mr Tolson's submission that the embryos are to be deemed to have been used on the day of their creation falls apart.

b [35] In relation to his estoppel ground Mr Tolson made some attempt to go behind the judge's findings, particularly as to what passed between the couple on 10 October. He had obtained a transcript only of the evidence of Mr Johnston and emphasised passages during the course of the cross-examination in which Mr Johnston conceded that Ms Evans's desire for a baby had been greater than his. From that Mr Tolson sought to develop the submission that Mr Johnston had concealed his ambivalence, thereby inducing Ms Evans to go forward with him into couple treatment. Mr Tolson submitted c that had she known his true state of mind and feeling she would have appreciated the risks of his withdrawing consent and, perhaps, elected for fertilisation of her eggs with donor sperm.

CONCLUSIONS ON STATUTORY CONSTRUCTION

d [36] First we do not consider that any attack on the judge's findings of fact is justified. He heard three, if not four witnesses whose evidence touched in varying degrees on the points which Mr Tolson raises. The judge had the obvious advantage of appraising the oral evidence, at the end of which he made balanced and carefully considered findings. We, who have only the transcript of the evidence of one of those witnesses, are hardly in a position to differ from e those findings.

[37] Miss Rose is, in our judgment, right to stress that the clear policy of the 1990 Act is to ensure continuing consent from the commencement of treatment to the point of implant. Consent may be given subject to conditions. Consent may be varied. Consent may be withdrawn. Against that background the court f should be extremely slow to recognise or to create a principle of waiver that would conflict with the parliamentary scheme.

[38] In reaching our conclusions on the construction of the 1990 Act we draw upon the judgment of this court, delivered by Hale LJ, in *Re R (a child)* [2003] EWCA Civ 182, [2003] 2 All ER 131. Her exposition of the scheme of the Act at g [17]–[25] answers many of the contentions advanced by Mr Tolson.

[39] Another judgment of this court delivered by Hale LJ is equally persuasive. The case is *U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, [2002] Lloyd's Rep Med 259. Again between [23] and [26] Hale LJ stresses the great importance that must be attached to the prescribed form completed in h compliance with Sch 3 to the Act. As she put it (at [26]):

j 'Hence a Centre having in their possession a form dealing with the matters with which it is required by Schedule 3 to the 1990 Act to deal should be both entitled and expected to rely upon that form according to its letter, unless and until it can clearly be established that the form does not represent a valid decision by the person apparently signing it. The most obvious examples are forgery, duress or mistake as to the nature of the form being signed (*non est factum*). The equitable concepts of misrepresentation and undue influence may have a part to play but the Courts should be slow to find them established in such a way as to supply a centre with a consent which they would not otherwise have.'

[40] We have also had regard to the judgment of this court in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] EWCA Civ 667, [2003] 3 All ER 257, [2004] QB 168. Our attention has been focused on the judgment of Mance LJ at [111]. In our judgment Miss Rose is entitled to derive support from the following sentence within the paragraph:

'The fact that *some* practices (eg a biopsy) designed to secure the suitable condition, or determine the suitability, of embryos to be placed in a woman involve use of an embryo does not mean that *all* practices for such a purpose involve "use" of the embryo, or therefore require to be licensed as activities under para 1(1) of Sch 2.'

[41] In our judgment therefore, Mr Johnston was entitled by the terms of the Act to withdraw his consent as and when he did. The effect of his withdrawal of consent is to prevent both the use and the continued storage of the embryo fertilised with his sperm. Future treatment of the appellant would not be 'treatment together' with Mr Johnston. We will come in a moment to the impact of the 1998 Act on the case, but before doing so we turn to a question which arose in the course of argument.

THE SECRETARY OF STATE'S INTERVENTION

[42] The Secretary of State for Health was joined in these proceedings by order of Dame Elizabeth Butler-Sloss P following the issue of the claim. Because a declaration of incompatibility was sought, he was entitled by virtue of s 5(2) of the 1998 Act to be joined. But this is a case in which the court might in any event think it right, as Dame Elizabeth Butler-Sloss P clearly did, to give the Secretary of State an opportunity to make submissions about the construction of legislation affecting a material aspect of the public interest.

[43] Accordingly the Secretary of State filed a 19-page witness statement. As is customary, the alter ego doctrine (see *Carltona Ltd v Works Comrs* [1943] 2 All ER 560) was relied on to enable him to speak through Edward Webb, the head of the section of the Department of Health responsible for policy on assisted conception and embryology. Mr Webb's witness statement contains evidence under the following heads. (1) The legislative history of the provisions of the Act which govern the giving and withdrawal of consent. (2) The policy justification for the regime of the Act whereby consent to the transfer of an embryo to a woman may be withdrawn at any time prior to that transfer. (3) Relevant legal practice in other Council of Europe states. (4) The legal status of embryos under the 1990 Act.

[44] Under the first head, the legislative history, Mr Webb recounts the successive publications of the Warnock Report, the Green Paper and the White Paper, quoting material passages. He then quotes from the speech of the Lord Chancellor to the Upper House on the introduction of the Bill by way of explanation of the government's intention in relation to consent. Mr Webb goes on to say this:

'15. ... there were, of course, a number of different options as to the fixing of the "point of no return", at which consent to use of an embryo could no longer be withdrawn ... It was, however, decided that the Bill should permit an individual to withdraw consent to the use of an embryo which was in storage, at any point prior to the transfer of an embryo to a woman, and that was clearly reflected in the terms of Schedule 3.'

a 16. The provisions of the Bill dealing with consent did not prove controversial during the passage of the Bill through Parliament. So far as I have been able to ascertain, the approach taken in Schedule 3 commanded widespread approval in Parliament, in that the text of Schedule 3 as enacted remained as the Government had intended when the Bill was introduced.'

b [45] Although no formal objection was taken before us to the admission of this evidence, Mr Coppel was pressed from the bench about its admissibility. In the absence of any intractable ambiguity of the sort contemplated in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, it seemed at first sight an endeavour by the department of state responsible for drafting the legislation to introduce its own intentions as an aid to construction, something which is no more permissible in the construction of legislation than it is in the construction of contracts. The court, perhaps anomalously, may have regard to certain antecedent public documents—here, for example, the Warnock Report and the White Paper—but that is all.

c [46] There also seemed to be a risk that the passage we have quoted, by offering an evaluation of the attitude of Members to the Bill, would call in question proceedings in Parliament in breach of art IX of the Bill of Rights 1689: 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' One has only to contemplate the possibility of Ms Evans's advisers seeking to advance a different analysis of the debates recorded in Hansard to appreciate the risk.

e [47] Under his next head, the policy underlying the consent regime, Mr Webb sets out to explain 'the policy basis for the rules' contained in Sch 3, something which is ordinarily a function of legal argument. Mr Webb continues: 'In the Secretary of State's view, the provisions of Schedule 3 to the Act ... serve to promote a number of inter-related policies and interests.' Although this passage is in the present tense, it is apparent from the text which follows it that what is being described is what the original ministerial promoter of the legislation had in mind. This would ordinarily be no more admissible than what the present holder of the office has in mind.

f [48] Mr Webb goes on over the succeeding 14 paragraphs of his witness statement to set out policy imperatives which support the construction favoured by the Secretary of State:

g '21 ... In the Secretary of State's view it would be undesirable and unfair to insist that either party to IVF treatment be held to a consent which they may have given several years before when the circumstances of their lives were rather different ...

h 24. The Secretary of State therefore takes the view that a male partner should be able to withdraw his consent to IVF treatment up to the point at which that possibility becomes inconsistent with the bodily integrity of the woman concerned.'

j He concludes:

'31 ... That is why the Secretary of State opposes the private law claims of Ms Evans based on contract and estoppel. If such claims could be made, the

consent regime in Schedule 3 to the Act, and all of the policies which underlie it, would be fatally undermined.' a

[49] In the light of this tendered evidence we have given some consideration, with the help of submissions from Mr Coppel, who has ably represented the Secretary of State before us, to whether the 1998 Act may have altered the accepted division between argument and evidence. Mr Coppel, whose own skeleton argument and oral submissions have been entirely proper in form and content, explains Mr Webb's evidence as conforming to the guidelines set by their Lordships' House in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, the leading case on the making of declarations of incompatibility under s 4 of the 1998 Act. b

[50] In *Wilson's* case three of their Lordships devoted sections of their speeches to the impact of the proportionality test on the conventions and case law governing reference by the courts to Parliamentary records capable of illuminating legislative policy. Lord Nicholls (with whom Lord Scott expressly agreed) said: c

[61] ... As to the objective of the statute, at one level this will be coincident with its effect ... But that it not the relevant level for convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so. d

[62] The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation came into force ... e

[63] When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the "proportionality" of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation. f

[64] This additional background material may be found in published documents, such as a government white paper. If relative information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard for information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was g
h
j

a proceeding through Parliament. By having regard to such material the court would not be “questioning” proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

b [65] To that limited extent there may be occasion for the courts, when conducting the statutory “compatibility” exercise, to have regard to matters stated in Parliament.’

c [51] Is the distinction between parliamentary and extra-parliamentary accounts of legislative intent technical only? Lord Hope in his speech in *Wilson’s* case explained why it is not. He spoke (at [110]) of ‘familiar constitutional principles’ and went on:

‘[111] One of these principles, which has repeatedly been emphasised, is that legislation is the exclusive responsibility of Parliament ... Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the Executive.’

d He went on, in a carefully reasoned passage, to indorse the use of parliamentary materials for the purposes of s 4 of the 1998 Act: see [112]–[118]. Lord Hobhouse of Woodborough did so too, but with this caveat:

e [139] ... Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law.’

f [52] We recognise that there is a longstanding anomaly in the principle on which extraneous aids to construction are accepted. The resort to White Papers, indorsed long before *Pepper v Hart* by the decision of the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, is a resort precisely to statements of legislative intent by the executive. It may be that White Papers are nowadays—that is since *Pepper v Hart*—to be regarded, like ministerial statements made in Parliament, as means by which Parliament informs itself in the course of the legislative process.

g [53] We are not at present persuaded, even so, that the speeches in *Wilson’s* case will accommodate the full ambit of Mr Webb’s witness statement in these proceedings. If it is open to a minister whose predecessor was administratively responsible for a Bill to give evidence for s 4 purposes of the departmental policy and intent behind the measure, it is not immediately obvious why a minister may not give evidence—potentially conclusive evidence—of what he or his predecessor intended in making a statutory instrument of which the meaning is being debated in court.

j [54] It appears from Lord Nicholls’ speech that it is the proportionality of the legislative policy at the time of the challenge, not at the time of the enactment, which has to be determined. This is still relatively unexplored territory. In *Wilson’s* case Lord Nicholls was able to note (at the end of [62]) that there had been no suggestion of a relevant change of circumstances since 1974 when the statute under consideration was enacted. In the present case, what is novel is not the general situation in relation to in vitro fertilisation but the specificity of a case arising within it. This too would seem to be within the principle stated

by Lord Nicholls. If the 1998 Act is concerned with the protection of individuals from particular incursions by the state into fundamental rights now accorded to them by law, it must be open to a single individual to challenge as disproportionate the effect of legislation on her alone. But that is not to say that the state cannot rely on the generality of its policy and the needs of society as making its measure proportionate: it is simply to say that the interests of the many will not always or necessarily eclipse the rights of a few.

[55] Mr Coppel has drawn our attention to two recent human rights cases in this court, in each of which departmental evidence was admitted and relied upon in the process of deciding whether legislation was compatible with convention rights. In *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577, the court had to consider the convention-compatibility of statutory provision for widows' benefit and widows' bereavement allowance. At [52]–[55] an important body of data, taken from the evidence of a senior civil servant, was cited and relied upon by Laws LJ in relation to the question whether the (discriminatory) granting of widows' pensions should have been discontinued earlier than it was. At [52] Laws LJ cites and founds upon data about the numbers of pensioners eligible for uprating should the appellants' arguments succeed, and at [79] he recites departmental testimony about the earning capacity and domestic independence of different age-groups (associated, it has to be said, with some evaluative comments which evidently drew heavy fire from the appellants' statistical expert).

[56] Since no formal objection has been taken, we are not called upon to rule on the admissibility of Mr Webb's evidence. We do no more than record our concerns about it and express the hope that attention will be given to them in future proceedings on the construction of a statute to which the promoting department is a party. It does not appear that admissibility was in issue in the case noted in the previous paragraph. They may demonstrate no more than that, once the proportionality or discriminatory effect of legislation becomes an issue under the 1998 Act, it may help the court to know the factual background against which the compatibility of the legislation with the convention falls to be gauged. This would be unexceptionable, not as an aid to construction but as a means of testing compatibility. What remains to be decided if the occasion arises is the admissibility of evidence of departmental policy as an aid to the construction of a statute. The issue is a potentially important one which touches upon the separation of powers.

ARTICLE 8 OF THE CONVENTION

[57] Mr Tolson's contention is that the respect for private life commanded by art 8 either requires a secondary or non-natural reading of the 1990 Act or, if this is not possible, creates an incompatibility which the court should declare.

[58] The first limb of this submission can be briefly addressed. There is no available way of reading down the Act so as to make the withdrawal of Mr Johnston's consent immaterial to the continuation of Ms Evans's treatment. We say 'no available way' because this court in *Re R* has construed the 1990 Act as meaning that 'the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together' (see [2003] 2 All ER 131, [2003] 2 WLR 1485 at [22]). Were it not for this, it might have been arguable that the recurrent use of the word 'together'

- a following various references to 'a man and a woman' is simply a drafter's device to prevent 'and' from being read disjunctively. If this were the case, everything would continue to turn on consent; but the terms in which consent is obtained might well call for revision, since in its present prescribed form it assumes that the man and the woman must be 'together' in a sense more enduring than simply having been joint candidates for treatment. The questions about the
- b prospective well-being of the child would of course remain. But once mutuality is required at the point where treatment services are being provided, the requirement of continuing consent is inescapable.

[59] Is this statutory requirement then compatible with Ms Evans's right to respect for her private life? Article 8 provides:

- c 'Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the
- d economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Mr Tolson has not argued the family life limb.

- e [60] It was held by Wall J and was accepted before us that the refusal of treatment is an interference with, and therefore a failure to respect, Ms Evans's private life. The respondents' answer is that the limitation of Ms Evans's right is prescribed by law and is necessary for the protection of the rights and freedoms of, in this case, Mr Johnston. The argument therefore turns on whether this limitation is one which is necessary in a democratic society—or, in the Strasbourg
- f court's translation of that phrase, whether it is proportionate.

- [61] Mr Tolson's argument is not that it is disproportionate for the statute to require regard to be had to the question of Mr Johnston's consent but that it is disproportionate to make it decisive. He accepts that this would mean that in each case where consent was withdrawn the authority or the clinic or both would have to evaluate the case for continuing with treatment in its absence. This is
- g precisely why, in the respondents' contention, a bright line is justifiable, indeed essential.

- [62] We have set out earlier in this judgment what we recognise as the policy of the 1990 Act. Mr Coppel, whose argument is adopted by the authority and by
- h Mr Johnston, makes it his principal submission that the adoption of such a policy is 'clearly within the area where the state will be accorded a broad discretion'. 'The state authorities', he submits, 'are entitled to be accorded a broad margin of discretion in deciding where the balance should be struck'.

- [63] We consider propositions of this breadth to be a wrong starting point. The margin of appreciation (a solecism originating in the literal rendering in the
- j English text of the decision in *Handyside v UK* (1976) 1 EHRR 737 of the French phrase 'marge d'appréciation', meaning margin of appraisal or judgment) is a tool by which the Strasbourg court gauges the relationship of a state's act to the convention. It has no direct relevance to the process by which a court adjudicates, within a state, on the compatibility of a measure adopted by the executive or the legislature, for it is only at the end of that process that the state's act crystallises. This is why Lord Hope in *R v DPP, ex p Kebeline*, *R v DPP, ex p*

Rechachi [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 381, took such care to distinguish the Strasbourg approach from what he characterised domestically as the discretionary area of judgment. Discretion implies a choice between two or more legitimate (and therefore proportionate) courses, and where Parliament has made such a choice the courts have no power of intervention under the 1998 Act. To invoke a supposed 'margin of discretion' by contrast is to collapse two distinct concepts into a single nebulous one.

[64] What is therefore critical in deciding whether the point of intervention has been reached is the legitimacy, in convention terms, of the choice that Parliament has made. As Lord Nicholls said in *Wilson's* case [2003] 4 All ER 97 at [70]:

'Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified ... The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention right ... The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.'

[65] The last of these propositions is not gratuitous or freestanding. It follows logically from the preceding propositions, for this reason: while legislation modifying individuals' private law liabilities can be expected not to infringe their convention rights without clear justification, legislation directed to the implementation and management of social policy may well have to infringe some individuals' convention rights in the interests of consistency. But the test is the same in both cases: could a less drastic means have been used to achieve the chosen end without infringing the primary right of the claimant?

[66] The less drastic means contended for here is a rule of law making the withdrawal of Mr Johnston's consent non-conclusive. This would enable Ms Evans to seek a continuance of treatment because of her inability to conceive by any other means. But unless it also gave weight to Mr Johnston's firm wish not to be father to a child borne by Ms Evans, such a rule would diminish the respect owed to his private life in proportion as it enhanced the respect accorded to hers. Further, in order to give it weight the legislation would have to require the authority or the clinic or both to make a judgment based on a mixture of ethics, social policy and human sympathy. It would also require a balance to be struck between two entirely incommensurable things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.

[67] Like Wall J, we agree that the two principles which visibly underpin Sch 3 to the Act, neither of them objectionable in convention terms, are the principle of female self-determination and the principle of consent. The two are articulated by requiring mutual consent to the point of implantation, but by thereafter giving the woman full control of the pregnancy. This protects not only the man but the woman from any compulsion to go through with the treatment. Its vice, from the present claimant's point of view, is that it accords no recognition to her now-or-never situation. But for the reasons we have given, it is not possible to construct an alternative system which would have that effect, would be convention-compliant and would still be able to achieve the legitimate objectives of the legislation. It might be otherwise if one of those objectives were to fix

a consent at the moment of sperm donation; but the role of the court does not extend to intervention in legislative policy choice (the 'discretionary area of judgment') save where the policy itself contravenes the convention.

[68] Mr Tolson has relied on authorities which undoubtedly illustrate the power of the court to intervene on human rights grounds where, for example, a policy, adopted for the exercise of statutory powers, by being unnecessarily rigid, disproportionately infringes human rights. One example is *R (on the application of P) v Secretary of State for the Home Dept*, *R (on the application of Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151, [2001] 3 FCR 416, [2001] 1 WLR 2002, where it was held that an inflexible rule against mothers keeping their babies in prison beyond the age of 18 months could operate disproportionately. But such cases illustrate an uncontentious point, just as the decision in favour of a bright-line rule in *Pretty v UK* [2002] 2 FCR 97 at 135 (paras 72–74) illustrates the same point from the other side.

[69] The contentious point is whether the principle of proportionality has been infringed here. As Mr Coppel submits, there may be good reasons for a uniform regime: exceptions are not always necessary to comply with the requirement of proportionality. He goes on to argue that the fact that legislation may produce a harsh or unreasonable outcome in a particular case does not render it disproportionate. That may be right, but—at least if the outcome is a denial of a primary convention right—the case for a bright-line rule requires careful examination. Adopting the synoptic test propounded by Hale LJ in *Re W and B (children) (careplan)*, *Re W (children) (care plan)* [2001] EWCA Civ 757 at [54](iii), [2001] 2 FCR 450 at [54](iii), for the generality of care cases, we ask ourselves 'whether the proposed interference with the right to respect for private life is proportionate to the need which makes it legitimate'. The answer, in our judgment, is that it does. The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet Ms Evans's otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency. The sympathy and concern which anyone must feel for Ms Evans is not enough to render the legislative scheme of Sch 3 disproportionate.

ARTICLE 14 OF THE CONVENTION

[70] Mr Tolson's alternative argument, that the statute unjustifiably discriminates against Ms Evans in breach of art 14, encounters insuperable difficulties of principle.

[71] Article 14 provides:

'Prohibition of discrimination'

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[72] The first question is: what is the material ground of discrimination here? Mr Tolson submits that it is Ms Evans's infertility as against that of

fertile, or alternatively pregnant, women. The difficulty with this is that it is not the 1990 Act which discriminates against Ms Evans on this ground. It is the 1990 Act which, conditionally, seeks to reverse nature's discrimination. What are under attack in these proceedings are the conditions on which it does so. a

[73] If therefore there is to be an art 14 claim, it has to relate to the legislative discrimination between women seeking treatment whose partners have withdrawn their consent and those whose partners have not. Mr Tolson has not argued the case on this basis. While, however, we are not disposed to accept Mr Coppel's submission that failure under art 8(2) means that Ms Evans cannot succeed under art 14, the factors which render the material provisions proportionate under art 8(2) also have the effect, in our judgment, of affording objective justification for the single form of discrimination of which complaint could logically have been made, that is to say discrimination on the basis of consent. And this, no doubt, is why the art 14 case has not been argued on such a footing. b

[74] For these reasons we reject the claim under art 14. On the alternative approach preferred by Arden LJ to art 14, namely that the 1990 Act discriminates between women who can and women who cannot conceive through sexual intercourse, we would have held likewise that the discrimination is objectively justified for the reasons we have given under art 8(2). c

GENERAL REMARKS

[75] For Ms Evans this is a tragedy of a kind which may well not have been in anyone's mind when the statute was framed. Where, as has happened here, the parties' confidence in each other's commitment proves ill-founded, there is nothing in the legislation to stop the woman trying again with another partner or with a donor. In fact, had there been any doubt about the durability of Mr Johnston's commitment, or even time for Ms Evans to reflect a little about the future, different boxes might have been ticked and the present impasse avoided. As Ms Rose accepted, Ms Evans might have chosen to have her eggs frozen (a risky procedure) or to have had her eggs fertilised by the use of donor sperm. What has brought about the present tragedy is Ms Evans's inability, because of the removal of her ovaries, to produce any more eggs for any of these purposes. In such a situation the simple requirement of continuing consent can work hardship of a possibly unanticipated kind. d

[76] We wish also to associate ourselves wholeheartedly with the remarks of Arden LJ on this aspect of the case. e

CONCLUSION

[77] This appeal therefore fails. f

ARDEN LJ.

[78] I have read in draft the judgments of Thorpe and Sedley LJJ. I gratefully adopt their statement of the facts. I agree that this appeal must be dismissed but in part for different reasons. g

THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990

[79] This Act was passed following the publication of the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) under the chairmanship of Dame Mary Warnock DBE (the Warnock Report), consideration of the responses to a consultation paper issued by the Department h

- a of Health and Social Security under the title of *Legislation on Human Infertility Services and Embryo Research* (Cm 46) (1986) (the consultation paper) and the publication of a White Paper *Human Fertilisation and Embryology: A framework for legislation* (Cm 259) (1987) (the White Paper). A primary object of the 1990 Act is to regulate the creation, use and storage of human embryos outside the body. Thorpe and Sedley LJ have set out certain provisions of the 1990 Act. This
- b appeal principally concerns the statutory restrictions on the use of embryos. In outline, the 1990 Act stipulates that the Human Fertilisation and Embryology Authority (the authority) may grant licences to provide treatment services (that is, medical treatment to assist women to have children) but it is a condition of such licences that a person's genetic material is not used except in accordance with a subsisting consent given in writing: see ss 2(1) and 11 of, and Sch 3 to, the
- c 1990 Act. Section 11 and Sch 3 are set out in the judgment of Thorpe and Sedley LJ.

[80] The 1990 Act inevitably uses clinical language, such as gametes and embryos. But it is clear that what the 1990 Act is concerned with is the very emotional issue of infertility and the genetic material of two individuals, which, if implanted, can lead to the birth of a child.

d [81] Infertility can cause the woman or man affected great personal distress. In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity.

e [82] Science has made many remarkable advances in recent years. Among them is in vitro fertilisation (IVF). This enables a woman to conceive a child in circumstances where in the past this would have been impossible or nearly impossible, as where a woman ovulates only very occasionally. The treatment is perhaps unpleasant and certainly intrusive, but the result is to give a woman who is not fertile the chance of being on the same footing as one who is.

f [83] Miss Dinah Rose, for the authority, submits that there are two pillars in the 1990 Act, the interests of the child and the consent of the two persons who are to be the parents of the child and consent to be treated together or to the use of their genetic material. In *Leeds Teaching Hospital NHS Trust v A* [2003] 1 FLR 412, Dame Elizabeth Butler-Sloss P described these two matters as 'the two most important principles to be found in the Act'. In relation to consent, the Warnock

g Report, whose recommendations were substantially implemented by the 1990 Act, stated:

'Consent

h 3.5 We feel it to be very important that time and consideration should be devoted to explaining fully to prospective patients and, where necessary to their partners, the details of any infertility treatment they are to undergo. No such treatment should be undertaken without the fully informed consent of the patient and this should, in the case of more specialised treatment, normally be obtained in the presence of someone not associated with the procedures ...'

j [84] The requirement to consider the interests of the child is in s 13(5) of the 1990 Act, which Thorpe and Sedley LJ have set out. The 1990 Act does not, in fact, define 'child'. If the life of a child began before the relative embryo was transferred to a woman, it would always (or very nearly always) be in the interests of the child for the embryo to be so transferred unless the mother had contracted some disease which would deprive the child of any meaningful

standard of life when born. If indeed the life of a child began before transfer of the relative embryo to a woman, the genetic father would never have any ability to withdraw his consent after the embryo had been created. Nor could an embryo ever be destroyed. However, it is clear that the 1990 Act draws a distinction between an embryo and a child. a

[85] It is understandable that even in legislation about the procreative freedom of two adults there must be a requirement to take account of the interests of the child. Put another way, it is the policy of the 1990 Act that children should not be brought into the world simply to satisfy the wishes of their genetic parents, or other human beings. There may, quite separately, be plenty of scope for argument about what the interests of the child involve. Over the course of time, views about what is in the interests of a child have changed. Thus, for instance, at one point in time it was thought that it was important that the child should know where his or her home was. Today, the courts often approve shared care arrangements which permit the parents to take very nearly equal shares in caring for the child so that the child will spend nearly half its time in one place and the remainder in another. Parliament has not prevented developments in the law in that regard. b

[86] It is less easy, however, to find the statutory requirement for consent. As the judgment of Thorpe and Sedley LJ shows, the requirement for the consent of the genetic parents is not in the substantive sections of the 1990 Act but tucked away in a schedule incorporated into the 1990 Act by the provisions regulating the conditions on which licences may be granted under the 1990 Act. I pause to remark that this seems to me to be a periphrastic way for Parliament to identify one of the twin pillars of the 1990 Act. Then the issue is, consent to what? In normal sexual intercourse, a man gives his sperm voluntarily but is not thereafter in a position to prevent the consequent birth of a child. Parliament would obviously wish to require the consent of any person who gave his sperm or on whom legal paternity was to be imposed at the start of the treatment services. But the question whether his consent is required at any later stage in the treatment is left comparatively obscure. It depends on the meaning of the provision of treatment services to two persons 'together' and of the word 'use' in relation to an embryo. c

[87] This issue is not simply a question of words. Words could have been chosen to reflect any particular policy. The underlying question is: what is the policy to which the provisions of the 1990 Act give expression? On this, the position is that there is little material demonstrating pre-legislative consideration of the question whether the father's consent should be to all stages in the treatment. The Warnock Report does not deal with this issue: it states that both parties will give their consent to seek treatment (paras 3.5 and 4.23). But at no stage does the report discuss what is to happen if the parties become estranged during treatment. Nor was anything said about this matter in the consultation paper. Nor have we been taken to any admissible statement in Hansard. The only admissible pre-legislative material is in the White Paper. Paragraphs 57 and 58 of this document state that donors would have the right under the proposed legislation to vary or withdraw their consent 'before the gametes/embryos were used', and that it would not be possible for embryos to be destroyed without both donors' consent. However, there is no explanation for these proposals. d

[88] There are a number of possible reasons for requiring the consent of the genetic father at all stages. It can be said that it is important to involve e

a the male at all stages so as to ensure that he will be involved in the upbringing of the child. No doubt that is a very good idea in principle but the genetic father can equally withdraw his consent after implantation. Moreover, it is not to be assumed that the child cannot properly be brought up without two parents. Another approach might be that the father has some rights of property in his genetic material. But the question posed by this case is, why should he have any right of property in this regard since he would not have had any right of property if sexual intercourse had taken place in the normal course of events?

b [89] As Thorpe and Sedley LJ have explained, the court asked Mr Johnston, the genetic father in this case, whether he would consent to the storage of the embryos in question in case Ms Evans met another partner who would become the legal father of any child resulting from implantation of the embryos. Mr Johnston in that event would not have legal responsibility for such a child. Mr Kambiz Moradifar, for Mr Johnston, told the court that Mr Johnston did not agree to this on the grounds of principle. He does not want to know there is a child of his growing up in some other town. So the wider issue arises whether, in a world in which many people have come to accept a woman's right of choice as to whether she should have a child or not, the genetic father should have the equivalent right—a right greater than that conferred by nature. Should there be a continuing requirement for consent when there is no link between mere biological parenthood and legal responsibility? Is it to be supposed that, if a father in this situation some years after the birth of the child met the child, in whom the spark of human life had by then been kindled by his ex-partner, he would be bound to say 'I wish you had never been'? These are difficult questions. However, it may be that the answer to the question posed at the end of the previous paragraph is that, if the father were to reject the child, that could be distressing for both parties. Indeed, even without meeting the child, the father's own freedom of action may be inhibited by feelings of guilt or even responsibility, for instance if the mother became unable to look after the child. This may also be part of the rationale for a continuing requirement for the father's consent to use or storage of his genetic material, if that is what the 1990 Act indeed provides.

g [90] Ms Evans wants the freedom to have the embryos containing her genetic material transferred to her. She wants to exercise her reproductive liberty in this way. The courts respect freedoms for many reasons, not least because to do so demonstrates respect for the dignity of each individual as a human being. The difficulty for Ms Evans is that the genetic material is now not simply hers alone. If the 1990 Act contained no restriction, or if there had been no Act, the courts might well say that the father had given his consent.

j [91] A feature of modern society is that conditions are changing very rapidly. Only in 1978 was it possible for a child to be conceived by IVF and for the hope of parenthood to be given by technology. Parenthood is one of the great privileges and joys of life. Not all adults want it, but for those who do want it, it is, and I repeat, one of the privileges and joys of life. Moreover, many women feel parenthood gives them an assurance of their position in society. Parenthood is a very important matter to women, even today. The United Kingdom was one of the first countries to have legislation regulating IVF treatment, and the model of regulation which Parliament chose was a detailed and comprehensive one (see *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687). The

position in the United Kingdom may be contrasted, for instance, with that in the United States, where IVF treatment is not regulated: see generally Bartholet *Family Bonds* (1999) ch 9 and *Medically Assisted Procreation and the Protection of the Human Embryo: comparative study on the situation in 39 states* (Council of Europe) (1998), exhibited to the witness statement of Mr Edward Webb filed on behalf of the Secretary of State for Health.

'TREATMENT TOGETHER'

[92] It is important to recognise the centrality of this issue in this case. Even if the requirement for Mr Johnston's continuing consent is satisfied or the fact of its withdrawal is overcome, the embryos resulting from the genetic material of Ms Evans and Mr Johnston cannot be implanted in Ms Evans unless it can be said that the implantation would be part of services provided to Mr Johnston and Ms Evans 'together'. This was the limitation in the consent provided by Mr Johnston: see the judgment of Thorpe and Sedley LJ at [8], above. It is accepted by all parties that this word must have the same meaning as in ss 4(1)(b) and 28(3) of, and para 2(1)(a) of Sch 3 to the 1990 Act. Curiously, when treatment services are provided to a man and woman together a licence is only required for the purpose of storing genetic material: s 4(1)(a), (b). Moreover, para 2(1)(a) of Sch 3, unlike s 4(1)(b), does not require that the persons receiving treatment together should be a man and a woman.

[93] As the appellant points out, 'treatment together' cannot mean literally together. In *Re R (a child)* [2003] EWCA Civ 182, [2003] 2 All ER 131, [2003] 2 WLR 1485, this court had to determine whether the person, who had agreed to receive treatment services together with the mother of a child born as a result, was the father for the purposes of s 28(3) of the 1990 Act even though the couple had separated. The putative father had never withdrawn his consent to treatment together. This court held that, as the couple were not receiving treatment services together at the time of the transfer of the embryo to the woman, the person who sought legal paternity did not acquire that status under s 28(3). This decision followed that of Bracewell J in *Re B (minors) (parentage)* [1996] 3 FCR 697 where Bracewell J spoke of a 'joint enterprise'. This court in *Re R* at [23] expressed some disapproval of the translation by Wilson J of the requirement for receiving 'treatment together' into a requirement for receiving treatment 'as a couple'. In so far as this imposed some additional requirement, it constituted an unjustifiable gloss on s 28.

[94] The effect of the provision of treatment services together in s 28 is a very different from its effect in para 2(1)(a) of Sch 3. Parliament is unlikely to have intended a person to be able to claim legal paternity in respect of a child with whom he has no biological or other connection other than that he signed a consent to become his or her father under different circumstances in the past. None the less, since in an Act of Parliament words are in general to be given the same meaning, the jurisprudence in *Re R* as to the meaning of 'together' in s 28(3) must inform this court's approach to the same term in Sch 3, para 2(1)(a). It follows that the consent to the provision of treatment services together must be consent to each and every stage of the provision of the treatment services. Accordingly, if the consent is not formally withdrawn, but those who formerly sought treatment 'as a joint enterprise' no longer do so, the consent is inoperative as the treatment services would no longer be within those described in the consent.

a [95] The licence holder will not commit an offence under s 4(1) as a result of a consent becoming ineffective, provided that he had taken all reasonable steps and exercised all due diligence to avoid committing an offence (see s 41(11) of the 1990 Act).

b [96] My conclusion means that, on the construction which I have placed on 'together' in para 2(1)(a) of Sch 3, Ms Evans cannot succeed on this appeal even if she shows that the consent was never withdrawn, unless she can succeed in showing that the structure of consents required by Sch 3 is incompatible with her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or must bear some other construction in order to be compatible with her convention rights.

c [97] The requirement for treatment together appears to reflect an expectation that, if two persons are jointly involved in the creation of an embryo and its transfer to the woman, both will be responsible for the upbringing of the child when born. As I have sought to show, this aim is not necessarily achieved simply by a requirement for two people to be involved together at that stage. It may one day be possible for a child to have only one genetic parent. Even now, there is no need for a child to be brought up by two persons and very often these days this does not happen. However, the appellant has not argued that the word 'together' must be given a contemporary meaning to reflect this change in social conditions and accordingly this is not an argument on which it would be appropriate for me to express a view in this case.

e [98] In effect the argument of Mr Robin Tolson QC, for Ms Evans, on this point removes any function for the word 'together'. On his argument it adds nothing to the requirement for consent.

f [99] Once the meaning of treatment 'together' has been determined, it becomes a question of fact whether there would in the present case be treatment 'together'. In my judgment, Mr Johnston and Ms Evans would plainly not be united in their quest for treatment services and accordingly Mr Johnston's consent would not cover implantation of the embryos into Ms Evans.

g [100] Accordingly, for similar reasons to those given by the judge, I consider that the judge came to the right conclusion on this point.

'USE'

h [101] In the case of IVF, Sch 3 draws a distinction between the creation, storage and use of an embryo: see paras 2 and 3 of Sch 6. Mr Tolson seeks to persuade the court that 'use' of an embryo occurs effectively as soon as the embryo is created, that is when the embryos are selected for storage. He invokes para 1(1)(d) of Sch 2. This describes the various sorts of activities that can be licensed. Paragraph 1(1)(d) describes one such activity as 'practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose'. These activities can, as Mr Tolson submits, only fall within the class of activities constituting 'use' on the basis of the 1990 Act's threefold classification. The judge did not accept this argument: he held that para 1(1)(d) of Sch 2 was equally apt to describe processes preparatory to 'use'. I agree. However, the authority has to accept that 'use' is not limited to transfer to a woman. For instance, in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] EWCA Civ 667, [2003] 3 All ER 257, [2004] QB 168,

(which, like the judge, I will call *Quintavalle (tissue typing)*), the removal of a single cell from an embryo was held to be the 'use' of an embryo which the authority could licence. On the question whether the carrying out of tests on the cell so removed, constituted use, only Mance LJ expressed a view (see [110]–[111]). In his judgment, this did not amount to use of an embryo. This shows that the concept of 'use' has limits.

[102] However, the provisions of para 4(2)(a) have to be read and construed against the fact that, by inference from the principle of the primacy of consent in the Warnock Report and the 1990 Act, the aim of the provision is to identify the last point in time when a consent can be withdrawn. There can, therefore, only be one 'use' for the purpose of this paragraph. Since para 4(2)(a) provides by implication that the withdrawal of consent by the person who provided the genetic material is ineffective after 'use', the court should, in determining which 'use' is the 'use' for the purpose of para 4(2)(a), approach the matter on the basis that the relevant use is the last practicable 'use' for the purpose of barring the withdrawal of consent. This approach is consistent with permitting the genetic parents maximum control over the use of their own genetic material.

[103] In the context of the withdrawal of consent (Sch 3, para 4), in my judgment, 'use' refers to the final stage. That construction is one which gives greatest respect to the genetic parents as individuals. On the appellant's construction, Ms Evans could not now withdraw her consent and the question would arise whether the embryo could still be transferred to her if Mr Johnston insisted.

[104] The meaning of 'use' (and that of 'together') for the purposes of Sch 3 is not, in my judgment, as the judge thought, a question of fact but a question of law, being a question of the true interpretation of the 1990 Act.

[105] In any event, in Ms Evans's case the treatment could not properly be described as 'use'. All that happened was that the embryos were inspected visually to remove abnormal ones. This is in reality simply a process preliminary to the use of an embryo.

ARTICLE 2

[106] Article 2 of the convention provides that 'Everyone's right to life shall be protected by law'. Mr Tolson recognises that an embryo has no right to life in the sense that a human being has such a right. He submits that an embryo has a qualified right to life, that is a right to life which is consistent with his mother's wishes. Neither convention jurisprudence nor English law provides a clear cut answer to the question: at what point does human life attain the right to protection by law? For many purposes, the viability of a foetus is taken as the benchmark for determining the legal status of a child. Under the Abortion Act 1967, as amended by the 1990 Act, the legal benchmark is 24 weeks. At that point, however, a child may today survive: approximately 20% to 30% of such babies survive. Abortions are not permitted after the 24 weeks' stage unless there is a substantial risk of foetal disability or a substantial risk to the life or health of the mother. We do not have any scientific detail and so I proceed on the basis that while an embryo has the potential to become a person it is not itself that person: further changes must take place.

[107] In my judgment, an embryo has no qualified right to life. This court rejected the argument that a foetus had a right to life protected by art 2 in *Re F (in utero)* [1988] 2 All ER 193, [1988] Fam 122. So far as an embryo created by

- a IVF is concerned, the claim to a right to life must be weaker. The 1990 Act does not recognise any such right, whether absolute or qualified in the way Mr Tolson submits, since the embryo must be destroyed after ten years or if either party withdraws their consent to storage. (In the different context of art 8 and within the field of artificial insemination (AID), the Strasbourg court has accorded member states a wide margin of appreciation with respect to the
- b recognition of the rights of social parents, noting the lack of consensus between member states with regard to some of the ethical issues arising from AID: *X, Y and Z v UK* [1997] 3 FCR 341. The 1998 Council of Europe report suggests a similar lack of consensus in relation to the ethical issues arising from IVF.) In all the circumstances, I do not consider that the 1990 Act in denying the embryo even a qualified right to life is incompatible with the convention. In sum, the
- c embryo has no right to life which trumps the right to choose of a person whose ongoing consent to its use or storage is required under the 1990 Act.

ARTICLE 8

- [108] It is common ground that art 8, which has already been set out by
- d Thorpe and Sedley LJ, is engaged because Ms Evans's bodily integrity (private life) is affected. I do not consider that she could assert any right to family life with a future child whose embryo has yet been transferred to her. However, I agree with the judge that, by regulating the circumstances in which Ms Evans can have an embryo transferred to her, the state has interfered with Ms Evans's private life
- e engaged to the extent that the 1990 Act purports to regulate any right they would otherwise have to use an embryo. No distinction has been drawn between the requirement for consent at the start of treatment and the requirement for ongoing consent. In other words, argument has not been addressed to the question whether the requirement for ongoing consent (as opposed to the
- f requirement for consent before treatment starts) is necessary in order to ensure compatibility with the convention.

- [109] The next question is whether the interference is justified under art 8(2). In the 1990 Act Parliament has taken the view that each genetic parent should have the right to withdraw their consent for as long as possible. It was not inevitable that Parliament should take that view. Subject to the possible effect of
- g the convention, Parliament could have taken the view that, as in sexual intercourse, a man's procreative liberty should end with the donation of sperm but that, in the light of the woman's unique role in making the embryo a child, she should have the right to determine the fate of the embryo. But Parliament did not take that view. Nor did Parliament take the view that the court should
- h have any power to dispense with the requirement for consent of both parties, even when circumstances occur which were not envisaged when the original arrangements were made.

- [110] Like Thorpe and Sedley LJ, I consider that the imposition of an invariable and ongoing requirement for consent in the 1990 Act in the present
- j type of situation satisfies art 8(2) of the convention. The requirement is supported by the arguments set out in the evidence of Mr Edward Webb, particularly the argument based on the primacy of consent. As this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for Parliament: see the passage from the speech of Lord Nicholls in *Wilson v First County Trust Ltd* [2003] UKHL 40 at [70], [2003] 4 All ER 97 at [70] set out at [63], above. Parliament has taken the view that no one should

have power to override the need for a genetic parent's consent. The wisdom of not having such a power is, in my judgment, illustrated by the facts of this case. The personal circumstances of the parties are different from what they were at the outset of treatment, and it would be difficult for a court to judge whether the effect of Mr Johnston's withdrawal of his consent on Ms Evans is greater than the effect that the invalidation of that withdrawal of consent would have on Mr Johnston. The court has no point of reference by which to make that sort of evaluation. The fact is that each person has a right to be protected against interference with their private life. That is an aspect of the principle of self-determination or personal autonomy. It cannot be said that the interference with Mr Johnston's right is justified on the ground that interference is necessary to protect Ms Evans's right, because her right is likewise qualified in the same way by his right. They must have equivalent rights, even though the exact extent of their rights under art 8 has not been identified.

[111] The interference with Ms Evans's private life is also justified under art 8(2) because, if Ms Evans's argument succeeded, it would amount to interference with the genetic father's right to decide not to become a parent. Motherhood could surely not be forced on Ms Evans and likewise fatherhood cannot be forced on Mr Johnston, especially as in the present case it will probably involve financial responsibility in law for the child as well.

[112] Mr Tolson argues that the legislative policy is disproportionate. I do not agree. We are not dealing with a ministerial policy but with a person's consent. In those circumstances, I consider that it is convention compliant for the legislature to have a policy which respects that individual's consent and admits no exception to this policy.

[113] Mr Tolson also argued that both parties' consent should logically be required *not* to store an embryo since this involves its destruction. Indeed, the Warnock Report recommended this approach. The White Paper also proposed this approach (see [87] above). But the legislature has taken another approach, and the policy in this area is, as I have already stated, primarily a matter for Parliament. I consider that it was entitled so to do balancing the possibility that a genetic parent might change their mind against such factors as the emotional burden that uncertainty in the meantime would bring.

[114] I am mindful that Thorpe and Sedley LJ are concerned that Mr Webb's evidence contains matters which may in constitutional terms be improper. This issue has not been fully argued. I accept that the substance of these matters could have been presented as submissions, but in the absence of full argument I find it difficult to see why they cannot equally be included in the evidence served on behalf of the Secretary of State. The court has to form a view as to whether the interference with Ms Evans's private life is justified in order to determine whether the 1990 Act violates Ms Evans' convention rights. This is part of the process of interpretation since, if the 1990 Act does violate Ms Evans's convention rights, the court must consider whether the 1990 Act can be given a strained meaning so as to have effect in a manner which is compatible with her convention rights (s 3 of the Human Rights Act 1998). If such rights are violated, and the 1990 Act cannot be interpreted to have the effect mentioned, then the court may make a declaration of incompatibility (s 4 of the 1998 Act). If any party submits that there is relevant evidence on the question of (say) proportionality or legitimate aim (being questions which are often essential steps in determining when a convention right has been violated by an enactment), it must be put in evidence in an appropriate way. Mr Webb's

- a evidence sets out the legislative history of the provisions of the 1990 Act which govern the giving and withdrawal of consent (including an explanation of the history of material differences between the Warnock Report and the 1990 Act). He also sets out the matters which the Secretary of State considers to be the ethical and practical considerations favouring the present consent regime in the 1990 Act. It therefore goes beyond matters of submission, but it is not
- b suggested that the Secretary of State's views could bind the court's judgment on these matters. For completeness, I should add that Mr Webb also deals in his witness statement with the legal practice in other member states of the Council of Europe (see [91], above), and with the legal status of embryos.

- c [115] I do not read Mr Webb's evidence as evidence as to the intention of the Secretary of State at the time of the passing of the 1990 Act but rather as an account of the present Secretary of State's views as to the policy considerations justifying the consent requirements of the 1990 Act. It is not an attempt to involve the court in the proceedings in Parliament at the time of the Bill. Since the court is concerned with the question whether the legislation is convention-compliant as of the date of giving judgment, the court is not
- d confined to the intention of Parliament as expressed in the 1990 Act, or to ascertaining the purpose of legislation solely from the provisions of the 1990 Act or any Royal Commission or other report leading to the enactment or any statement from Hansard which may be admissible. The observations of Lord Nicholls in *Wilson's* case [2003] 4 All ER 97 at [63]–[66] are primarily concerned with the use which courts may properly make of statements in Parliament and
- e they do not, as I read them, state that only such statements and statements in explanatory notes accompanying legislation or published documents, such as a White Paper, are the only sources of evidence relevant to the issue whether legislation is or is not convention-compliant. As I have said, the evidence of Mr Webb is not put forward on the basis that the Secretary of State's views
- f conclude any issue on this appeal, but to inform the court. For these reasons, my provisional view is that Mr Webb's evidence is admissible and that it is not liable to be impugned on the grounds of constitutional impropriety.

ARTICLE 14

- g [116] Article 14 is set out in the judgment of Thorpe and Sedley LJ. The appellant does not need to establish a violation of art 8 in order to be able to rely on art 14: see *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113. It is sufficient that she can bring herself within 'the ambit of' art 8, and she can do that in this case as it is common ground that art 8(1) is engaged. The appellant contends that she is discriminated against as an infertile woman.
- h The remaining issues are: whether there is a difference in treatment in respect of the enjoyment of her art 8(1) right between the appellant and the person she puts forward for comparison, whether that person is in an analogous situation, and if so, whether the difference is justifiable.

- j [117] The contentious issue is the identity of the correct comparator, that is the person in an analogous situation with whom the appellant can draw a comparison and demonstrate discrimination. The analogous situation in this case is that of natural conception, that is of the creation of an embryo naturally as a result of normal sexual intercourse. On the basis of that analogy, is the correct perspective that of the (biological) mother or that of the (biological) father? If the relevant perspective is that of a woman who conceives naturally, there is no discrimination because the donation of sperm through sexual

intercourse is equivalent to that of the transfer of the embryo to her, and the moment of conception is equivalent to that of implantation. No embryo has yet been transferred to Ms Evans. However, the issue of discrimination in this case arises in the context of the question whether the genetic father can withdraw his consent. Accordingly, it seems to me that the focus should be on the father and the position of a fertile woman and an infertile woman in relation to the father. Seen from that perspective, there is discrimination between the position of Ms Evans and that of a woman who conceives through normal sexual intercourse. The genetic father is allowed to withdraw his consent in IVF later than he could do so in ordinary sexual intercourse.

[118] However, even if this is the correct analysis for the purpose of determining whether discrimination within art 14 exists, there is no violation of art 14 if the discrimination is objectively justifiable. In this case, in my judgment, the provision permitting withdrawal of the genetic father's consent prior to transfer of the embryo to a woman would be so justified for the reasons given in the discussion of art 8 above.

[119] It is interesting to note that there are other respects in which the 1990 Act discriminates between women who can conceive naturally and those who undergo IVF treatment. For instance, the requirement in s 13(5) of the 1990 Act to take account of the interests of the child is not one which prevents a fertile woman (or man) from exercising their reproductive freedom. The 1990 Act clearly (and, I suggest, for good reason) discriminates between fertile and infertile adults in this respect.

ESTOPPEL

[120] In my judgment, the judge was correct in law to rule that Mr Johnston could not be estopped from exercising his statutory right to withdraw his consent. A person may give up a right created by statute for his benefit only, but here the right of withdrawal is granted in recognition of the dignity to which each individual is entitled. Such dignity must include an individual's right to control the use of their own genetic material. In my judgment, it would be contrary to public policy for courts to enforce agreements to allow use of genetic material. Accordingly, Mr Tolson's submission on this point must, in my judgment, be rejected.

DISPOSITION

[121] For the reasons given above, I would dismiss this appeal.

[122] One conclusion that I would draw from this case is that couples seeking IVF treatment should consider reaching some agreement about what is to happen to their embryos if they separate and also if the genetic father dies before transfer of the embryo to the woman. In this case, the only reference to separation in the form of consent was a statement that the appellant and Mr Johnston understood that 'on cessation of our domestic relationship ... we understand that the storage and use of embryos must be reviewed'. Any agreement between the parties would be subject to the 1990 Act, but early discussion could avoid heartbreak at a later stage.

Appeal dismissed.

Harbour Estates Ltd v HSBC Bank plc

[2004] EWHC 1714 (Ch)

CHANCERY DIVISION

LINDSAY J

15, 16 JUNE, 15 JULY 2004

Land – Right in, to or on property conveyed – Statutory provision providing that every conveyance effectual to pass such right – Whether applying only to right touching and concerning land – Law of Property Act 1925, s 63.

Landlord and tenant – Option to determine – Break clause – Lease containing break clause expressed to be personal to original tenant but allowing assignment of benefit in specified circumstances – Original tenant assigning lease to company which fell within category of persons to whom benefit of break clause could be assigned – Assignment of lease containing no express assignment of benefit of break clause – Whether benefit of break clause passing on assignment of lease as right touching and concerning land or having reference to subject-matter of lease – Law of Property Act 1925, ss 63, 142.

The predecessor in title of the claimant landlord granted an underlease to S Ltd for a term running from 24 June 1993 to 24 December 2013. Clause 6 of the lease was a break clause, giving the tenant the right to determine the lease on, inter alia, 23 June 2004. Clause 6.5 provided that cl 6 was personal to S Ltd and was not capable of assignment to, or exercise by, any other person. However, cl 6.5 was subject to a proviso, allowing assignment of the benefit of cl 6 to a permitted assignee of the lease where that assignee was a group company (a term which included a holding company of the tenant) or, in the reasonable opinion of the landlord, had provided to the landlord for its approval references satisfactory to the landlord and its audited accounts showing for the last three years either profits of a specified level or net assets of a specified amount. S Ltd eventually assigned the lease to its parent company, H plc, which was therefore a group company for the purposes of cl 6.5. The assignment of the lease did not contain an express assignment of the benefit of cl 6 to H plc. The latter subsequently served a notice on the landlord, purporting to terminate the lease under cl 6 on 23 June 2004. The landlord challenged the validity of that notice. In subsequent proceedings, it contended that, in the absence of express assignment or implied transfer, the benefit of cl 6 had not passed to H plc since that clause did not touch and concern the land. H plc challenged that contention, and relied on s 142^a of the Law of Property Act 1925. That provision was concerned with obligations under conditions entered into by a lessor with reference to the subject-matter of the lease, and provided that they could be taken advantage of, and enforced by, the person in whom the term was from time to time vested. The court considered whether, if cl 6 did not touch and concern the land, the benefit of that clause had nevertheless passed to H plc automatically on the assignment of the lease by virtue of s 63^b of the 1925 Act. Section 63 provided that every conveyance was effectual to pass,

a Section 142, so far as material, is set out at [14], below

b Section 63 is set out at [16], below

inter alia, all the 'right' which the conveying parties had 'in, to, or on the property conveyed'.

Held – A right in, to or on the property conveyed did not pass automatically with the conveyance under s 63 of the 1925 Act unless it touched and concerned the land. In the instant case, however, the benefit of cl 6 did touch and concern the land. Although unusual and hybrid in nature, the break clause was plainly not wholly personal, and was to be regarded as touching and concerning, or as having reference to the subject-matter of, the lease. Its benefit thus passed with the term on the assignment, even though it was not mentioned, because it was a right 'in, to, or on the property conveyed', and touched and concerned the land. Accordingly, H plc had been entitled to exercise the break clause as at 23 June 2004, and had validly done so (see [35], [45], [46], [51], below).

Kumar v Dunning [1987] 2 All ER 801 applied.

Notes

For the effect of the all estate or right clause and for the burden of landlord's obligations running with reversion, see respectively 13 *Halsbury's Laws* (4th edn reissue) para 239 and 27(1) *Halsbury's Laws* (4th edn reissue) para 483.

For the Law of Property Act 1925, ss 63, 142, see 37 *Halsbury's Statutes* (4th edn) (2003 reissue) 195, 289.

Cases referred to in judgment

Berkeley Leisure Group Ltd v Williamson [1996] EGCS 18, CA.

Boots the Chemist Ltd v Street (1983) 268 EG 817.

Cedar Holdings Ltd v Green [1979] 3 All ER 117, [1981] Ch 129, [1979] 3 WLR 31, CA.

Chapman v Gatcombe (1836) 2 Bing NC 516, 132 ER 202.

Davis v Town Properties Investment Corp Ltd [1903] 1 Ch 797, [1900–3] All ER Rep 558, CA.

Grant v Edmondson [1931] 1 Ch 1, [1930] All ER Rep 48, CA.

Griffith v Pelton [1957] 3 All ER 75, [1958] Ch 205, [1957] 3 WLR 522, CA.

Hanbury v Bateman [1920] 1 Ch 313, [1918–19] All ER Rep 375.

Hill v Booth [1930] 1 KB 381, [1929] All ER Rep 84.

Kumar v Dunning [1987] 2 All ER 801, [1989] QB 193, [1987] 3 WLR 1167, CA.

Price v John [1905] 1 Ch 744.

Public Trustee v Chancellor of Duchy of Lancaster [1927] 1 KB 516, CA.

Roe d Bamford v Hayley (1810) 12 East 464, 104 ER 181.

Stirrup's Contract, Re [1961] 1 All ER 805, [1961] 1 WLR 449.

Swift (P&A) Investments (a firm) v Combined English Stores Group plc [1988] 2 All ER 885, [1989] AC 632, [1988] 3 WLR 313, HL.

System Floors Ltd v Ruralpride Ltd [1995] 1 EGLR 48, CA.

Thelluson v Liddard [1900] 3 Ch 635.

Williams & Glyn's Bank Ltd v Boland [1980] 2 All ER 408, [1981] AC 487, HL.

Claim and counterclaim

By claim form issued on 8 March 2004, the claimant, Harbour Estates Ltd, the landlord of premises on the third and fourth floors of 3 Harbour Exchange, Isle of Dogs, London E1, sought a declaration that the defendant, HSBC Bank plc, the tenant of the premises, was not entitled to bring its leases of the premises to an

a end on 23 June 2004 or 23 June 2009. By claim form issued on 15 March 2004, the defendant sought a declaration that it was so entitled and also sought rectification, if necessary, of an assignment of the leases to it on 13 December 1999. By consent order made by David Richards J on 6 April 2004, the two claims proceeded together as if claim and counterclaim. The facts are set out in the judgment.

b *Guy Fetherstonhaugh QC* (instructed by *Davenport Lyons*) for the claimant.
John Male QC (instructed by *Denton Wilde Sapte*) for the defendant.

Cur adv vult

c 15 July 2004. The following judgment was delivered.

LINDSAY J.

d [1] I have before me two actions concerned with the benefit of an unusually-framed break clause which entitled a lessee who had its benefit, on giving due notice, to bring the term to an end. There is an argument as to whether the benefit of the clause was merely personal or 'touched and concerned the land'. The right to terminate the lease has become valuable. Had its benefit passed automatically from the original lessee as the assignor to the assignee of the term (as that assignee, the current lessee, asserts) despite the benefit not having been mentioned in the assignment or did it not pass by reason of its not being mentioned as doing so (as the current lessor asserts)? It is clear that the benefit would have passed had it been mentioned. The proceedings require a close look at and give rise to difficult questions as to a relatively little-considered provision, s 63 of the Law of Property Act 1925, and as to some parts of the law authoritatively described, as long ago as 1931, as arbitrary. If the benefit did not pass automatically, the current lessee seeks rectification of the assignment.

g [2] On 13 January 1994 Midland Bank plc as landlord, acting as trustee for others, granted an underlease (the lease) to its 100% subsidiary Stafford Properties Ltd (Stafford). The demised premises were at 3 Harbour Exchange, Isle of Dogs, London, E1, on the third floor. A corresponding underlease was made as to the fourth floor. For convenience I shall refer to only one of the two underleases; the case is in all respects the same for each of them. The term of the lease was from 24 June 1993 to 24 December 2013. The rent was substantial and reviewable. The expressions 'the Landlord' and 'the Tenant' were respectively defined to include, in effect, their respective successors in title. Clause 6 of the lease provides as follows:

j '6. The Tenant may determine this Lease on 23rd June 1999, 23rd June 2004 or 23rd June 2009 by serving on the Landlord not less than six months written notice of its desire to terminate the Term on such date ('the Date of Commencement').

6.1 The Lease shall expire on the relevant Date of Determination and neither party shall have any further liability to the other in respect of the Premises save in respect of and without prejudice to any right of action of either party in respect of any antecedent breach by the other of this Lease.

6.2 Time is of the essence in respect of this Clause 6.

6.3 Any notice served under Clause 6 shall be irrevocable.

6.4 On the Date of Determination the Tenant shall:

(a) give vacant possession of the Premises to the Landlord and

(b) deliver to the Landlord the title documents to the Premises and the keys to the Premises.

6.5 The benefit of this Clause 6 is personal to Stafford Properties Limited and shall not be capable of assignment to or exercise by any other person PROVIDED THAT the benefit of this Clause 6 may be assigned to an assignee of this Lease permitted pursuant to paragraph 11 of the Sixth Schedule ("a Permitted Assignee") where the Permitted Assignee is a Group Company (as defined in paragraph 11 of the Sixth Schedule) or in the reasonable opinion of the Landlord the Permitted Assignee has prior to the date of the assignment provided to the Landlord for its approval (such approval not to be unreasonably withheld):

(a) references satisfactory to the Landlord; and

(b) its audited accounts showing for the last three years either pre-tax profits of not less than three times the Current Rent and positive assets or net assets with a value of not less than five times the Current Rent and positive pre-tax profits.'

Nothing in cl 6.6 or 7.1 throws any light on the questions before me. Clause 7.2 provides:

'If the Tenant serves notice to determine this Lease in accordance with Clause 6 but the Lease does not determine on the Date of Determination then the provisions of Sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 shall again apply.'

The Sixth Schedule ('Tenant's Covenants'), brought in by cl 2 of the lease, provided, so far as material:

'11.1 Not to assign or charge part only of the Premises

11.2 Not to part with or share the possession or occupation of the whole or any part of the Premises (except as provided in sub-paras 11.3, 11.4 and 11.5 of this paragraph)

11.3 Not to charge or assign the whole of the Premises PROVIDED THAT the Tenant may within four months after obtaining the written consent of the Landlord (which shall not be unreasonably withheld or delayed) charge the whole of the Premises or assign the whole of the Premises to a respectable and responsible assignee who shall first have entered into a covenant with the Landlord to pay the Rent and other monies payable by the Tenant under this Lease and to perform and observe the other covenants on the part of the Tenant contained in this Lease during the residue of the Term and on condition that if the Landlord reasonably requires the Tenant shall procure that a guarantor or guarantors reasonably acceptable to the Landlord shall enter into a direct covenant with the Landlord in such terms as the Landlord shall reasonably require ...

11.5(a) Notwithstanding any of the provisions of this para 11 the Tenant may (after giving written notice to the Landlord containing all relevant information) share occupation of the Premises with any Group Company on condition that any such sharing shall not create any relationship of Landlord and Tenant and that on any such occupier

a ceasing to be a Group Company such occupation shall immediately cease or be otherwise documented in accordance with the provisions of this para 11

(b) "Group Company" for the purposes of Clause 6 and this para 11 means any corporation which is a Holding Company of the Tenant or which is a subsidiary of any such Holding Company and for the purposes

b of this definition the following words shall bear the following meanings:

"corporation" shall have the meaning ascribed to it by Section 740 of the Companies Act 1985

"Holding Company" shall have the meaning ascribed to it by Section 736 of the Companies Act 1985

c "Subsidiary" shall have the meaning ascribed to it by Section 736 of the Companies Act 1985

12 Within fourteen days after any assignment underletting mortgage or charge surrender or other disposition transmission or devolution of the Premises or any part of them to give to the solicitors for the time being of the Landlord notice in triplicate specifying the basic particulars of the same and at the same time to supply to them two certified copies of the instrument making or evidencing the same and pay to them a registration fee of twenty-five pounds or such higher sum as shall be reasonable at the time plus such registration fee as shall be payable to the Superior Landlord or his solicitors.

[3] By or on 8 December 1999 the reversion immediately expectant upon the lease had become vested in the Royal Bank of Canada Trust Co (Jersey) Ltd (RBC) as the 'Landlord'. Midland Bank plc, the erstwhile landlord, had no longer any relevant concern in the premises as trustee and had changed its name on 27 September 1999 to HSBC Bank plc (the defendant). It wished to become tenant in place of its subsidiary, Stafford. On 8 December 1999 RBC gave leave to Stafford to assign to the defendant. In the grant of licence to assign the defendant was referred to as 'the Assignee'. Clauses 3 and 6 of the licence respectively provided:

g '3 Licence

Subject to the covenants and conditions set out below the Landlord consents to the assignment of the Leases to the Assignee

h 6 Restriction

This Licence is restricted to the particular assignment hereby permitted'.

There is nothing in the licence to suggest that the permission which it gave or the assignment which it contemplated was or would be circumscribed or limited save as that cl 6, *supra*, indicated. There is nothing, in other words, to indicate that at that stage Stafford had in mind, or had been denied permission for, an assignment which was in any way of less than it could be. Nor did RBC seek to impose any condition relating to the break clause, such, for example, that the break clause, after assignment of the term, should be personal to the assignee or that it should be (or continue to be) personal to Stafford.

[4] On 13 December 1999 Stafford assigned the lease in writing to the defendant. In that instrument (the assignment) the defendant is called 'the

Buyer'. Under the heading 'Definitions and Interpretations' sub-cll 1.3 and 1.4 provided as follows:

'1.3 "the Property" means the premises more particularly described in the Lease and briefly described in the Second Schedule

1.4 "the Term" means the term granted by the Lease'.

[5] Recitals in cl 2 included that Stafford (there referred to as 'the Seller') had agreed to assign the lease to 'the Buyer' for the residue of the term. Clause 3 provided:

'Assignment

In consideration of the performance and observance of the covenants by the Buyer contained in this Assignment the Seller assigns to the Buyer the Property TO HOLD to the Buyer for the unexpired residue of the Term SUBJECT to the performance of the Covenants.'

I do not feel able to infer from the assignment being of the whole unexpired residue of the term that the benefit of the mechanism by which the term might transpire to be less than its maximum was not intended to pass. The assignment, so said cl 4, was made with 'full title guarantee' and nothing in the assignment reflects any intent on the assignor's part to except or reserve anything that could have been passed.

[6] Notice of the assignment was given to RBC and was received by RBC's solicitors on 17 December 1999.

[7] At some date thereafter the reversion immediately expectant on the lease was transferred by RBC to Harbour Estates Ltd (the claimant).

[8] On 14 December 2003 the defendant sent to the claimant's solicitors a 'Notice of Determination' purporting to terminate the lease under the provisions of cl 6 supra (which I will call 'the break clause'). After identifying the claimant as the intended addressee, the notice, at its material part, said:

'2. Determination

HSBC Bank plc being the current tenant under the Lease ("the Tenant") hereby gives Harbour Estates Limited, the current landlord under the Lease, notice that pursuant to clause 6 of the Lease (short particulars of which are contained above) the said Lease shall determine on 23 June 2004

3. Vacant Possession

The Tenant hereby gives notice that the Tenant shall give the Landlord full vacant possession of the Premises on 23 June 2004'.

It was signed on behalf of the defendant.

[9] On 24 November 2003 the claimant's solicitors indicated that the validity of the 'Notice of Determination' was not accepted.

[10] On 8 March 2004 the claimant issued a claim form claiming that in point of construction and in the events which had happened the defendant was not entitled to bring the lease to an end as at 23 June 2004 and sought related relief that included relief as to the position as it said it would be on 23 June 2009. A few days later, on 15 March 2004, the defendant issued a claim form for opposite relief and seeking also rectification should it be necessary. On 6 April 2004, David Richards J by consent made an order for the two actions to proceed together as if claim and counterclaim and made consequential procedural provisions. Written evidence was then exchanged and, on the issue of rectification, I have, in addition, heard oral evidence by way of

a cross-examination of witness statements. So it is that I have before me three principal issues. The first is as to the true construction and effect of the break clause in the events which have happened. Secondly, if that effect is not to have enabled the defendant to have brought the lease to an end as at 23 June 2004, the question arises as to whether any and if so what rectification might be appropriate of the assignment. Thirdly, a question may arise as to the position
b as it might come to be in relation to the break clause in June 2009. I shall deal with these in turn.

ENTITLEMENT TO SERVE THE 14 NOVEMBER 2003 NOTICE OF DETERMINATION

[11] Mr Fetherstonhaugh QC, for the claimant, accepts that the defendant, an assignee of the lease, was and is a 'Group Company' as defined in the Sixth
c Schedule to the lease and that, in that event, to use the words of sub-cl 6.5 of the break clause, 'the benefit' of the break clause 'may be assigned to it' without that assignment of benefit requiring the approval, references or accounts required for an assignment of benefit to someone other than a 'Permitted Assignee'. He accepts, too, that there are no formal defects in the Notice of
d Determination. But, argues Mr Fetherstonhaugh, whilst the benefit of the break clause might have been assigned, it was not assigned prior to the last date upon which six months' notice could have been given so as to have exercised the break clause as at 23 June 2004. Indeed, at the hearing on 15 and 16 June 2004, his argument continued, the benefit of the break clause could not then or
e thereafter be assigned so as to enable a valid exercise of the break clause even as at 23 June 2009.

[12] Mr Fetherstonhaugh accepts, of course, that in many cases the benefit of a break clause passes automatically with the term of the lease creating it—see *Woodfall on Landlord and Tenant*, vol 1 (para 17.288) citing *Roe v Bamford v Hayley* (1810) 12 East 464 at 469, 104 ER 181 at 183. He points also
f to the fact that the lease antedates the Landlord and Tenant (Covenants) Act 1995 and thus that the transfer of the benefit of a break clause will, in common with the benefit of other clauses, pass only, he says, if, under the old phrase, the provision 'touches and concerns the land'. He emphasises that cl 6.5 begins by stating that the benefit of the break clause is 'personal to
g Stafford ... and shall not be capable of assignment to or exercise by any other person'. There is, he accepts, an exception to that in the break clause, but even within the exception there is an ability in the landlord (not to be unreasonably exercised) to deny any passing of the benefit of the break clause (save in the case where it is a Group Company that is assignee). In such
h circumstances, he argues, it cannot be said that this highly unusual break clause touches and concerns the land; its chief characteristic, a characteristic overriding the exceptions within it, is such, he says, that it was expressed to be personal to Stafford and (in general) incapable of assignment. No authority, he adds (and Mr Male QC for the defendant accepts this) can be found where a break clause including any such language as does this one has
j been held to 'touch and concern' whatever 'land' was relevant or to be such as to cause its benefit automatically to pass with the term of the lease of which it formed part. Mr Male, rightly in my view, describes the break clause as a 'hybrid', but I shall for the time being accept Mr Fetherstonhaugh's argument so far. I shall thus proceed for the moment on the basis that the opening words of sub-cl 6.5 imprint on the break clause the chief characteristic of its being personal and, in general, unassignable, and that, on that account, I

should not accept that it so 'touches and concerns' the lease as to pass with the lease under that doctrine. a

[13] I do not see *Griffith v Pelton* [1957] 3 All ER 75, [1958] Ch 205, cited by Mr Male, as assisting the defendant as there was in that case no equivalent of the stipulation that the benefit was to be personal to Stafford, the original lessee, nor any provision which shows, as does the provision as to the landlord being able to decline permission for a transfer of the benefit to a non-Group Company, that it was within contemplation that the benefit that the break clause might not pass with the lease. b

[14] Mr Male also relies upon s 142(1) of the Law of Property Act 1925. That section is concerned with obligations under conditions or covenants entered into by a lessor 'with reference to the subject-matter of the lease'. Such obligations in general pass automatically with the reversion. Section 142 adds of them that they '... may be taken advantage of and enforced by the person in whom the term is from time to time vested ...' Section 142 therefore requires one to consider whether the condition concerned (here the break clause) has 'reference to the subject-matter of the lease'. Standing in the way of a simple affirmative is the dictum of Cozens-Hardy LJ in *Davis v Town Properties Investment Corp Ltd* [1903] 1 Ch 797 at 805, [1900-3] All ER Rep 558 at 561 that s 11 of the Conveyancing Act 1881 (in the same terms as s 142 of the 1925 Act) 'in no way alters the old law as to the class of covenants the burden of which will run with the reversion'. Assuming that to be right and proceeding on the basis I have indicated, s 142 of the 1925 Act cannot be taken to have altered the law as to the class of conditions of which the person in whom the term is from time to time vested can take advantage. If, therefore, I am right in proceeding on the basis I have indicated (namely that this unusual hybrid break clause, neither wholly personal nor such as contemplated as invariably passing with the term, does not, under the old law 'touch and concern' the lease), then neither is it 'with reference to the subject-matter of the lease' so as to pass under s 142. c
d
e
f

[15] Mr Fetherstonhaugh's argument then continues that, there being no automatic transfer of the benefit under the 'touches and concerns' doctrine, there was plainly no express mention in the assignment of the benefit of the break clause being included, nor is there, he continues, any commercial or other necessity to imply a transfer of that benefit. Even as between one Group Company and another the assignor is not *obliged* to assign the benefit; sub-cl 6.5 says that it 'may be' assigned, not that it 'shall' or 'will' be. It could not be right, he says, to imply a transfer of a benefit where the assignor, free to transfer or not to transfer the benefit, cannot be seen to have chosen to transfer it. If, then, says Mr Fetherstonhaugh, there is no automatic, no express and no implied transfer of the benefit, it must be that the defendant did not have its benefit on 23 December 2003 (the last date for service of six months' notice for 23 June 2004) nor at any time prior to 23 June 2004. g
h

[16] It is at this point in the argument that Mr Male referred to s 63 of the 1925 Act. Mr Fetherstonhaugh had not, I think, seen Mr Male's skeleton argument sufficiently ahead of the hearing to prepare a considered answer to the s 63 argument and after the hearing had concluded he agreed with Mr Male, subject to my consent, that he should serve a written argument directed to it. In the event I received written arguments dated 18 June (from the claimant) and 28 June (from the defendant). The parties had sensibly agreed terms such j

a that my consequent inability to give judgment before the crucial date of 23 June should not prejudice either party. Section 63 provides as follows:

b (1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and so far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

c (3) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one.'

The section replaces s 63 of the 1881 Act.

d [17] The term 'conveyance' is defined in s 205 of the 1925 Act to include a lease and every other assurance of property or of an interest therein by any instrument except a will. The verb 'convey' is given a corresponding meaning. The definition of 'instrument' does not exclude an assignment in writing of a term. The word 'property' is defined to include any thing in action and any interest in real or personal property.

e [18] There is relatively little learning available as to s 63. The note to the section in *Wolstenholme and Cherry's Conveyancing Statutes* (13th edn, 1972), vol 1, p 141, whilst saying that its object (and, I take it, that of its predecessor) was to abolish the 'all estate' clause, goes on to add a number of further useful references. I fear I did not derive assistance from *Price v John* [1905] 1 Ch 744, but did from *Public Trustee v Chancellor of Duchy of Lancaster* [1927] 1 KB 516. That case f dealt, inter alia, with the question of whether the conveyance of a farm out of which a tithe rentcharge issued carried with it, by reason of s 63, the rentcharge itself. It was held that the farm and the tithe rentcharge were two separate hereditaments and that express words were necessary to pass the rentcharge. The argument of Sir Herbert Cunliffe KC and the response to it of Mr Gavin Simonds QC, as he then was, is illuminating. After citing s 63 Sir Herbert g continued (at 521–522):

h 'Therefore the mere conveyance of the farm to the Duchy sufficed to carry the tithe rentcharge with it. It must be conceded that even since the passing of the Act of 1881 it has always been the practice, where it was intended to sell the tithe rentcharge along with the land, to use express words for that purpose. But that practice must be regarded as due only to abundant caution.

j Gavin Simonds K.C. and *Winning* for the respondents. The clue to the construction of s. 63 of the Conveyancing Act [1881] is to be found in the words "the property conveyed". Before the Act of 1836 [a reference to the Tithe Commutation Act 1836] the "all estate" clause did not pass tithe, for it only operated to convey the interest of the vendor in the hereditament purported to be conveyed and the words of that clause were as wide as those of s. 63. The appellant must show that the Act of 1836 made such an alteration of the law that tithe had ceased to be a separate hereditament. This is the first time in the ninety years that have

elapsed since the passing of that Act that such a suggestion has ever been made. a

[He was stopped].’

[19] Bankes LJ held that the intent of the Tithe Commutation Act 1836 was to keep the tithe rentcharge hereditament separate from the land out of which it issued. He referred to *Chapman v Gatcombe* (1836) 2 Bing NC 516, which had held that one separate hereditament could not be appurtenant to another, as ‘still good law’ and continued ([1927] 1 KB 516 at 524): b

‘... and that general words such as those used in that case, “together with all the estate, right, title, interest ... of him W. Gatcombe therein or thereto or to any part or parcel thereof”, are insufficient to pass tithe rentcharge. And as the object of s. 63 of the Conveyancing Act 1881 was merely to do away with a necessity of using those general words and to treat every conveyance as if it contained them, that section does not carry the matter any further. It only enacts that the conveyance shall pass every interest etc., which the conveying party may have in “the property conveyed” and for the reasons above given tithe rentcharge is not such an interest.’ c
d

Scrutton LJ, after stating the historical position that a tithe was not regarded as an interest in the land in respect of which it was payable, said (at 526):

‘... It was called in the language of lawyers of that day [1836] a “collateral hereditament” which was held by a different title from that of the land itself.’ e

[20] He, too, regarded *Chapman v Gatcombe* as good law and continued (at 527–528): f

‘That being so s. 63 of the Conveyancing Act 1881 does not assist the appellant. It merely renders it unnecessary any longer to include in a conveyance the long string of general words, “all the estate, right, title, interest,” etc., that used to be known by the name of the “all estate clause”, and, in the absence of a contrary intention appearing, treats the conveyance as containing them. The result is that the conveyance of the lands of Chapel House Farm to the Duchy of Lancaster did not carry with it the rectorial tithe rentcharge, as that rentcharge was not an “interest in” the land out of which it issued but something collateral to and independent of it.’ g
h

Sargant LJ, after noting that the relevant conveyance had there begun with a conveyance of physical land, continued (at 530):

‘So far it is plain that the conveyance would not include tithe rentcharge. But it is said this tithe rentcharge is an “interest in the land”, and that by virtue of s. 63 of the Conveyancing Act 1881, the conveyance is to be read as if these words were written in it. Now it is quite clear that before 1836 a conveyance of physical land with any number of general words added, such as “all the estate, right, property, interest, claim and demand” in the land conveyed would not pass tithe, for the reason that tithe was a hereditament independent of and separate from j

a the land on which it was charged and was not an interest in it or appertaining to it.'

b [21] In *Hill v Booth* [1930] 1 KB 381 at 387, 390, [1929] All ER Rep 84 at 86, 89-9 (per Scrutton and Greer LJ respectively) it was held that despite its entanglement with a right of entry intended to procure its payment, a separate personal obligation to pay instalments of the sum agreed as the premium for a lease remained merely a personal obligation and that a call for the payment by instalments was not a claim or demand in, to, or on the property conveyed within s 63.

c [22] In *Irving v Turnbull* [1900] 2 QB 129 at 132 the Queen's Bench Divisional Court had part of s 63 cited to them as part of the argument of the unsuccessful appellant although the section was not identified. The section is not mentioned in the judgment of either Darling J or Channell J and it is hard to determine how far, if at all, the court had relied upon it although their conclusion was consistent with the passing under the section of a right in or to or on the property conveyed without its having been expressly mentioned.

d [23] In *Thelluson v Liddard* [1900] 3 Ch 635 Stirling J commented briefly on s 63 of the 1881 Act in response to a contention that it took effect so as to pass whatever estate, right or interest the conveying party had in the property there being considered at the date of the deed that was relevant in that case. He indicated that that contention was well-founded.

e [24] In *Hanbury v Bateman* [1920] 1 Ch 313 at 316, [1918-19] All ER Rep 375 at 377 an argument was raised on s 63 but it failed because there was no 'conveyance' for the purpose of s 63. However, Sargant J ([1920] 1 Ch 313 at 320) did comment:

f 'The effect of the Act may be this, that a conveyance will have the effect of conveying every estate and interest which the person conveying can convey ... [but] I do not think you can read the definition clause of the Act so as to provide that a conveyance shall operate not only to convey everything that the person could convey, but also to appoint everything he could appoint.'

g [25] In *Re Stirrup's Contract* [1961] 1 All ER 805, [1961] 1 WLR 449 Wilberforce J, dealing with a case where the showing of a good title depended on an assent under seal sufficing where a conveyance ordinarily so-called should have been used, held there to be a good title shown. He said ([1961] 1 All ER 805 at 809, [1961] 1 WLR 449 at 454):

h 'Section 63(1) states that every conveyance is effectual to pass all the estate which the conveying party has or which is intended to be so passed and if one reads that in conjunction with the definition in s 205(1)(ii), by which the expression "conveyance" is stated to include an assent, that seems to produce the result that an assent, provided that it is under seal, is effective to pass whatever estate the conveying party has. I would be reluctant to decide this case on the basis of a mechanical argument of that kind alone, but I think on the broad framework of the Act, provided that the sole form of requirement of being under seal is complied with, any document, since 1925, at any rate, is effective to pass a legal estate, provided that the intention so to pass it can be ascertained. I therefore consider on both branches of the argument that the vendor is correct in saying that although the document is described as an assent, and although admittedly the case was not one for using an assent, yet

nevertheless on the intention to be ascertained from it and having regard to the statutory provisions, it is perfectly effective to pass the fee simple to the purchaser, and I propose so to declare.'

The comment on *Re Stirrup's Contract* by Sir Lancelot Elphinstone 'Assent to the vesting of a legal estate acquired by an executor after the death of the testator' (1961) 25 Conv (NS) 490, whilst raising some doubts on the case, raises none as to Wilberforce J's reliance upon s 63.

[26] To move from authorities noted in *Wolstenholme and Cherry* (and in *Halsbury's Statutes* as supplied by Mr Fetherstonhaugh) to later authority, I was referred to *Boots the Chemist Ltd v Street* (1983) 268 EG 817 per Falconer J. Counsel drew his attention to s 63 and he read sub-s (1) of it. He continued (at 818):

'I need not read any further. But [counsel] submits, I think rightly so, that under that provision the transfer, which was a transfer of the freehold reversion, subject, of course, to the lease, from the original landlords to the present plaintiffs, is effective to pass such interest as there may be or may have been in the original landlords to have the lease rectified in the manner now sought to have it rectified.'

He made an order for rectification.

[27] In *Cedar Holdings Ltd v Green* [1979] 3 All ER 117, [1981] Ch 129 the Court of Appeal had before it an argument that insisted that an interest in the proceeds of sale of the land conveyed was an interest 'in ... the property conveyed' for the purposes of s 63. Buckley LJ observed ([1979] 3 All ER 117 at 122, [1981] Ch 129 at 140) that there seemed to be no judicial authority upon the meaning and effect of the expression 'interest in the property conveyed' in s 63. He continued:

'That section replaced s 63 of the Conveyancing Act 1881 which was in identical terms. The purpose of that section was clearly to ensure that a conveyance should operate to convey all that the grantor could convey in relation to the subject-matter, notwithstanding that the language of the conveyance might not be in every respect apt to produce that result, and to eliminate the need for an "all estate" clause of the kind which conveyancers had previously been accustomed to include in conveyances. It is not surprising that we have not been referred to any pre-1926 decision in which s 63 of the 1881 Act was held to operate in relation to an interest in the proceeds of sale of land held on trust for sale. The bank says that it would be strange if the effect of s 63, in conjunction with the 1925 reform of real property law was that, whereas a conveyance executed on 31 December 1925 of the whole interest in land of which the sole grantor was one of two or more co-owners would be effectual to pass his undivided share of the property, a similar conveyance executed on 1 January 1926 would not be effectual to pass that which on that date became substituted for his previous undivided share in the land, viz, his undivided share in the proceeds of sale. The wife, on the other hand, contends that the historic function of s 63 and of its predecessor, s 63 of the 1881 Act, is and was connected with the normal operations of conveyancing, and that the section is not, and has never been, designed to deal with matters which have no relation to the title in the subject-matter of a conveyance which the grantee acquires under the

a conveyance, and in particular with matters which since 1925 are for conveyancing purposes behind the curtain of a trust for sale.'

He continued ([1979] 3 All ER 117 at 123, [1981] Ch 129 at 141):

b 'In s 63 we are concerned with the expression "interest in the property conveyed or expressed or intended so to be". This, as it seems to me, focuses attention on the particular subject-matter conveyed or expressed or intended to be conveyed. If, as in the present case, that subject-matter is land it would seem to me a strong thing to construe the word "interest" in such a way as to make a conveyance effectual to pass property which is not land in any sense. The device of the statutory trust for sale in respect of property vested in co-owners must have been very prominent in the minds of those who framed the 1925 property legislation. Had they intended s 63 of the Law of Property Act 1925 to have a different kind of operation from that which s 63 of the Conveyancing Act 1881 had been designed to achieve, I would certainly have expected some indication of this fact in s 63 of the 1925 Act. Instead, s 63 of the 1881 Act was left intact by the amending Act (the Law of Property Act 1922) and was consolidated without any change in its language into the 1925 Act. In my judgment, on the true construction of s 63 of the 1925 Act a beneficial interest in the proceeds of sale of land held on the statutory trusts is not an interest in that land within the meaning of the section and a conveyance of that land is not effectual to pass a beneficial interest in the proceeds of sale.'

e [28] Goff LJ, dealing with the argument of Mr Leolin Price QC, for the second defendant, that s 63 could only be used to read into a conveyance a transfer of an interest in land and not an interest in its proceeds of sale, 'which is an interest in personalty and not in land', considered the question very difficult ([1979] 3 All ER 117 at 125, [1981] Ch 129 at 144). For some purposes, he noted, an interest in the proceeds of sale of land was regarded as an interest in land. However, after a review of cases dealing with the conversion of real property into personalty he came to the same conclusion as Buckley LJ. In *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408 at 415, [1981] AC 487 at 507 Lord Wilberforce, with whose speech all others of their Lordships hearing the case agreed, held that *Cedar Holdings Ltd v Green* had been wrongly decided. It was wrong in describing—

h '... the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in the proceeds of sale, or rents or profits till sale ...'

That, said Lord Wilberforce, is 'just a little unreal'. Lord Wilberforce's comment would, if anything, enlarge the effect of s 63 rather than diminish it.

j [29] In *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18 the Court of Appeal held that a right to claim rectification of the boundary of the land conveyed passed with the conveyance of the land itself.

[30] Before I turn to Mr Fetherstonhaugh's argument based on analogies drawn from other statutory provisions I would see the effect of s 63 of the 1925 Act, so far as it can be seen from the authorities directly dealing with the section, to be capable of being summarised as follows. Its object, like that of s 63 of the 1881 Act, was to avoid the litany of express mentions of ancillaries and sweepings-up which, in order to ensure that everything passed that could

pass with the conveyance, had become the standard language of conveyancers. That standard language was, by statute, instead to be read into every conveyance (including a written assignment of a lease) unless a contrary intention was expressed in the conveyance. Of course, such standard words could not carry a separate hereditament; it would be absurd if a conveyance of Blackacre carried with it Whiteacre merely because the transferor owned both. But, focusing, as Mr Gavin Simonds's argument in *Public Trustee v Chancellor of Duchy of Lancaster* [1927] 1 KB 516 suggested, on the words 'the property conveyed', one looks to see what, in terms of estates and interests, was the main corpus intended to be transferred and then, in the absence of an express contrary intention, one may give full literal effect to the words of the section. No authority I have seen has cut down that full literal effect and, indeed, it may even be—see the comment in *Williams & Glyn's Bank Ltd v Boland* upon *Cedar Holdings Ltd v Green*—that the section may operate to pass even something—a beneficial interest in the proceeds of sale of a property—not generally regarded as a right to or interest in the property itself. But there has to be the required nexus between 'the property conveyed' and the right, claim or demand in issue; an entirely personal right would not pass as it would not be 'in, to, or on' the property conveyed—see *Hill v Booth* [1930] 1 KB 381 at 387–388, [1929] All ER Rep 84 at 87. Subject only to Sargant LJ's reference in *Public Trustee v Chancellor of Duchy of Lancaster* [1927] 1 KB 516 at 530 to 'appertaining to it' (a reference neither Bankes nor Scrutton LJ had made), on the face of things the section requires no investigation beyond whether the right is 'in, to, or on' the land conveyed; it specifies no examination into whether the particular right or claim is appurtenant or annexed to or enjoyed with the main corpus—compare s 62 of the 1925 Act—or whether it 'touches or concerns' that main subject matter or even 'has reference to' it—compare ss 141 and 142 of the 1925 Act. Nothing such is expressly required. Nor, one might think, would such a literal effect open any floodgates; the disponent only has to express a contrary intent in the disposition to deny such effect.

[31] Section 63 offers a number of ways in which it can become applicable—the word 'or' appears five times—but what will frequently be the easiest way of seeing it to be applicable, where it is a 'right' that is in issue, is to ask whether the right, if, indeed, in, to or on the property conveyed, was such that the transferor had power to convey it along with the property conveyed. It will be remembered that, as the assignment was from one Group Company to another, Stafford as assignor had power to pass the benefit of the break clause without requiring any consent from the landlord. Surely the benefit of the break clause, on that basis, is a right 'in, to, or on the land' where the land is the lease and the right is there in the lease?

[32] To counter any such conclusion (but still proceeding on the basis that the benefit of the break clause is merely personal, even if literally a right 'in, to, or on' the land) Mr Fetherstonhaugh mounts a formidable argument based not upon s 63 but on s 62 of the 1925 Act. Section 62(1) provides as follows:

'A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever,

a appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.'

b In a corresponding way s 62(2) provides that a conveyance of land shall include, inter alia, rights appertaining or reputed to appertain to the land or, at the time of the conveyance, enjoyed with or reputed or known as part or parcel of or appurtenant to the land. Subsection (4) indicates that s 62 applies only if and so far as a contrary intention is not expressed in the conveyance and that the section has effect 'subject to the terms of the conveyance and to the provisions therein contained'. Subsection (5) provides that the section should not be construed as conveying to any person any right mentioned in the section 'further or otherwise than as the same could have been conveyed to him by the conveying parties'.

c [33] Mr Fetherstonhaugh, by reference to authorities on s 62, argues, notwithstanding the difference in the language between the two sections and the apparent simplicity of a s 63 inquiry into whether a right which the conveying party has is a right 'in, to, or on the property conveyed' and which he has power to convey, that one must treat s 63, as s 62, as passing only rights which in the technical sense touch and concern or are appurtenants of or annexed to the land. He relies chiefly for this argument upon the judgment of Browne-Wilkinson V-C, with which Croom-Johnson and d Neill LJ agreed, in *Kumar v Dunning* [1987] 2 All ER 801, [1989] QB 193. At [1987] 2 All ER 801 at 805, [1989] QB 193 at 198 there is, after citation of s 62, a passage in which Browne-Wilkinson V-C continues as follows:

f 'The main intention of s 62 was to provide a form of statutory shorthand rendering it unnecessary to include such words expressly in every conveyance. It is a matter of debate whether, in the context of the section, the words "rights ... appertaining to the land" include rights arising under covenant as opposed to strict property rights. However, I will assume, without deciding, that rights under covenant are within the words of the section. Even on that assumption, it still has to be shown g that the right "appertains to the land". In my judgment, a right under covenant cannot appertain to the land unless the benefit is in some way annexed to the land. If the benefit of a covenant passes under s 62 even if not annexed to the land, the whole modern law of restrictive covenants would have been established on an erroneous basis. Section 62(1) h replaces s 6(1) of the Conveyancing Act 1881. If the general words "rights ... appertaining to land" operate to transfer the benefit of a negative restrictive covenant, whether or not such benefit was expressly assigned, it would make all the law developed since 1881 unnecessary. It is established that, in the absence of annexation to the land or the existence of a building scheme, the benefit of a restrictive covenant cannot pass j except by way of express assignment. The law so established is inconsistent with the view that a covenant, the benefit of which is not annexed to the land, can pass under the general words in s 62. Therefore, in my judgment, the plaintiff cannot rely on s 62 unless, at the least, he can show that the surety covenant touches and concerns the land so as to be capable of annexation ...'

[34] Mr Fetherstonhaugh's argument is thus based on a comparability with the unthinkable upset that would be caused if, by way of s 62, the benefit of a negative restrictive covenant passed without being mentioned with the land conveyed. Such a benefit is not a right 'to' or 'on' the property conveyed within s 63 but a right in relation to other land, the land afflicted with the burden of the covenant but it could, I would accept, be described as a right 'in' the land conveyed. Mr Fetherstonhaugh is entitled to ask how could there have been a necessary debate in *Kumar v Dunning* as to whether the benefit of a covenant passed with land under s 62, an argument rejected for want of the covenant touching and concerning the land, if, all along, it would have passed without any such annexation under s 63? Of course there are significant differences in many respects between restrictive covenants and other property rights, but Browne-Wilkinson V-C was content, without further comment, to assume s 62 applied to covenants as it did to other property rights and, for my part, I cannot see how he could have done otherwise.

[35] I confess to doubt as to the intended respective boundaries to s 62 and s 63. In some respects an overlap between the two seems possible. Thus s 62(1) and (2) refer to rights and advantages appertaining to the land conveyed and s 63 refers to 'right' and 'demand' (both in the singular) in, to or on the property conveyed. I am loth to require of s 63 that it can pass only that which in a technical sense is an appurtenance of, annexed to or is such as to touch and concern the property conveyed and it is certainly arguable that that is not so. Firstly, s 63 makes no reference to any annexation, appurtenance or the 'touching and concerning' test. Secondly, the draftsmen of the 1925 legislation, in the highest degree familiar with such tests, expressly refer to them at other points in the legislation where they are needed and can thus, it may be argued, be intended not to have required them with where they are not expressly incorporated—compare, for example, ss 62, 84(1)(b), 141 and 142 of the 1925 Act. Thirdly, the authorities on s 63, although mostly commenting only in passing (and perhaps dealing only, where s 63 applied, with instances where the interest or right in issue was manifestly appurtenant or annexed) at no point decide that any such test is required to be satisfied before the section can operate. Fourthly, I find it almost offensive to common sense, in the absence of any expressed contrary intention and where the property conveyed was the term of years in the lease, not to be able to regard the benefit of the break clause in the lease as falling within the meaning of the words in s 63 as a 'right ... in [or] to ... the property conveyed' given that, in the events which happened, the landlord had no power to withhold approval to an assignment of the break clause and that the benefit was thus a right which the assignor had power to convey. I would thus have been pleased to be able to have concluded that the benefit of the break clause, even if a right not touching or concerning the lease, had passed, with the help of s 63, to the defendant by way of the assignment as a right 'in' the lease, notwithstanding that the assignment makes no express mention of such benefit. However what is, in my view, the insurmountable argument in *Kumar v Dunning* bars such a conclusion. It is especially insurmountable as the *Kumar* reasoning was approved by the House of Lords in *P&A Swift Investments (a firm) v Combined English Stores Group plc* [1988] 2 All ER 885, [1989] AC 632.

[36] Moving from rights in, to or on the property conveyed to look at the requirements of 'touching and concerning the land' in more detail, one

a encounters the dictum of Lord Oliver of Aylmerton in the *P&A Swift Investments* case [1988] 2 All ER 885 at 890–891, [1989] AC 632 at 642 where he said:

b 'Formulations of definitive tests are always dangerous, but it seems to me that, without claiming to expound an exhaustive guide, the following provides a satisfactory working test for whether, in any given case, a covenant touches and concerns the land. (1) The covenant benefits only the reversioner for the time being, and if separated from the reversion ceases to be of benefit to the covenantee. (2) The covenant affects the nature, quality, mode of user or value of the land of the reversioner. (3) The covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant). (4) The fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land.'

d [37] I would not expect the touching and concerning test, applicable to both, to be different whether one is using it to test whether a burden passes with the reversion or a benefit with the term. If that is right then that first requirement, transposed, would be that the benefit of the break clause, if separated from the term, would have to cease to be of benefit to the original lessee. I find that not to be the case. For example, if Stafford wished to assign the term to an assignee acceptable, indeed, irresistible under para 11 of the Sixth Schedule to the lease e but which had only recently been incorporated and was not a Group Company, such an assignee would not be able, on that account, to provide the three years' accounts required as a pre-condition of the landlord's consent. The assignment of the term could go ahead with the benefit of the break clause being expressed f not to pass. The term would thus have become separated from the benefit of the break clause (assuming that the break clause could have a separate existence). In such a case, when, in time, the assignee's accounts could be produced and the landlord would then have no ground to refuse his approval to an assignment of the benefit, Stafford could, one might suppose, require a payment by the then lessee of a sum in order to procure Stafford to assign to g that lessee the benefit of what could be or become the valuable right to terminate the lease.

[38] If Lord Oliver's guide is definitive (it has been relaxed by the Court of Appeal—a subject I shall later need to return to), then, on account of the break clause failing Lord Oliver's first requirement, it may provide reason for me to h have proceeded on the basis that this unusual and hybrid break clause is so personal in character as not to touch and concern the lease. There are, though, a number of arguments that that is not so.

[39] Firstly, it is not said that the burden of the break clause has not passed with the reversion to the claimant. The assignment by which the claimant j acquired the reversion is not in evidence, but it is at least possible that no express transfer was made of the burden of the break clause but that it was left to pass without express mention, no doubt on the basis that it was an obligation under a condition entered into by the lessor with reference to the subject matter of the lease and hence passing under the first part of s 142 of the 1925 Act. I appreciate that one and the same provision might possibly touch and concern the reversion but not the term but, even so, that the

burden has been taken to run, unmentioned, with the reversion (assuming it has) would provide some argument for the assignee of the term being able to take advantage of the condition under the latter part of s 142. It has not been suggested that the break clause is operable only against the original or any specified other lessor for the time being as opposed to its being operable against any lessor. a

[40] Secondly, there has been a perceptible shift against exclusive reliance upon an older view of the 'touch and concern' test, a test the rules of which have long been said to be arbitrary, with the distinctions required by those rules being described as quite illogical—per Romer LJ in *Grant v Edmondson* [1931] 1 Ch 1 at 28, [1930] All ER Rep 48 at 59. Thus Lord Oliver in *P&A Swift Investments* [1988] 2 All ER 885 at 889, [1989] AC 632 at 640 commented, in 1988, and dealing with an argument based on the old law, that 'We are, in any event, concerned with what is the position in 1988 and not in 1539 ...' b

[41] So, too, in *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 the Court of Appeal was concerned with a break clause contained in an agreement not in the lease but in a side letter. The side letter made the benefit of the break clause personal to the original lessee but said nothing express as to whether the burden of the break clause passed to an assignee of the reversion. The Court of Appeal was concerned with whether the burden had passed with the reversion. Morritt LJ, after citing Lord Oliver's suggested test of what is required of a covenant in order for it to touch and concern the land, said (at 50): c

'Any *dictum* of Lord Oliver of Aylmerton commands the greatest respect even when, as here, he does not purport to lay down an exhaustive test and, indeed, recognises the dangers of attempting to do so. Nevertheless, I do not think that the burden of a covenant will fail to satisfy the conditions of section 142 merely because the benefit of it is personal to the present tenant.' d

Both he and Millett LJ were ready to relax the third of Lord Oliver's four tests for determining what touched and concerned the land. Lord Oliver's formulation was not intended in all respects to be definitive and has proved not to be. e

[42] Thirdly, such criticism or relaxation of the old rule could suggest that Cozen-Hardy LJ's view (which he alone took) in *Davis v Town Properties Investment Corp Ltd* [1903] 1 Ch 797, [1900–3] All ER Rep 558, namely that the 1881 Act and subsequent legislation had not in any way changed the old test, could be looked at in a different way. If the old law and the expression in s 142 of the 1925 Act 'with reference to the subject-matter of the lease' are truly synonymous, then why not, in 2004, apply the test by reference to the more modern and simplified version of the two synonyms? Why not ask merely whether the condition has reference to the subject-matter of the lease? If that were to be the appropriate question to ask, it is difficult to see how the advantage of the hybrid break clause should not have passed under the assignment to the defendant by virtue of s 63 of the 1925 Act, despite no express mention of an intention that it should. f

[43] Fourthly, even adhering to Lord Oliver's guide, this hybrid is not 'personal'; its benefit is not given only to a specific tenant. Indeed, three classes of lessees are contemplated as possibly having or acquiring its benefit, namely the g

a original lessee, a 'Group Company' assignee and a specifically approved 'Permitted Assignee'.

b [44] Fifthly, there is nothing in the break clause that suggests, after an assignment of the term by Stafford with the benefit of the break clause, that Stafford should any longer have any ability to regulate whether the benefit passed on subsequent assignments or that the landlord should thereafter be able to resist the automatic passing of the benefit of the clause to a subsequent assignee of the term.

c [45] It is the unusual hybridity of the break clause which gives rise to difficulty in assigning it to one category or another; it is plainly not wholly personal and the arguments I have just described, on balance, enable me, in my judgment, to regard it as 'touching or concerning', or as having reference to the subject-matter of, the lease. Its benefit, even if I am correct in limiting s 63's apparently broad language as I have done, thus passed with the term on the assignment, even though it was not mentioned, as it was a right 'in, to, or on the property conveyed' and touched and concerned the land.

d [46] That being so, I hold that the defendant was entitled to exercise and did validly exercise the break clause as at 23 June 2004.

23 JUNE 2009

e [47] It follows, too, that the defendant would, if then still the lessee, have been able, had there not already been a valid exercise of the break clause, to exercise the break clause as at 23 June 2009.

RECTIFICATION

f [48] That conclusion makes any decision on rectification unnecessary, but lest rectification becomes relevant I should say something as to the evidence which related to it.

[49] The defendant applied for rectification of the assignment so as to add the words 'together with the benefit of Clause 6 of the Lease' between the words 'the Property' and 'TO HOLD' in its cl 3.

g [50] As for the evidence, both of the witnesses for the defendants, Mr Richard Craig MRICS (the defendant's Asset Manager in its Strategic Property Unit) and Miss Jill Wilson, a solicitor in the defendant's legal department, gave both written and oral evidence. Both were impressive and honest witnesses whose evidence, written and oral, I can safely accept in full. As the assignments were between a 100% subsidiary and its parent, Miss Wilson, in effect, acted for both sides of the transaction as also, though h less engaged, did Mr Craig. She prepared the assignment. I must take it from the evidence given that there was no intent or instruction at any time not to transfer the benefit of the break clause to the defendant by way of the assignment; on the contrary, it was always intended that such benefit should pass. Mr Craig mentioned to a colleague (the manager having day-to-day j responsibility for the property) that he had in mind the right to terminate the lease. Miss Wilson had been told that it was important that group leases were very flexible and she knew the break clause was a valuable right. The only reason why the assignment did not contain any express reference to the transfer to the defendant of the break clause was that it was firmly believed by those having the charge of the matter and in particular by Miss Wilson (both assignor and assignee being known to be Group Companies within the

definition in the lease) that such benefit would pass automatically, without any need for express mention.

CONCLUSION

[51] Returning to the two actions proceeding as if claim and counterclaim, I dismiss the claimant's claim and, on the defendant's counterclaim, I grant the declaration sought and, that being the case, make no order for rectification.

Order accordingly.

Celia Fox Barrister.

Re X (restraint order)

[2004] EWHC 861 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

DAVIS†

10, 11, 13 FEBRUARY, 22 APRIL 2004

Restraint order – Variation of order prior to conviction – Whether order variable on application of general creditor – Criminal Justice Act 1988, ss 77(1), (2), 82(2), (4), (6).

Restraint orders could be made on the application of the prosecutor, where, inter alia, proceedings had been instituted in circumstances where Pt VI of the Criminal Justice Act 1988, which provided for the confiscation of the proceeds of an offence, applied. On the application of the claimant a restraint order under s 77^a of the 1988 Act was obtained over the assets of X and a receiver was appointed over the assets of a company controlled by X. Section 77(1) of the 1988 Act empowered the court to prohibit any person from dealing with any realisable property 'subject to such conditions and exceptions as may be specified in the order' and sub-s (2) provided: 'Without prejudice to the generality of subsection (1) above, a restraint order may make such provision as the court thinks fit for living expenses and legal expenses.' Section 82^b of the 1988 Act applied to the powers conferred by, inter alia, s 77, on the court, or on a receiver, and by s 82(2) the powers were to be exercised with a view to making available the value of realisable property 'for satisfying the confiscation order, or as the case may be, any confiscation order that may be made'. Section 82(4) provided that the powers were to be exercised with a view to allowing any person other than a defendant (or the recipient of a gift from him) to retain or recover the value of any property. Under s 82(6) no account was to be taken of any obligations of, inter alia, a defendant which conflicted with the obligation to satisfy a confiscation order. The receiver sought the directions of the court as to whether it was proper to make a payment requested by the applicant company for a sum due for goods supplied and delivered by the applicant to X's company and the applicant shortly thereafter applied for a variation of the restraint order to permit the payment to it of the sum it sought. The claimant contended (i) that, by virtue of s 82(2), (6) of the 1988 Act, the court had no power to vary the restraint order to allow payment to general creditors in priority over the interests of the Crown, which had obtained the restraint order; or (ii) alternatively, that the statutory purpose of s 82 would be defeated if the court were not limited to ordering payment to creditors only where the value of the realisable property was not reduced.

Held – The court had jurisdiction, on the application of a person affected, to vary a restraint order made before conviction so as to permit the payment of a sum claimed as a debt. Section 77(1) of the 1988 Act conferred a wide discretion on the court and it was plain that the court was empowered to sanction the payment of creditors over and above the payment of living expenses and legal expenses expressly permitted under s 77(2). Such payments to creditors were not limited only to those that would

a Section 77, so far as material, is set out at [10], below

b Section 82, so far as material, is set out at [12], below

not reduce the value of the realisable property. Section 82(2) required that the powers under s 77 be exercised 'with a view to' making available for satisfaction of any confiscation order the value of the realisable property and that phrase introduced a degree of elasticity. Section 82(4) indicated that the court was required to have regard to the position of creditors trying to recover the debts owed to them by the person the subject of the restraint order. Moreover, while s 82(6) provided that no account was to be taken of any obligations of a defendant which conflicted with the obligation to satisfy the confiscation order, that subsection only applied where a confiscation order had actually been made. Although the court was required to take into account a 'legislative steer' to the effect that the value of realisable property should be maintained with a view to making it available to satisfy any confiscation order which might be made, that was not a conclusive consideration in all cases (see [18], [20]–[23], [32], [33], below).

Re Peters [1988] 3 All ER 46 applied.

Re W (1990) Times, 15 November not followed.

Notes

For restraint orders, their effect and variation, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1314–1316.

Sections 77 and 82 of the Criminal Justice Act 1988 are prospectively repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, para 17(1), (2)(a), Sch 12, as from a day to be appointed under s 458(1) of the 2002 Act.

For the Criminal Justice Act 1988, ss 77, 82, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 969, 977.

Cases referred to in judgment

CPS v Compton [2002] EWCA Civ 1720, [2002] All ER (D) 395 (Nov).

G (restraint order) (Note), *Re* [2001] EWHC Admin 606, [2002] STC 391.

H (restraint order: realisable property), *Re* [1996] 2 All ER 391, CA.

Hughes v Customs and Excise Comrs, *R v CPS*, *Anderson v Customs and Excise Comrs* [2002] EWCA Civ 734, [2002] 4 All ER 633, [2003] 1 WLR 177.

Iraqi Ministry of Defence v Arcepey Shipping Co SA (Gillespie Bros & Co Ltd intervening), *The Angel Bell* [1980] 1 All ER 480, [1981] QB 65.

M (restraint order), *Re* [1992] 1 All ER 537, [1992] QB 377.

Peters, *Re* [1988] 3 All ER 46, [1988] QB 871, [1988] 3 WLR 182, CA.

Piper, *Re* [1999] 4 All ER 473, sub nom *Re P (restraint order: sale of assets)* [2000] 1 WLR 473.

SCF Finance Co Ltd v Masri [1985] 2 All ER 747, [1985] 1 WLR 876, CA.

Trustor AB v Smallbone (No 2) [2001] 3 All ER 987, [2001] 1 WLR 1177.

W, *Re* (1990) Times, 15 November.

Applications

The receiver appointed on 7 October 2003 over the assets of X and the assets of Y Ltd following the successful application of the claimant for a restraint order under s 77 of the Criminal Justice Act 1988 issued an application notice on 21 October 2003 seeking the directions of the court in relation the application of Z Ltd (the applicant) for payment of £873,972 for goods supplied and delivered to Y Ltd. The applicant also issued an application notice seeking variation of the restraint order. The receiver did not appear. The applications were heard in chambers. The facts are set out in the judgment.

a *David Barnard and John Law* (instructed by the *Solicitor for the Customs and Excise*) for the claimant.

Huw Davies (instructed by *Watson, Farley & Williams*) for the applicant.

Cur adv vult

b 13 February 2004. Davis J delivered judgment in chambers, dismissing the application of Z Ltd, and directing the receiver to retain the sum claimed until further order of the court.

22 April 2004. The following judgment was delivered in open court, reproducing in part the judgment given on 13 February.

c **DAVIS J.**

INTRODUCTION

d [1] On 7 October 2003 I made, on the application, without notice, of the claimant, a restraint order pursuant to the provisions of s 77 of the Criminal Justice Act 1988 in respect of the assets of an individual whom it is sufficient, for present purposes, to designate as 'X'. In addition, a receiver was appointed over the assets of X and also over the assets of a company, controlled by X, which it is sufficient, for present purposes, to designate as 'Y Ltd': there appearing to be a sufficient prima facie case that the corporate veil should be lifted or pierced (see *Re H (restraint order: realisable property)* e [1996] 2 All ER 391; *Trustor AB v Smallbone (No 2)* [2001] 3 All ER 987, [2001] 1 WLR 1177). The restraint order conferred wide powers on the receiver. It also gave liberty to any person affected by it to apply to vary or discharge the restraint order. No such application has been made by X.

f [2] Shortly after his appointment, the receiver (in his capacity as receiver of Y Ltd) was requested by a company, which it is sufficient for present purposes to designate as 'Z Ltd', to make payment to Z Ltd of the balance of the price said to be due for goods supplied and delivered, pursuant to written orders and written invoices rendered. The sum claimed amounted to £873,972. Payment to a designated bank account at a Swiss bank in Zurich g was requested.

[3] The receiver had in his control sufficient funds to make such payment. He had concerns, however, as to whether it was proper to do so. On 21 October 2003 he accordingly issued an application notice seeking the court's directions as to whether or not he should make such payment to h Z Ltd. Shortly thereafter Z Ltd itself issued its own application notice, seeking variation of the restraint order made on 7 October 2003 in order to permit the payment of the sum of £873,972 to Z Ltd. After various interlocutory hearings, which it is not necessary further to specify, the application came on for hearing, as it happened before me, during February j 2004; and I delivered a judgment orally, dismissing the application of Z Ltd and, on the receiver's application, directing him to retain the sum until further order of the court.

[4] The hearing before me took place in private and my judgment was delivered in private. Mr Barnard (with Mr Law) appeared for the claimant. Mr Huw Davies appeared for Z Ltd. The receiver was not formally represented by counsel, but one of his staff did attend parts of the hearing. X had been notified

of the hearing. He was not represented at it but had written a letter, through his solicitors, saying that he supported the application of Z Ltd. a

[5] The principal reason why the hearing took place in private was because of the existence of criminal proceedings both against X and also against certain other individuals whose names featured prominently in the evidence put in on these applications and who are (so the claimant asserts) closely connected with Z Ltd. Those individuals had, in fact, appeared at previous interlocutory stages of these applications and one had put in witness statements in support of the application of Z Ltd. None in the event was represented by solicitors or counsel at the hearing before me. However at the time I delivered my judgment (and at my suggestion) one of them did appear by counsel, who, having heard my judgment, submitted that it should remain a private judgment, for fear of possible prejudice to the various defendants in the criminal proceedings; and letters from solicitors for other defendants in the various criminal proceedings were shown to me, taking the same position. Mr Barnard did not disagree with that approach. It seemed to me that it was right to direct that my judgment should remain a private judgment (until further order) given the circumstances, not least because the facts were very unusual, and indicated with regard to the corporate trading a rather specialised *modus operandi*, which possibly, if publicised, might (given the allegation in the criminal proceedings) be linked to the various defendants even if their names were anonymised. b
c
d

[6] However in the course of the hearing a point of some general importance had arisen. It was and is the position of the claimant that the trading between Z Ltd and Y Ltd, giving rise to this claimed debt, was not legitimate or bona fide commercial trading; and thus the requested payment of the £873,872 to Z Ltd should not be permitted. But Mr Barnard also took a preliminary point as to jurisdiction. He submitted that the court had no power to vary the restraint order of 7 October 2003 so as to allow such payment to be made. e
f

[7] The point is of importance, since it applies not only to the scope of the court's powers under the 1988 Act but also, potentially, to the analogous powers conferred under the various drug trafficking statutes. In addition, Mr Barnard suggested that my decision might have a bearing on the court's jurisdiction under the new Proceeds of Crime Act 2002 (although I stress that that statute was not examined in argument before me). The argument before me also involved a consideration of the correctness of the decision in *Re W* (1990) Times, 15 November: a decision which, it would appear, has not attracted universal approval. g

[8] In the circumstances, it seems appropriate (as Mr Barnard suggested) to hand down an open judgment, reproducing my earlier judgment to the extent (and only to the extent) that it dealt with the jurisdiction point: since that section of the judgment cannot, with the appropriate use of initials, identify any of the various defendants. The circumstances in which the matter came before me at the hearing are, I think, sufficiently set out in what I have just said to explain the context for my ruling on the jurisdiction point. h
j

THE LEGAL ISSUE AS TO JURISDICTION

[9] On behalf of the claimant, Mr Barnard submitted that the court simply has no power to order payment of the £873,972 to Z Ltd. To explain that particular submission, it is necessary to set out the relevant provisions of the

a 1988 Act—it being common ground before me that the provisions of the Proceeds of Crime Act 2002 do not apply here by reason of the dates of the alleged offences.

[10] By s 74(1) ‘realisable property’ is defined as follows:

b ‘(a) any property held by the defendant; and (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act.’

Section 74(4) provides as follows:

c ‘Subject to the following provisions of this section, for the purposes of this Part of this Act the value of property (other than cash) in relation to any person holding the property—(a) where any other person holds an interest in the property, is—(i) the market value of the first-mentioned person’s beneficial interest in the property, less (ii) the amount required to discharge any incumbrance (other than a charging order) on that interest; and (b) in any other case, is its market value.’

d Section 77 provides as follows by sub-ss (1)–(9):

‘(1) The High Court may by order (referred to in this Part of this Act as a “restraint order”) prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

e (2) Without prejudice to the generality of subsection (1) above, a restraint order may make such provision as the court thinks fit for living expenses and legal expenses.

f (3) A restraint order may apply—(a) to all realisable property held by a specified person, whether the property is described in the order or not; and (b) to realisable property held by a specified person, being property transferred to him after the making of the order.

(4) This section shall not have effect in relation to any property for the time being subject to a charge under section 78 below.

g (5) A restraint order—(a) may be made only on an application by the prosecutor; (b) may be made on an ex parte application to a judge in chambers; and (c) shall provide for notice to be given to persons affected by the order.

(6) A restraint order—(a) may be discharged or varied in relation to any property; and (b) shall be discharged when proceedings for the offence are concluded.

h (7) An application for the discharge or variation of a restraint order may be made by any person affected by it.

j (8) Where the High Court has made a restraint order, the court may at any time appoint a receiver—(a) to take possession of any realisable property, and (b) in accordance with the court’s directions, to manage or otherwise deal with any property in respect of which he is appointed, subject to such exceptions and conditions as may be specified by the court; and may require any person having possession of property in respect of which a receiver is appointed under this section to give possession of it to the receiver.

(9) For the purposes of this section, dealing with property held by any person includes (without prejudice to the generality of the

expression)—(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and (b) removing the property from Great Britain.’ a

[11] Section 78 contains provisions empowering the court to make a charging order on realisable property, as defined, securing payment to the Crown. The assets capable of being so charged are then specified and in essence are land, securities or an interest under a trust. Provision is made empowering the court to discharge or vary any charging order so made. b

[12] Section 82 provides as follows:

‘(1) This section applies to the powers conferred on the High Court by sections 77 to 81 above or on the Court of Session by sections 90 to 92 below, or on a receiver appointed under this Part of this Act or in pursuance of a charging order. c

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant’s case the value for the time being of realisable property held by any person by the realisation of such property. d

(3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act the powers shall be exercised with a view to realising no more than the value for the time being of the gift. e

(4) The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.

(5) An order may be made or other action taken in respect of a debt owed by the Crown.

(6) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.’ f

[13] Section 84 contains provisions broadly to the effect that, where a person who holds realisable property is subsequently adjudged bankrupt, property for the time being subject to a restraint order is excluded from the bankrupt’s estate. Conversely, where a person is already a bankrupt, a restraint order subsequently made is not to be made in relation to property forming part of the bankrupt’s estate. g

[14] Finally, for present purposes, s 102 contains a wide definition of the word ‘property’ as used in Pt VI of the 1988 Act. Such definition extends to choses in action. h

[15] Mr Barnard’s first submission was that when a restraint order has been made the court is not empowered to pay general creditors in priority over the interests of the Crown which has obtained the restraint order. He said that is so by reason of the wording of s 82(2) coupled, if need be, with s 82(6). The purpose of the 1988 Act, he submitted, is identified as making available the realisable property (as defined) with a view to satisfying a confiscation order, and to permit payment out to general creditors would defeat such statutory purpose. j

[16] He further relied, in support of his submission, on the decision of Buckley J in the case of *Re W*, a transcript of which judgment was placed before

a me, and on certain comments of Otton J in the case of *Re M (restraint order)* [1992] 1 All ER 537, [1992] QB 377. In *Re W* (1990) Times, 15 November a restraint order had been made in respect of the assets of an individual. Subsequently, the applicant obtained judgment for moneys owing and applied for a variation of the restraint order to permit payment of the judgment debt—it being common ground that the applicant was a bona fide judgment creditor. Buckley J refused such application. In the course of his judgment, he said this, after setting out the terms of s 82:

c “The powers there referred to are powers which the Act gives including the power to make the variation sought in this case. The purpose is clear. It is to make available the value of realisable property to satisfy the confiscation order. Realisable property, for present purposes, means “property held by the defendant” (section 74(1)(a)). All the frozen moneys fall within this net. Subsection (4) expressly protects those third parties who may have an interest in any of the realisable property. “Mrs W” does not have an interest in the frozen moneys, save perhaps as to £10,000. Subsection (6) seems plain. Assuming that “obligation” includes debts, the satisfaction of the confiscation order takes priority. As “obligations” is given no special meaning in the definition sections of the Act, the assumption is justified. Support for this view of the legislative purpose is also to be found in the provisions concerning receivers, realisation of property and priorities on bankruptcy in, for example, sections 78, 79, 80, 81 and 84. Mr Stephens, for “Mrs W”, drew my attention to *Re Peters* [1988] 3 All ER 46, [1988] QB 871 and the analogy there drawn with Mareva injunctions. He submitted that under that jurisdiction the court would permit bona fide debts to third parties to be paid as they fell due. There is one fundamental difference between the two jurisdictions which did not concern the court in *Re Peters* but which is vital here. The object of Mareva injunctions is not to give any priority or advantage to the plaintiff over other creditors of the defendant. The provisions to which I have referred in the 1988 Act do give priority to the satisfaction of the confiscation order at least over general creditors. If that is the overall purpose of the Act, it must be wrong to make any order at an intermediate stage which might thwart such purpose, quite apart from section 82(6).”

h [17] In *Re M (restraint order)* [1992] 1 All ER 537, [1992] QB 377, a case under the comparable provisions of the Drug Trafficking Offences Act 1986, Otton J, in the course of his judgment, said ([1992] 1 All ER 537 at 543, [1992] QB 377 at 382–383):

j “The property to which the restraint order applies is no longer to be considered a part of the defendant’s estate. He holds only notional title to such property. All dealings with such property are to be held in abeyance until such time as the defendant is acquitted or a confiscation order is made and satisfied. Any doubt is removed by consideration of the purpose of the Drug Trafficking Offences Act 1986, which is to be found in s 13 as follows: “... (2) subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant’s case the value for the time

being of realisable property held by any person by the realisation of such property ... (6) in exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.” The purpose, in short, is to make available the value of the realisable property and, by its realisation, to satisfy the confiscation order. Here Mr M is a defendant. He has been charged with a drug trafficking offence. The High Court on two previous occasions has been satisfied that there exists a reasonable likelihood that he will be convicted. It has made a restraint order pursuant to s 8 of the Drug Trafficking Offences Act 1986. All property rights in the property to which the order relates lie in abeyance. The property can no longer be considered part of his estate until the outcome of his criminal trial.’

Overall, that, submitted Mr Barnard, is the position here.

[18] Put like that, I cannot accept that submission. Section 82(1), in terms, applies equally to the powers conferred on the court by ss 77–81, and on receivers appointed under Pt VI of the 1988 Act. If Mr Barnard is right, a receiver appointed over assets of a company under Pt VI of the 1988 Act would have no power to pay off trade debts with a view to retaining the value of the business of the company. That, as Mr Barnard readily agreed, would be a nonsense. Likewise, if an individual the subject of a restraint order owned a valuable commercial leasehold property, it would be a nonsense if payment could not be permitted to be made to a landlord for rent: otherwise the property might become forfeit and therefore its value lost. Yet further, as Mr Barnard also agreed, the court is empowered to sanction payment of debts in the form of living expenses and legal expenses. That is expressly permitted under s 77(2). But s 77(2), in terms, is prefaced by the words ‘without prejudice to the generality of subsection (1) above’. Subsection (1) confers a wide discretion on the court; and it is therefore plain from the wording adopted by the statute that the court is empowered to sanction the payment of creditors over and above the payment of living expenses and legal expenses. It is also plain from the wide wording of s 77(6) and (7) that the court can vary such an order to achieve that result.

[19] Mr Barnard then advanced an alternative submission as to jurisdiction. He submitted that at all events the court is only empowered to order the payment to creditors where the value of the realisable property, as defined, is not reduced: for example, in the case of the payment of rent in the example given above. He submitted that, unless that is so, the statutory purpose identified in s 82 will be defeated; and s 82(2) requires that a court cannot exercise its powers otherwise than with a view to making available for satisfying a confiscation order, or any confiscation order that may be made, the value for the time being of the realisable property.

[20] He submitted, and I agree, that *Re W* is at least authority for that proposition: and that also accords with Otton J’s comments in *Re M*. In my view, however, that is not the correct interpretation of the statutory provisions. My reasons are as follows. First, as I have said, s 77(1) is phrased in wide terms and the generality of that subsection is preserved by sub-s (2) and by the unfettered discretion to vary conferred by sub-s (6). Second, while it is the case that the powers conferred by s 77 are subjected to the terms of s 82, it is to be noted that s 82(2) requires that the powers under s 77 shall be

a exercised 'with a view to' making available for satisfaction of any confiscation order the value of the realisable property. I agree with Mr Davies's submission that the words 'with a view to making available' are not to be read as though they said 'to make available'. The phrase 'with a view to' in this particular statutory context, in my judgment, introduces a degree of elasticity. Third, s 82(6) provides that no account shall be taken of any obligations of the defendant which conflict with the obligation to satisfy the confiscation order. But it is to be noted that sub-s (6) does not, unlike sub-s (2), include the words 'or as the case may be, any confiscation order that may be made'. Thus sub-s (6) only applies, and is only designed to apply, where a confiscation order has actually been made, not at an earlier stage. Indeed, that has been authoritatively decided by the Court of Appeal in the case of *Re Peters* [1988] 3 All ER 46, [1988] QB 871: see in particular the judgment of Lord Donaldson of Lymington MR ([1988] 3 All ER 46 at 51, [1988] QB 871 at 879). That, it is true, was a decision on the Drug Trafficking Offences Act 1986, but the wording of the relevant section is the same in the relevant respects as that of s 82 of the 1988 Act and, in my view, the reasoning is equally applicable.

d [21] Mr Barnard submitted that one can discern from the scheme of Pt VI of the 1988 Act, quite apart from the provisions of s 82, an intention that the Crown should have priority over general creditors. He cites by way of example the position as set out in s 84(1) with regard to subsequent bankruptcy, and he also cites the power to make a charging order—points, indeed, noted by Buckley J in *Re W*. But as Mr Davies observed, it is also to be noted that Parliament thought it necessary to make such provisions expressly. Indeed, one might query the value of the ability to make a charging order (unless it be in the context of notification to third parties) if the effect of making a restraint order is of itself as Mr Barnard would have it.

e In my view, however, what is important to bear in mind is that there is a clear distinction between the position after a confiscation order has been made and the position before one has been made. A confiscation order is made after conviction. Before conviction there is a presumption of innocence. The person who is the subject of the restraint order may be acquitted. It is difficult to think that Parliament could have intended to restrict the court's powers as a matter of jurisdiction in the way now contended for when the consequence might be the bankruptcy or ruin of the individual concerned before he has even been tried. That, indeed, to my mind is one explanation for the distinction between the wording of s 82(2) and s 82(6).

g [22] Moreover, I would draw attention to s 82(4). The wording of that section is apt to extend to debts, given the wide definition of the word 'property' in s 102. It seems to me that, on its natural reading, sub-s (4) in itself indicates that the court is required to have regard to the position of creditors who may be trying to recover the debts owed to them by the person the subject of any restraint order. That also seems consistent with what is contemplated in para 6 of the Practice Direction annexed to RSC Ord 115 (as set out in Sch 1 to the CPR).

j [23] For these reasons alone I would reject Mr Barnard's submissions on jurisdiction. I appreciate those submissions might give rise to an element of certainty; but there are many occasions when the desideratum of certainty must yield to the desideratum of flexibility and I think this is one of them. The court certainly is required, I accept, to take into account what in *Re Peters* was called a

'legislative steer' to the effect that the value of the realisable property should be maintained with a view to making it available to satisfy any confiscation order that may be made. That will always, indeed, be a highly material and important consideration. But it is not, in my view, and contrary to Mr Barnard's submissions, a conclusive consideration in all cases.

[24] This view, moreover, is reinforced by other legal authorities. In *Re Peters* itself, Mr Peters was made the subject of a restraint order under the applicable provisions of the 1986 Act on 31 July 1987. A subsequent order varying the restraint order was made by Nolan J permitting payment of, amongst other things, school fees for Mr Peters's son of £2,200 per term and ancillary educational expenses. Later, in matrimonial proceedings the registrar made an order for payment by Mr Peters of a lump sum of £25,000 to be expended on the son's school fees, and in due course, the restraint order was varied by McNeill J to allow payment to the former wife's solicitors of that lump sum of £25,000 to be applied for that purpose. Subsequently, again, Mr Peters was convicted of the alleged drug trafficking offences. The Court of Appeal set aside McNeill J's order. It was held that the anticipatory discharge of liabilities was contrary to the terms of the relevant section of the Act (which was, in the relevant respects, in identical terms to that of s 82(2) of the 1988 Act), and contrary to the underlying purpose of that Act. The order of Nolan J, however, was approved.

[25] In the course of his judgment, Lord Donaldson MR said ([1988] 3 All ER 46 at 51, [1988] QB 871 at 879–880):

'Counsel for the commissioners, points out that a court faced with the making or variation of a restraint order or a charging order is not concerned with the making of a confiscation order or a process of execution in satisfaction of such an order. It is concerned solely with the preservation of assets at a time when it cannot know whether the accused will or will not be convicted. Such a jurisdiction is closely analogous to that exercised by the courts in relation to Mareva injunctions and might, not inaccurately, be referred to as a "Drugs Act Mareva". Under the Mareva jurisdiction the interest of the potential judgment creditor has to be balanced against those of actual creditors, whether secured or unsecured, and of the defendant himself who may succeed in the action and should be fettered in his dealing with his own property to the least possible extent necessary to ensure that the processes of justice are not frustrated. Subsection (2) is consistent with such a purpose, subject to what counsel for the commissioners described as a "legislative steer", namely, that, so far as is reasonable taking account of the fact that the accused may be acquitted and that, unlike the position under the Mareva jurisdiction, there is no counter undertaking in damages although there is a discretionary power to award compensation under s 19 of the Act, the value of the realisable property shall be maintained in order that it may be available to satisfy any confiscation order. The exercise of power to vary the restraint order by Nolan J was entirely consonant with this purpose. Mr Peters, as an unconvicted accused person who might be acquitted, was entitled to ask that his son's education should not be interrupted, that he himself should be adequately clothed and that he should be able to pay for the costs of his defence. But the anticipatory discharge of liabilities which could be expected to arise only if Mr Peters

- a had either been acquitted or convicted and, in the event of conviction, his property had been made subject to a confiscation order is quite another matter and is wholly contrary to s 13(2) and indeed the underlying purpose of the protective provisions of the 1986 Act. In so far as there was a conflict between the court order made in the divorce proceedings and the restraint order made under the 1986 Act, it should have been
- b resolved in favour of maintaining the restraint, leaving the son's education to be continued within the limits provided for by the order of Nolan J. But in fact no such conflict should have been allowed to arise. Mr Registrar Guest would not, I apprehend, have made his order, even with consent, if he had thought that Mr Peters had no assets.'

- c [26] Nourse LJ agreed. He too stated that the jurisdiction to make or vary restraint orders was 'closely analogous' to the Mareva jurisdiction. He said ([1988] 3 All ER 46 at 52, [1988] QB 871 at 880) with regard to the statutory power to make a restraint order:

- d 'Although that power is in terms unlimited, it is clear that it must not be exercised so as unreasonably to diminish the value of the realisable property which is available to satisfy any confiscation order which may later be made.'

The word 'unreasonably' is to be noted.

- e [27] Mann LJ, in the course of his judgment, said ([1988] 3 All ER 46 at 52, [1988] QB 871 at 881):

'In my experience a restraint order does not, and properly does not, prevent the meeting of ordinary and reasonable expenditure. That which is or is not ordinary expenditure may vary from time to time.'

- f [28] These statements of principle are not consistent with Mr Barnard's contentions; and the actual conclusion of that case is positively inconsistent with them. For the court expressly approved the order of Nolan J allowing for the termly payments of the son's school fees made prior to any confiscation order being made. But, self-evidently, such payments of those term school fees could not maintain the value of Mr Peters' realisable assets.
- g They could only reduce them. Thus such termly payments clearly were permitted as being reasonable, on the footing that that was a proper exercise of an available discretion in circumstances where Mr Peters had not yet been convicted.

- h [29] That there is such a discretion available (albeit, of course, subject to giving due weight to the underlying statutory purpose behind restraint orders) is yet further confirmed by the observations of Simon Brown LJ in the case of *Re Piper* [1999] 4 All ER 473, [2000] 1 WLR 473, a case under the Drugs Trafficking Act 1994. Simon Brown LJ said ([1999] 4 All ER 473 at 481, [2000] 1 WLR 473 at 481):

- j 'The provision in short, is not to be read as a requirement upon the court in all cases to appoint a receiver with full powers of sale and for the receiver then immediately to realise all assets. Rather the court and receiver are directed (at whichever stage the question arises) to seek to preserve the present value of the defendant's assets but plainly that cannot be the only relevant consideration, least of all before the defendant comes to be tried and whilst, therefore, he is to be presumed

innocent. Rather, as *Re Peters* makes clear, a balance has to be struck between, on the one hand preserving the worth of the defendant's realisable property against the possibility that he may be convicted and a confiscation order made against him, and on the other hand allowing him meantime to continue the ordinary course of his life. The problem in *Re Peters* was in deciding just what expenses are reasonable, the point at which expenditure becomes dissipation. The difficulty in the present type of case is to decide whether certain assets ought properly to be retained so that the defendant may continue to enjoy them, not merely to the limited extent possible whilst in custody awaiting trial but in future were he ultimately to be acquitted and the restraint order and receivership accordingly discharged.'

[30] The same judge made comments to the like effect in *Hughes v Customs and Excise Comrs* [2002] EWCA Civ 734 at [60], [2002] 4 All ER 633 at [60], [2003] 1 WLR 177. He there observed that the court in deciding whether to make or vary a restraint order 'must weigh up the balance of competing interests with the greatest care'.

[31] Mr Barnard nevertheless invited me, whatever doubts I may have as to the correctness of the decision in *Re W*, to apply the doctrine of stare decisis, and accordingly follow the decision in *Re W*.

[32] I decline to do so. In my view, with all respect to Buckley J, *Re W* was incorrectly decided on this point, in so far as it decided that the satisfaction of a confiscation order invariably involves in all cases giving priority to the Crown over general creditors—although I add that, on a consideration of the facts as revealed in the report of the case of *Re W*, the indications are that the decision itself can readily be justified on other grounds. Moreover, that decision is not in this respect consistent with the Court of Appeal authorities which I have mentioned, and it has also not, it would appear, been universally applied or approved. For example, its correctness is doubted in *Gee Mareva Injunctions and Anton Piller Relief* (4th edn, 1998) p 411. The decision in *Re W* also is not consistent with the observations made at first instance by Stanley Burnton J as to the general form of restraint orders made under the 1988 Act in *Re G (restraint order)* (Note) [2001] EWHC Admin 606 at [14], [2002] STC 391 at [14].

[33] Accordingly, I hold that I have jurisdiction to grant the relief sought by Z Ltd: and Z Ltd itself plainly is entitled to apply as a 'person affected' to vary the restraint order previously made so as to permit payment of the sum of £873,972. In so holding, I make clear that I express no view as to whether or to what extent the court has jurisdiction to vary a restraint order made after a conviction has resulted. That does not arise in this case.

[34] The question then is, having regard to all the circumstances and taking due account of the legislative steer given by s 82 and the underlying purpose of the 1988 Act, and also taking due account of the fact that there have been no convictions and no confiscation order made, as to whether I should permit this proposed payment.

DISPOSITION

[35] Consideration was then given to the evidence that had been filed and the submissions of counsel; reference was made to various cases, including *Iraqi Ministry of Defence v Arcepey Shipping Co SA* (Gillespie Bros & Co Ltd intervening), *The Angel Bell* [1980] 1 All ER 480, [1981] QB 65, *SCF Finance*

a *Co Ltd v Masri* [1985] 2 All ER 747, [1985] 1 WLR 876 and *CPS v Compton* [2002] EWCA Civ 1720, [2002] All ER (D) 395 (Nov) and it was concluded that it was not appropriate to vary the restraint order so as to permit payment to Z Ltd. The application of Z Ltd was accordingly dismissed.

Order accordingly.

Martyn Gurr Barrister.

Macepark (Whittlebury) Ltd v Sargeant and another a

[2003] EWHC 427 (Ch)

CHANCERY DIVISION b

GABRIEL MOSS QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

10, 11 FEBRUARY, 5 MARCH 2003

Easement – Right of way – Extent – Claimants owning land with express right of way over defendants' land – Claimants proposing to create track across land owned by third parties to access motor racing circuit – Whether right of way could be used for purpose of accessing motor racing circuit. c

The claimant leased land (the red land) from the defendants not far from a well-known motor racing circuit. On the red land was a hotel and other leisure facilities. The lease granted to the claimant a right of way (the path) over other land owned by the defendants at all times and for all purposes for the claimant its invitees and servants and/or others authorised by it 'for the purpose of gaining access to an egress from [the red land] and the county highway'. Adjacent to the red land, was land owned by a third party (the copse). The claimant wished, by agreement with the owner of the copse, to construct a vehicular access through the copse and link the red land directly with the racing circuit. An issue as to the extent of the right of access over the path arose and the parties referred to an arbitrator the question, inter alia, whether it would be a lawful use of the path if guests were to use it in order to access the red land with a view to staying the night at the hotel and then driving through the proposed vehicular access through the copse to the racing circuit. The arbitrator decided that such a use would be unlawful and the claimant appealed. The court considered the doctrine of the 'ancillary' exception to the principle that a right of way, by its nature as a right over a servient property for the benefit of a dominant property, could not be used to benefit non-dominant land. d
e
f
g

Held – A right of way over servient land for the benefit of dominant land might be used to access non-dominant land where the use was not in substance use for the benefit of the non-dominant land, which would be the case where either there was no benefit to the non-dominant land, or the extent of the use for the benefit of the non-dominant land was insubstantial. 'Benefit' included use of an access in such a way that a profit could be made out of the use of the non-dominant land. In the instant case use of the path would be for the benefit of the red land, and for the benefit of the copse and the racing circuit, in that the copse owners could charge for the privilege of access to the racing circuit and the circuit would benefit by having additional access; its use would alter the nature of the access so that in substance it would be for the benefit of both the dominant land and the non-dominant land so that the copse and the racing circuit would become dominant land. Accordingly, the proposed use of the path could not be said to be merely ancillary to the use of the path to benefit the red land. The appeal would therefore be dismissed (see [49], [50], [57]–[60], [73], below). h
j

- a* *Alvis v Harrison* (1990) 62 P & CR 10, *Harris v Flower & Sons* (1904) 74 LJ Ch 127, *Peacock v Custins* [2001] 2 All ER 827 and *Massey v Boulden* [2003] 2 All ER 87 applied.

Notes

- b* For limits on the use of the right of way by the owner, see 14 *Halsbury's Laws* (4th edn) para 147.

Cases referred to in judgment

- Alvis v Harrison* (1990) 62 P & CR 10, HL.
Das v Linden Mews Ltd [2002] EWCA Civ 590, [2002] 2 EGLR 76.
Harris v Flower & Sons (1904) 74 LJ Ch 127, CA.
c *Jobson v Record* [1998] 1 EGLR 113, CA.
Lawton v Ward (1696) 1 Ld Raym 75.
Massey v Boulden [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792.
Peacock v Custins [2001] 2 All ER 827, [2002] 1 WLR 1815, CA.

d Case referred to in skeleton arguments

Bracewell v Appleby [1975] 1 All ER 993, [1975] Ch 408, [1975] 2 WLR 282.

Appeal

- e* The claimant, Macepark (Whittlebury) Ltd, appealed with permission granted on 18 June 2002 pursuant to s 69 of the Arbitration Act 1996 from an award of an arbitrator (Peter Dickinson FRICS) that proposed use by Macepark of a right of way granted in a lease dated 29 October 1998 made between the defendants, Jeffrey Ian Sargeant and Carol Elizabeth Sargeant, and Macepark to access property owned by third parties did not fall within the terms of the lease. The facts are set out in the judgment.

- f* *Patrick Rolfe* (instructed by *Prettys*, Ipswich) for Macepark.
Martin Dray (instructed by *Beachcroft Wansboroughs*) for the Sargeants.

Cur adv vult

- g* 5 March 2003. The following judgment was delivered.

GABRIEL MOSS QC.

INTRODUCTION

- h* [1] This is a reserved judgment on the hearing of an appeal against an award by an arbitrator, Mr Peter Dickinson FRICS, pursuant to s 69 of the Arbitration Act 1996. This permits appeals on points of law with the permission of the court. Permission was given by an order dated 18 June 2002.

- [2] This judgment concerns only the arguments of law relating to the use of a right of access: the questions of the form of any relief and a question connected with a boundary fence have been left to be considered after this judgment.

- j* [3] I have also agreed with the parties' counsel that they will have an opportunity to consider the final version of this judgment with their clients before any further hearing takes place to consider the remaining questions and any consequential matters.

[4] I am indebted to both counsel for the lively and skilful debate concerning the difficult question of law which arises on this appeal. If I do not deal with every

submission made it is not out of a lack of consideration of those arguments but with a view to keeping the length and scope of this judgment within reasonable bounds. a

THE BASIC SITUATION

[5] The basic situation in this case can be described as follows. The case concerns a right of access not far from the Silverstone racing car circuit, the venue for the British Grand Prix. It is an extremely well-known sporting venue. b

[6] Not far from the circuit, to the east, lies the village of Whittlebury. The A413 road runs south and a little eastward from the village. At one point the road adjoins land belonging to the Sargeants (the defendants). On the relevant map, the defendants' land is edged in green. I shall refer to it as 'the green land'. c

[7] Surrounded on three sides (north, south and east) by the green land is a site edged in red. It lies somewhat to the west of the A413 and is leased by Macepark (Whittlebury) Ltd (the claimant) from the defendants. I shall call this land 'the red site'. It consists not only of a hotel with restaurants and 123 bedrooms but also conference and leisure centres. d

[8] To the west of the red site lies land known as 'Cheese Copse', which is owned by a party other than the defendants and the claimant. A south-westerly direction from the red site through Cheese Copse would bring one to the Silverstone site, and in particular 'Copse Corner'. The Silverstone site is again under ownership other than that of the defendants or the claimant. e

[9] The defendants and the claimant are parties to a lease dated 29 October 1998 (hereinafter 'the lease'). That lease gives a right of access to the red site over a path on the green land belonging to the defendants, enabling vehicles to come and go from the A413 (the grant). The path of this access was referred to as 'the purple path' at the hearing of this appeal and I will use that expression, despite the reference to 'blue' in the actual wording of the grant, which I will set out below. The lease also contains a separate right of access from the red site over the green land to the south-west corner of the green land in order to drop off persons from the red site at the point on the green land nearest to a part of the Silverstone site known as 'Becketts Corner'. f

[10] The claimant wishes, by agreement with the owners of Cheese Copse, to construct a vehicular access through Cheese Copse so as to link the red site with the Silverstone site. The question in this appeal concerns the extent of the right of access over the purple path. g

[11] To take an example referred to by the arbitrator, if Formula One drivers use the purple path in order to access the red site with a view to staying the night at the hotel and then driving through the proposed vehicular access through Cheese Copse to the Silverstone site, would that be a lawful use of the access over the purple path? h

APPROACH TO THE ANALYSIS AND GENERAL PRINCIPLES

[12] It seems to me that as a matter of analysis there are two overlapping questions in this type of case. The first question concerns the nature of a right of way by way of easement. An easement is a proprietary right over someone else's property. To use the technical language in such cases, an easement is a right over a 'servient' property for the benefit of a 'dominant' property. It follows from the nature of an easement that such a right *cannot* consist of a right over the servient property for the benefit of a non-dominant property. The cases usually concern non-dominant property owned by the same party as the owner of the dominant j

a property. As a general principle, he cannot use the right of access over the servient property for the benefit of the non-dominant property.

[13] Does it make a difference if the relevant non-dominant property is in different ownership from the dominant property? It should not do so. If it did, an owner of dominant land who wished to use an access beyond its proper scope could simply enter into a contractual arrangement with the owner of the non-dominant land sought to be benefited rather than purchasing the non-dominant land outright. The House of Lords case of *Alvis v Harrison* (1990) 62 P & CR 10 at 15–16 shows that different ownership does not make a difference to the principle. Although that was a Scottish law appeal, the House of Lords considered that the law of England was the same.

c [14] The second and overlapping question is, in the case of a right of way created by a grant, what the scope of the grant, properly construed, is.

[15] In considering what the parties as reasonable people would have contemplated, the parties are assumed not to have restricted user to the type of use in place at time of the grant: see *Alvis*' case (at 15).

d [16] The parties as reasonable people are also assumed to have contemplated user exercised in a reasonable way, in the sense of being carried out in the way which is least burdensome to the servient land, consistently with full enjoyment: see *Alvis*' case (at 15).

THE CASE LAW

e [17] In the situation being considered, the red site is the dominant land and the purple path is the servient land. There are two further relevant properties, Cheese Copse and Silverstone, which are non-dominant land but which may be affected by the claimant's proposed vehicular access through Cheese Copse to Silverstone.

f [18] Counsel have not cited any case on the precise type of facts here. The starting point therefore is to see what legal principles have been established in the cases dealing with related situations.

[19] The earliest case cited by counsel was *Lawton v Ward* (1696) 1 Ld Raym 75. This was a decision of Treby CJ and Nevill, Powell and Powell of Gloucester justices. The case concerned a right of way by prescription. The court considered that if one has a right of way by prescription to go to C, and having gone to C, the person with the right way goes further to D, he is not using the right of way lawfully. The 'junior' Powell J said that the difference was that if the person goes further to a mill or a bridge, that may be lawful, but if he goes to his own property, that is not lawful. If he could use a right of way to C to go on to another one of his properties D, then he could buy a thousand properties and go to them all and that would be very prejudicial to the owner of the servient land.

[20] It might have been deduced from this that the distinction was that the mill or bridge he refers to would be owned by a person other than the owner of the dominant land. However, that would not be a logical distinction and it appears from *Alvis*' case that the different ownership would not in itself be a valid distinction.

j [21] The correct distinction would appear to be that if the user goes to the mill or bridge he is not using the right of way to C for the benefit of the mill or the bridge and not treating them as if they were additional dominant land, whereas if the user goes on to his own property, D, he is exercising the right of access for the benefit of non-dominant land and treating it as if it were dominant land.

[22] Hence the correct principle to be drawn from this case appears to be that a right of way, of its nature, cannot be used to benefit non-dominant land, whether or not the non-dominant land is owned by the owner of the dominant land.

[23] In *Harris v Flower & Sons* (1904) 74 LJ Ch 127 the Court of Appeal considered a right of way by grant over servient land. The dominant land was known as 'the pink land'. The purchaser of the pink land at the time of purchase was already the owner of the adjoining property (the white land). Omitting various complications in the facts, the end position was that the owner of the pink and white properties proposed to use a new building standing partly on the pink land and partly on the white land as a factory and warehouse. The building was all one building with no physical division between the pink and white parts.

[24] The Court of Appeal considered that the proposed use went beyond the terms of the grant. For present purposes, the key passage in the judgment of Vaughan Williams LJ comes towards the end (at 132):

'It is not a mere case of user of the pink land, with some usual offices on the white land connected with the buildings on the pink land. The whole object of this scheme is to include the profitable user of the white land as well as of the pink, and I think the access is to be used for the very purpose of enabling the white land to be used profitably as well as the pink, and I think we ought under these circumstances to restrain this user.'

[25] It is significant to note that Vaughan Williams LJ regarded use of the right of way so as to make 'profitable' use of the non-dominant land as falling within the concept of use of the access for the benefit of the non-dominant land and as treating the non-dominant land as if it were dominant land.

[26] The Court of Appeal made a declaration (at 132)—

'that the defendant is not entitled to use the land of the plaintiff as a passage or way to or from the piece of land in the rear of the public house, with liberty to apply.'

[27] Romer LJ set out the general principle as follows:

'If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B.'

[28] This is an important principle and in the light of the House of Lords decision in *Alvis* case, is not restricted to situations where the grantee owns or acquires close B.

[29] *Jobson v Record* [1998] 1 EGLR 113 concerned a grant of a right of way for the benefit of certain dominant land. The owner of the dominant land acquired certain non-dominant land and stored timber felled on the non-dominant land on the dominant land and used the right of way for this purpose. Morritt LJ, with whom Simon Brown LJ and Sir Brian Neill agreed, held that whilst the access for the purpose of storage of timber grown on and felled on the dominant land was within the grant, access for the purpose of storage of timber felled on other land was not. As Morritt LJ succinctly put it (at 114): 'A right of way granted for the benefit of a defined area of land may not be used in substance for accommodating another area of land.'

THREE RECENT COURT OF APPEAL DECISIONS

a [30] I have now to attempt to deal with three recent Court of Appeal decisions which, amongst other things, consider the question of whether and to what extent there is a doctrine of 'ancillary use'.

b [31] In *Peacock v Custins* [2001] 2 All ER 827, [2002] 1 WLR 1815 the Court of Appeal dealt with an express grant of a right of way 'in connection with the use and enjoyment of' the dominant land. The dominant land was farmed as one unit with an adjacent field also owned by the same party. The right of way was used to reach both fields, taking a tractor over the right of way approximately six times a year, involving one or two more visits than if the dominant land had been farmed alone.

c [32] The Court of Appeal held that the right of way was to be used for the purposes of the dominant land only and could not be used for the purpose of benefiting the other property. This was entirely in line with the cases cited above.

d [33] The Court of Appeal also considered whether the use of the right of way for the purpose of cultivating the non-dominant (blue) land could 'sensibly be described as ancillary to the cultivation of the [dominant] red land' (see [2001] 2 All ER 827 at 836, [2002] 1 WLR 1815 at 1824 (para 27); my emphasis). The Court of Appeal held that it could not. Moreover, the Court of Appeal ([2001] 2 All ER 827 at 836, [2002] 1 WLR 1815 at 1824 (para 25)) ruled out any question of comparing the amount of use made of the right of way for the benefit of each of the properties respectively.

e [34] In coming to their conclusion, the Court of Appeal assumed that there would be certain circumstances in which the use of the right of way *could* be regarded as ancillary to the use for the benefit of the dominant land. They stated ([2001] 2 All ER 827 at 835, [2002] 1 WLR 1815 at 1823 (para 22)):

f 'However, in some circumstances a person who uses the way to access the dominant land but then goes off the dominant land, for instance to picnic on the neighbouring land, is not going outside the scope of the grant. The crucial question in the present case is whether those circumstances include a case whether one of the essential purposes of the use of the way is to cultivate land other than the dominant land for whose benefit the grant was made.'

g [35] It seems therefore that the Court of Appeal were of the view that there were exceptions in which a use of the right of access could be regarded as 'ancillary' even where it involved going beyond the dominant land to non-dominant land. The principle underlying the 'ancillary' exception is not spelt out.

h [36] There seem to be at least two possibilities. One is that a use of the right of way to go on to non-dominant land can be ancillary where it is *insubstantial*, as in the case of going on to non-dominant land for a picnic, but cannot be ancillary if it is *substantial*, as where the access is used for going on to non-dominant land in order to cultivate another field or to store on the dominant land timber grown and felled on non-dominant land.

j [37] A second approach, which would often coincide with the first, would be that a use can be ancillary if it does not *benefit* the non-dominant land, ie does not *in effect extend the dominant land*. The picnic, for example, concerned a situation where the use of the right of access involved going on to non-dominant land but not benefiting it. The going on to the non-dominant land for the purposes of the picnic could be seen as falling into the same category as going on to a mill or

bridge in *Lawton's* case, where the right of way is not for the benefit of the mill or the bridge. By contrast, non-dominant land is benefited if the access is used to enable it or to facilitate it to be cultivated or logged. a

[38] A third approach would be to say that a use was ancillary if it were *either* insubstantial *or* not a benefit.

[39] The second recent Court of Appeal case is *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2002] 2 EGLR 76. In that case the question arose whether a right of way allowing access to the dominant land could be used so as to access land which was not the dominant land without going through the dominant land at all ([2002] 2 EGLR 76 at [14] per Buxton LJ). The use was sought to be justified on the basis that the use in question was 'ancillary' to using the access to reach the dominant land. b

[40] That submission appears to have been rejected on two separate grounds. Firstly, the Court of Appeal appears to have rejected any general exception of 'ancillary' use altogether, despite being referred to *Peacock's* case [2001] 2 All ER 827, [2002] 1 WLR 1815. Secondly, they considered that on the facts of *Das's* case the use was more than merely 'ancillary'. The ability to access a parking place other than through the dominant land was considered to be a separate use from mere access (see [2001] 2 All ER 827 at 835–836, [2002] 1 WLR 1815 at 1823–1824 (para 24)). It was a use that took place other than on the dominant land. c

[41] It seems to me that the result in *Das's* case can be reconciled with *Peacock's* case as follows. In *Das's* case, the access in question was substantial and benefited the non-dominant land. It treated the non-dominant land as if it were dominant land. The use could not therefore on any view be seen as being merely ancillary. d

[42] However, the actual reasoning of the Court of Appeal in *Das's* case, rejecting any general exception of ancillary use, cannot easily be reconciled with the approach of the differently constituted Court of Appeal in *Peacock's* case. e

[43] The third Court of Appeal case, *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792 concerns several points. For present purposes, the relevant issue arose in the second ground of appeal. The dominant land was extended by the addition of two rooms. It was submitted that on the basis of the case law a right of way established for the benefit of dominant land could not be used for the benefit of both dominant and non-dominant land, whether or not that would involve any increase in the overall use of the right of way. f

[44] All three members of the Court of Appeal agreed (at [45]) with the rejection of this submission. This took the form of accepting a submission (at [38]) which went as follows: '... the critical question is rather whether the use made of Blackacre is more than merely ancillary to that made of Whiteacre.' g

[45] One finds (at [45]): h

'... on the facts found here ... in so far as the use of the way serves Blackacre that can only sensibly be described as ancillary to its use for the purposes of Whiteacre.'

[46] There is no real explanation in the judgments of what is meant by 'ancillary'. Moreover, *Massey's* case is not easy to reconcile with either the rejection of any general 'ancillary' doctrine in *Das's* case or with the decision in *Harris v Flower & Sons* (1904) 74 LJ Ch 127. i

[47] In accepting and applying the 'ancillary' doctrine I must assume that the Court of Appeal in *Massey's* case chose to follow the approach in *Peacock* rather

a than *Das*, since both cases are referred to in the judgment of Simon Brown LJ ([2003] 2 All ER 87 at [37]). I must accept therefore that there is an 'ancillary' doctrine.

b [48] The apparent clash with *Harris'* case is more difficult to resolve. The facts seem essentially similar. Moreover, there seems no doubt that in *Massey's* case the access was used for the benefit of the non-dominant land as well as the dominant land. The only way therefore in which the Court of Appeal could have regarded the use of the access to benefit the non-dominant land as 'ancillary' is if they regarded it as insubstantial: compare the use of the phrase 'in substance' by Romer LJ in *Harris'* case (1904) 74 LJ Ch 127 at 132 and Morritt LJ in *Jobson v Record* [1998] 1 EGLR 113 at 114. The additional rooms which extended the dominant land appear to have been regarded as mere appendages to the dominant land, so that the use of the access could be seen as being *in substance* for the benefit of the dominant land and not in substance for the benefit of the non-dominant land.

d [49] If I have reconciled the apparently conflicting authorities on the question of ancillary use successfully, the result seems to be as follows. (1) There is a doctrine of 'ancillary use'. (2) It applies where the use of the access for the benefit of the non-dominant land in addition to the benefit of the dominant land is insubstantial, eg where it is used to reach rooms which are mere appendages to the dominant property. (3) It also applies where the use of the access to reach the dominant land and then go on to non-dominant land does not benefit the non-dominant land, eg where there is a picnic on the non-dominant land. (4) With regard to the question of what 'benefits' the non-dominant land, where the access makes the use of the non-dominant land profitable, that access is being used to benefit the non-dominant land. For example, where the access, by an arrangement between the owner of the dominant land and the owner of the non-dominant land, is used to enable a profit to be made out of the use of the non-dominant land, there is a benefit to the non-dominant land.

SUMMARY OF THE LAW

g [50] On the basis that I have accurately understood the current standing of the 'ancillary' doctrine, the following propositions now seem to be correct. (1) An easement must be used for the benefit of the dominant land. (2) It must not 'in substance' be used for the benefit of non-dominant land. (3) Under the 'ancillary' doctrine, use is not 'in substance' use for the benefit of the non-dominant land if (a) there is no benefit to the non-dominant land or if (b) the extent of the use for the benefit of the non-dominant land is insubstantial, ie it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant land and the non-dominant land. (4) 'Benefit' in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, eg as a result of an arrangement with the owner of the dominant land.

j [51] The application of these principles can involve potentially difficult questions of fact and degree.

[52] One significant factor, identified by the Court of Appeal in *Peacock's* case [2001] 2 All ER 827 at 835–836, [2002] 1 WLR 1815 at 1823–1824 (para 24), is whether the benefit to the non-dominant land is likely to have its own 'commercial value'. It also seems from *Peacock* that it is not necessary to prove that separate value if it can be regarded as 'self-evident'.

THE SITUATION IN THE PRESENT CASE

[53] It seems to me that whether one looks at the present situation from the point of view of the essential nature of an easement or from the point of view of the true construction of the grant the result is the same. a

[54] The situation I must consider is one where a vehicular access has become available through Cheese Copse, by agreement with its owners, undoubtedly for a fee, running from the red site to the Silverstone site. I must then consider a stock situation described by the arbitrator, namely a booking by Formula One drivers to use the hotel on the red site with a view to using, after they had become bona fide hotel guests, the vehicular access over Cheese Copse to the Silverstone site from the red site. (The claimant accepts that the drivers could not within the grant use the red site as a mere 'bridge' to Cheese Copse and Silverstone.) b

[55] I then have to ask the question whether the access via the purple path in that situation is for the benefit merely of the red site or also for the benefit of Cheese Copse and/or Silverstone. c

[56] If it is for the benefit of either or both of those non-dominant properties, the next question is whether despite the use of the access to benefit the non-dominant property or properties the access is nevertheless used *in substance* for the benefit of the dominant property or whether it is in fact used for the benefit of both the dominant property *and* the benefit of one or other or both of the non-dominant properties. d

[57] It seems to me plain that the stock example is one in which the purple path is accessed for the benefit of the red site and also for the benefit of Cheese Copse and the Silverstone site. It obviously enables the Cheese Copse to be used profitably because the owners can undoubtedly charge for the privilege of access to Silverstone by that route. It also seems obviously of benefit to the Silverstone site to have an additional access. The mere fact that access can be had to Silverstone by driving a long way round or by being dropped off near Becketts Corner does not seem to affect this obvious conclusion. e

[58] Furthermore, it seems to me equally obvious that the use of the purple path for the benefit of Cheese Copse and Silverstone would alter the nature of the access, so that *in substance* it would be for the benefit of both the dominant property *and also* the non-dominant properties. In substance, Cheese Copse and Silverstone would also become dominant land. f

[59] It follows that in my view the use of the purple path to benefit the non-dominant land in this case cannot be considered to be 'merely ancillary'. g

[60] Unlike the situation in *Massey's* case, where the non-dominant land seems to have been viewed by the Court of Appeal merely as an adjunct to the dominant land, Cheese Copse and Silverstone are separate and substantial properties in their own right, each larger than the red site. I do not think it can fairly be said that the proposed use of the purple path to benefit Cheese Copse or Silverstone is merely ancillary to the use of the purple path to benefit the red site. h

[61] This conclusion follows whether one treats the question as concerning the true nature of the easement or whether one treats it as concerning the construction of the grant. j

FURTHER POINTS RELATING TO THE CONSTRUCTION OF THE GRANT

[62] The wording of the grant contained in Sch 1, Pt 1 of the lease is as follows:

'A right of way at all times and for all purposes [for the claimant] its invitees and servants and/or others authorised by it over and along the access way marked blue on Plan Number 2 for the purpose of gaining access to an egress

a from the Site and the County Highway [the claimant] contributing 50% of the cost of resurfacing the same.'

[63] This wording clearly identifies the red site (the Site) as the dominant land but does not, in my view, assist in resolving the question before me.

b [64], I have already referred above to a further right of way to the corner of the green land nearest to Becketts Corner. This gives rise to a possible argument that since the parties to the grant provided for a limited form of access to Silverstone by this method, this somehow impliedly ruled out a further access from the red site directly through Cheese Copse. In my view that would be too strong an inference to draw. The limited access in the direction of Becketts Corner does show that the parties to the grant considered the question of access from the red site to Silverstone. It does not show, however, that they intended it to be the sole mode of access. Bona fide users of the red site who have accessed it by the purple path can also reach Silverstone by driving back along the purple path and going around via the A413.

THE ARBITRATOR'S AWARD

d [65] The subject of this appeal is arbitrator's award no 7 in this matter. This deals with the question of 'Silverstone access' on the subject of liability only: see para 7.

e [66] Although it is only described as a statement by the defendants, the arbitrator appears to have found in the terms of para 12.6(d) of the award as follows:

f 'Mr and Mrs Sargeant have at all material times provided parking, camping, corporate hospitality and vehicular access to the Silverstone circuit during the Grand Prix and other major race meetings. Mr and Mrs Sargeant had for many years prior to the grant of the lease, an annual agreement with Silverstone Circuits and the adjacent owner of the land known as Cheese Copse for a "fast track access" from [the green land] through Cheese Copse and on to the Silverstone track. This was used by Formula One drivers and their teams and members of the press. In consideration of the grant of access, Mr and Mrs Sargeant received remuneration.'

g [67] Whilst I have not relied on these facts in coming to my conclusions above, it seems to me that these are additional facts which were either known to or ought to have been known to the claimant at the time of the grant. Even if that were wrong, I have no doubt that the proximity and size of the green land in relation to Silverstone and the A-road self-evidently afforded commercial opportunities to the defendants in relation to Grand Prix and other major race meetings. That would be obvious to anyone acquiring an interest in the red site.

h [68] Such commercial exploitation or opportunity, which was known or ought to have been known to both parties to the grant at the time of the grant, does in my view make it less likely that the parties, as reasonable people at the time of the grant, would have intended the purple path access to be used not merely to reach the red site but also Silverstone via Cheese Copse. Such further use would plainly have been in potential competition with the owners of the green land. Whether standing by itself that would have been a decisive factor on the construction of the grant I need not decide.

j [69] There was also argument by counsel for the parties before me in relation to the effect of para 12.27 of the award, which reads as follows:

'The question therefore is whether the hotel guests, having gained access to the hotel can then proceed via an adjacent track to visit a sporting location. The intent of the hotel guests must be considered. The authorities seem to indicate that if they went to the hotel and subsequently decided to visit the adjacent land, that may be within the grant. However, if they went to the hotel specifically to use the hotel as a base from which to visit the racing circuit—as may seem a logical conclusion at moments of major race meetings, and would certainly be the conclusion in the case of drivers and teams—that would seem to be outside the grant. I cannot see that in these circumstances access to the circuit would be incidental to the use of the hotel. Conversely, the use of the hotel would be incidental to the prime purpose of gaining access to the racing circuit.'

[70] It seems to me that the final two sentences of para 12.27 contain mixed statements of fact and law. In so far as they are factual conclusions they are fairly obvious. As far as the legal aspects are concerned, I have dealt with those above.

[71] The arbitrator in his award set out the contentions of the parties and extracts from a number of relevant authorities. The arbitrator's legal conclusion is similar to that which I have set out above, but not expressed in such elaborate terms.

[72] There are some differences of approach between the arbitrator and this judgment which may have to be revisited when the question of relief is considered. Since I have deferred consideration of the form of any relief, I will not go into those differences in this judgment.

CONCLUSION

[73] For the reasons set out above, I propose pursuant to s 69(7) of the Arbitration Act 1996 to confirm or vary the award depending upon the result of the argument about the form of relief.

[74] Once they have had an opportunity of considering this judgment, the parties should restore the appeal before me in relation to the matters I have left over, costs and any other consequential matters.

Appeal dismissed.

Victoria Parkin Barrister.